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A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

BY

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THIRD EDITION

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SECTION 1.

VENDOR AGAINST VENDEE.

[347] § 642. **Recovery on executed sales.** Where there has been a delivery, or what is equivalent to it, of the property sold, or which the vendor is at liberty to treat as sold, and when the contract is thus so far executed that the title has passed to the vendee, the vendor is entitled to the price or value.¹ A sale or an agreement to sell may be valid though the price of the property be not named and fixed. Thus, it has been laid down by an elementary writer that *express* contracts are those where the terms of the agreement are openly uttered

¹Scribner v. Schenkel, 128 Cal. 250, 60 Pac. Rep. 860; Ozark Lumber Co. v. Chicago Lumber Co., 51 Mo. App. 555; Crown Vinegar & Spice Co. v. Wehrs, 59 Mo. App. 493; Stresovich v. Kesting, 63 Mo. App. 57; Pratt v. S. Freeman & Sons Manuf. Co., — Wis. —, 92 N. W. Rep. 368.

A purchaser who unexcusedly refuses to perform his contract to pay the balance of the price or restore the goods to the possession of the seller cannot recover the money paid on the contract. Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. Rep. 666; Neis v. O'Brien, 12 Wash. 358, 41 Pac. Rep. 59, 50 Am. St. 894; Strickland v. McCulloch, 8 N. S. W. (law) 324.

By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that to constitute a valid sale there must be a concurrence of the following elements, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or

promised. Benj. on Sales, § 1; Mechem on Sales, § 1.

All that is required to give validity to a sale of personal property, whatever may be the amount or value, is the mutual assent of the parties to the contract. As soon as it is shown by any evidence, verbal or written, that it is agreed by mutual assent that the one shall transfer the absolute property in the thing to the other for a money price the contract is completely proven and binding on both parties. See Lincoln v. Johnson, 43 Vt. 74, 77; Williamson v. Berry, 8 How. 544; Mechem on Sales, § 5.

If by the terms of the agreement the property in the thing sold passes immediately to the buyer, the contract is termed in the common law "a bargain and sale of goods;" but if the property is to remain for the time being in the seller and only to pass to the buyer at a future time or on the accomplishment of certain conditions as, for example, if it is necessary to weigh or measure what is sold out of the bulk belonging to the vendor, then the contract is called in the common law an *executory* agreement. Benj. on Sales, § 3; Mechem on Sales, § 3.

and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain [348] goods; *implied*, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves; as, if I take up wares from a tradesman without any agreement as to price, the law concludes that I contracted to pay their real value.¹ A doubt was at one time expressed in an English case whether, where the parties are altogether silent as to the price in an executory contract of purchase and sale, the law will supply the want of an agreement by inferring that they must have intended to sell and to buy at a reasonable price; but it was declared that, undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendant, in order to prevent the injustice of his taking them without paying for them.² This doubt, however, was removed by a decision soon afterwards in the same court, this language being used: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."³ Also: "A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current

¹ 1 Black. Com., p. 443.

² Acebal v. Levy, 10 Bing. 376; note 2 to Webber v. Tivill, 2 Saund. 121.

³ Hoadly v. McLaine, 10 Bing. 482; Deck v. Feld, 38 Mo. App. 674; Shealy v. Edwards, 73 Ala. 175, 49 Am. Rep. 43; Greene v. Lewis, 85 Ala. 221, 4 So. Rep. 740, 7 Am. St. 42; Lovejoy v. Michels, 88 Mich. 15, 49 N. W. Rep. 901, 13 L. R. A. 770; B. S. Green Co. v. Smith, 52 Ill. App. 158; 1 Mechem on Sales, § 207; Taft v. Travis, 136 Mass. 95.

Under an allegation of an agreed

price, if there is a failure to prove such price, evidence of value is competent for the purpose of establishing the right to recover what the article was reasonably worth, but not to sustain a recovery beyond the sum alleged. Livingston v. Wagner, 23 Nev. 53, 42 Pac. Rep. 290; Sussdorff v. Smidt, 55 N. Y. 319.

The rule stated in the text cannot be applied in an action by the purchaser for damages for failure to deliver the purchased property. Trunkey v. Hedstrom, 131 Ill. 204, 23 N. E. Rep. 587.

price of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity or from various other causes.”¹

Where an order, silent as to price, is sent to a merchant or [349] manufacturer of goods in which he deals and is accepted, the law fixes the price at the current rate at which the goods are sold, and the party ordering is bound equally as though the price had been stated in the order. So, where an order is given for two articles mixed, to a manufacturer of such mixture, without specifying the proportion of each, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for market, and the acceptance of the order makes a valid contract to that effect.² A personal delivery of goods by a dealer to a customer, or by any person on request to another, is a transaction of the same nature, and there is a tacit agreement to pay the

¹ *Acebal v. Levy*, 10 Bing. 376; *James v. Muir*, 33 Mich. 223.

In *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. Rep. 901, 13 L. R. A. 770, the price charged for goods, nothing being said about it in the order, was that fixed by a combination of manufacturers, and was a considerable advance over the price which prevailed before the combination was formed, notice of which advance had not been given the customers of the plaintiff. Three opinions were filed. Two of the justices held that, independently of the unlawful character of the combination, the price fixed was no better evidence of value than one fixed by any vendor upon his wares, and was not a market price; that the market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course

of lawful trade and competition, and that, in the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser, nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value. One justice was of the opinion that a price so fixed was not evidence to show a reasonable price for goods sold by members of the combination, and that in the absence of proof of market value the reasonable worth of the goods must be determined by the cost of production and a reasonable profit thereon. The other two justices held that an arbitrary price fixed by such an association will not bind a purchaser who has not agreed to pay it. See § 653.

² *Konitzky v. Meyer*, 49 N. Y. 571; *Vickery v. Evans*, 16 Ind. 331.

customary price or what they are reasonably worth.¹ The vendor is entitled to their value at the time of executing the order without reference to any subsequent rise in the market price.² Where parties have contracted to sell and buy a specific quantity of goods at a fixed price, if more are ordered and shipped, after a known advance in the price, the stipulated price does not bind the parties.³ If goods are ordered to be shipped, their market value at the time and place of shipment measures the vendee's liability.⁴ There may be a recovery of interest on the purchase price in accordance with the statute of the state where the contract of sale was made, such statute being pleaded and proved in another state in which the action was brought.⁵ The vendor of a patent which is a process covering an entire manufacture, and not an improvement, or addition to, or combination of any other machine or process, who has sold it in consideration of a share of the profits arising from its use, is not entitled to have these measured by the advantages gained by the defendant in excess of what he would have obtained by using other means for making the product already open to the public and capable of producing the same result; instead, there must be taken from the total sales of the product all legitimate costs and charges of the manufacture and sale; the difference measures the recovery.⁶

¹ *Althouse v. Alvord*, 28 Wis. 517, 9 Am. Rep. 515. In this case Dixon, C. J., said: "The cost of the material out of which the article is made, . . . or in other words the profits arising to the vendor from the manufacture and sale, are matters quite foreign to the issue, where the manufactured article itself has a fixed and uniform market price or value. The purchaser must be presumed to have been familiar with such usual price or value, and to have bought with reference to it, and therefore willing to pay it. At all events it would be most unjust to the seller under such circumstances, there being no stipulation as to price, to require him to take less than he could have obtained elsewhere or from

other purchasers." *Henckley v. Hendrickson*, 5 McLean, 170; *Wells v. Abernethy*, 5 Conn. 222; *Burr v. Williams*, 23 Ark. 244.

² *Hill v. Hill*, 1 N. J. L. 261, 1 Am. Dec. 206; *Jenkins v. Richardson*, 6 J. J. Marsh. 541.

³ *Rice v. Western Fuse Co.*, 64 Ill. App. 603.

⁴ *Fenton v. Braden*, 2 Cr. C. C. 550, 8 Fed. Cas., p. 1140.

⁵ *Morris v. Wibaux*, 159 Ill. 627, 649, 43 N. E. Rep. 837. See § 366.

⁶ *Curry v. Warner Co.*, 2 Marvel, 98, 42 Atl. Rep. 425, citing *Freeman v. Freeman*, 142 Mass. 98, 7 N. E. Rep. 710; *Troy Iron & Nail Factory v. Corning*, 6 Blatch. 328; *Hitchcock v. Tremain*, 9 Blatch. 325.

If cattle are delivered in excess of the number sold at an agreed price per head according to the different classes, there cannot be a recovery for the additional number on the basis of their reasonable value. In the absence of proof showing which cattle were delivered by mistake, the contract price measures the recovery, and if the excess of each class received over the number bought could be ascertained, their value should be according to the classification under the contract at the time they were received.¹

§ 643. **Same subject.** Where, by a course of dealing or custom, there is one price for cash and another and larger price if credit is given, and a charge is made and the account presented in expectation of payment at once, and it is not made, the value of the credit price may be recovered.² If goods are delivered upon a special contract, and on examination are rejected as not conformable to it, but not returned to the vendor, he may recover their market value.³ So, if property is paid on a contract which is afterwards rescinded, the value of the property delivered, rather than the contract price of it, may be recovered.⁴ If a person who has been in the habit of buying goods from another appropriates goods which he does not account for, and thereby prevents the owner from accurately ascertaining the value of those taken, he is liable for the highest value of goods of the kind taken, and has the burden of showing their character.⁵ A vendee who agrees to pay, as the consideration for property, all the indebtedness due therefor from his vendor, to an amount specified, is liable to that extent although the latter has not paid his creditors, and notwithstanding the possibility that they may not insist upon full payment of their claims.⁶ If the vendor's title to the property sold is not good and the vendee is obliged to account to the owner for it, he is entitled to be credited on the purchase price with the amount paid to the owner.⁷ Under a contract to pay

¹ Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. Rep. 536. Bresnahan v. Ross, 103 Mich. 483, 61 N. W. Rep. 793.

² Taylor v. Tucker, 1 Ga. 231.

⁵ McCown v. Quigley, 147 Pa. 307, 23 Atl. Rep. 805.

³ Shields v. Pettie, 4 N. Y. 122; Terwilliger v. Knapp, 3 E. D. Smith, 86; Howard v. Hoey, 23 Wend. 350.

⁶ Meyer v. Parsons, 129 Cal. 653, 63 Pac. Rep. 216.

⁴ Camp v. Pulver, 5 Denio, 48; Day v. Mapes-Reeve Construction Co., 174 Mass. 412, 54 N. E. Rep. 878;

⁷ Parish v. McPhee, 102 Wis. 241, 78 N. W. Rep. 421.

a certain price for timber to be "furnished" by the plaintiff, the defendant then being engaged in negotiations for the purchase of lands and having instructed the plaintiff to cut the timber therefrom, it was held, the defendant having become the owner of such timber, that he was entitled to be credited on the contract price with the value of the stumpage.¹

The parties may agree that the price may be fixed by a third person named by them. They are then as much bound by the price he may fix, and it is as much a part of the contract, [350] as if fixed by them.² Until it is fixed the agreement to sell is incomplete.³ But if the property has passed to the vendee, and he does any act to obstruct or render impossible the valuation in the mode agreed upon, the vendor will be entitled to recover its value as estimated by a jury, as where the defendant agreed to buy goods at a valuation, and the valuers disagreed, and thereupon the defendant consumed the goods.⁴ So the parties may agree that a third person may decide any other fact upon which the identity, price or quantity depends, as to select, inspect, weigh or measure the commodity sold.⁵ The person whom they appoint for such purpose thereby becomes the agent of both parties, and his action in the matter for which he was appointed, honestly performed, will be conclusively binding upon them.⁶ If it does not appear that the person so employed

¹ Id.

² Benj. on Sales, § 87; Brown v. Bellows, 4 Pick. 189; Cunningham v. Ashbrook, 20 Mo. 553; McCandlish v. Newman, 22 Pa. 460; Nutting v. Dickinson, 8 Allen, 540.

³ Id.; Thurnell v. Balbirnie, 2 M. & W. 786; Cooper v. Shuttleworth, 25 L. J. (Ex.) 14; Vickers v. Vickers, L. R. 4 Eq. 529; Milnes v. Gery, 14 Ves. 400; Wilks v. Davis, 3 Meriv. 507; Fuller v. Bean, 30 N. H. 290.

⁴ Humaston v. Telegraph Co., 20 Wall. 20; Albemarle Lumber Co. v. Wilcox, 105 N. C. 341, 10 S. E. Rep. 371; Clark v. Watson, 18 C. B. 277; Carter v. McNeeley, 1 Ired. 448.

⁵ Gallagher v. Baird, 54 App. Div. 398, 66 N. Y. Supp. 759; Weeks v.

O'Brien, 141 N. Y. 199, 36 N. E. Rep. 185. See § 712.

⁶ President, etc. Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Savercool v. Farwell, 17 Mich. 319; Merrill v. Gore, 29 Me. 346; McAndrews v. Santee, 57 Barb. 193; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379.

"It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested, provided the interest was known, and no objection was made by the parties, and no fraud or bad faith is shown." New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. Rep. 432.

acted corruptly, or made some gross mistake,¹ in the absence of fraud or anything tending to show unfairness on the part of the plaintiff in procuring the result, the action of the referee is mutually binding.² Where mill logs were sold at a specified price per thousand feet, according to the quantity of lumber they should afterwards be estimated to make, and there was a table or scale of estimation then in such general use that the parties were found by the jury to have referred to it as a rule for computing the quantity, it was held that they were bound by it, though it proved erroneous in some respects.³

¹ Robinson v. Fiske, 24 Me. 401.

² Malone v. Gates, 87 Mich. 332, 49 N. W. Rep. 638; Bresnahan v. Ross, 103 Mich. 483, 61 N. W. Rep. 793; McParlin v. Boynton, 8 Hun, 449; Newlan v. Dunham, 60 Ill. 23.

In the last case the court say the decision of the referee cannot be affected by proof of mistake, but only by fraud. See Chapman v. Dease, 34 Mich. 375.

³ Heald v. Cooper, 8 Me. 32. In this case Parris, J., delivering the opinion, said: "No mode is prescribed in the written contract by which this estimate is to be made; and it is understood that, from the nature of the article to be delivered, the exact contents could not be ascertained until after the logs had been taken down the river and converted into boards. But it is alleged on the part of the plaintiff that this contract was entered into in reference to a usage or custom prevailing among log dealers on the K. river to ascertain the quantity of boards which may be made from a log or a lot of logs by a scale called the Brunswick scale; and it was submitted to the jury to determine whether, at the time of making the contract, that scale was in such general and exclusive use as that the parties in making their contract must be presumed to have had reference to it, and would expect to

ascertain the number of feet of boards which the logs would make by that scale, and they found in the affirmative. This usage explains the intent of the parties; and not being in opposition to established principles of law, or a contradiction to the express terms of the written instrument, is deemed to form a part of the contract as much as though actually incorporated into it, or expressly referred to. Williams v. Gilman, 3 Me. 276; 2 Stark. Ev. 453. . . . Considering that the jury have found the usage, and that the parties contracted in reference to such usage, they are bound by it, and the plaintiff is entitled to \$3 per thousand according to the scale, unless the defendants entered into the contract under such circumstances as will absolve them from the whole or any part of it. They contend that the estimate by the Brunswick scale is erroneous; that its application to logs of the size of those delivered under this contract gives a larger quantity of boards than can be actually produced; and that the plaintiff is, therefore, not entitled to the benefit of that part of the contract growing out of the usage, but must be holden to the strict quantity, or, at farthest, to the estimate made by the Leonard scale, which is understood to be more exact in giving the quantity of boards to be produced

Where a contract for the sale of hops provided for an [351] inspection by one of the two vendors, or another person mutually satisfactory, and the designated seller made the inspection, it was held an essential prerequisite to the tender of the goods, and none the less conclusive for having been [352] made by the party selling. The court say: "The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and, when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. . . . And if it was only *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated."¹ An inspection and measurement of sawlogs by a third person, acting as the vendor's agent, had been made before the contract of sale, and the contract was based upon them, referring to and adopting such person's

from logs of the size of these than the Brunswick scale. . . . The presumption from these facts (stated) is that the defendants knew the general size and quality of the logs they purchased, and also the scale by which they were to be estimated; and if they did not, that it was in consequence of a want of such diligence as the law presumes every man having a due regard to his own interests would be likely to use. . . . It is evident that a scale founded on general principles cannot, in its application, be equally exact in all cases. If a given per cent.

is to be deducted as waste from the contents of the log, it is apparent that if the deduction be correct in a large log it cannot be so in a small one. But it is not found, certainly is not to be presumed, that the defendants, dealers in lumber as they are, could be ignorant of a fact so apparent and important to the interests of all persons engaged in the lumber business." See *Barker v. Roberts*, 8 Me. 101.

¹ *Dustan v. McAndrew*, 44 N. Y. 76; *Sawyer v. Dean*, 114 id. 469, 478, 21 N. E. Rep. 1012.

scaling. It was held they did not thereby become of the same conclusive nature as when made after the contract, pursuant to employment by both parties, unless the vendee was fully acquainted with the person's qualifications.¹ Campbell, J., said: "If the parties had agreed on a sale before the logs were scaled, and had agreed that W. should scale them, he would have been made their joint agent and arbiter, and it would be difficult to impeach any act of his, honestly done, for a mere mistake of judgment. But when these logs were measured, he was acting entirely as the agent of the vendors, and on their behalf. Under these circumstances an offer to sell by his measurement already made involves an assertion that he is in all respects a competent person, and that he has acted honestly. [353] Nothing short of satisfactory evidence that the purchaser was fully acquainted with his qualifications would remove this burden from the vendor, who demands a sound price on the basis of his measurement. And where a person so employed, even by joint appointment, makes a mistake in a matter of fact, and not merely an error of judgment, there is no ground for holding that such a mistake cannot be corrected. An erroneous assay of silver, or a mistaken count of bushels of grain, has been held to bind no one.² A material representation or assumption need not be fraudulent in fact in order to authorize its correction."

§ 644. **Same subject.** To entitle the seller to recover the full value — either the contract or the market price — the sale must be executed so as to pass the title to the purchaser; the property must be at his risk, and he thus qualified to bring trover for it. Then, and not till then, an action either for goods sold and delivered, or bargained and sold, may be maintained; the former if there has been delivery, and the latter if there has not.³ The sale of a specific chattel passes the prop-

¹ *Ortman v. Green*, 26 Mich. 209.

² *Cox v. Prentice*, 3 M. & S. 344; *Wheadon v. Olds*, 20 Wend. 174.

³ *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. Rep. 165; *Bailey v. Smith*, 43 N. H. 141; *Gordon v. Norris*, 49 id. 376; *Messer v. Woodman*, 22 id. 172, 53 Am. Dec. 241;

Davis v. Hill, 3 N. H. 382, 14 Am.

Dec. 373; *Ward v. Shaw*, 7 Wend. 404; *Outwater v. Dodge*, 7 Cow. 85;

Warren v. Buckminster, 24 N. H. 336; *Fuller v. Bean*, 34 id. 290; *New-*

market Iron Foundry v. Harvey, 23 id. 395; *Williams v. Jones*, 1 Bush,

621; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Penniman v. Harts-*

erty in it to the vendee without delivery,¹ and the risk of property which is the subject of a sale attends the title.² [354] But where the sale is of goods generally, no property in them passes until there is a subsequent appropriation according to the contract of the goods to which it applies.³ Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.⁴

horn, 13 Mass. 87; *Macomber v. Parker*, 13 Pick. 175; *Hart v. Tyler*, 15 id. 171; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Atkinson v. Bell*, 8 B. & C. 277; *Elliott v. Pybus*, 10 Bing. 512; *Simmons v. Swift*, 5 B. & C. 857; *Goodall v. Skelton*, 2 H. Black. 316; *Hanson v. Meyer*, 6 East, 614; *Rohde v. Thwaites*, 6 B. & C. 388; *Nichols v. Morse*, 100 Mass. 523; *Morse v. Sherman*, 106 id. 430; *Dyer v. Libby*, 61 Me. 45; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Spicers v. Harvey*, 9 R. I. 582; *Scot-ten v. Sutter*, 37 Mich. 526; *Phillips v. Meritt*, 2 Up. Can. C. P. 513; *Bishop v. Minderhout*, 128 Ala. 162, 29 So. Rep. 11; *McFadden v. Henderson*, 128 Ala. 221, 29 So. Rep. 640.

¹ *Dixon v. Yates*, 5 B. & Ad. 313, 340; *Simmons v. Swift*, 5 B. & C. 862; *Gilmour v. Supple*, 11 Moore, P. C. 566; *Arnold v. Delano*, 4 Cush. 40, 50 Am. Dec. 754; *Roper v. Lane*, 9 Allen, 502, 510; *Marble v. Moore*, 102 Mass. 443; *Hinde v. Whitehouse*, 7 East, 558; *Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Spartali v. Benecke*, 10 C. B. 213; *Calcutta Co. v. De Mattos*, 32 L. J. (Q. B.) 322; *Wood v. Bell*, 6 El. & B. 355; *Dailey v. Green*, 15 Pa. 118;

Webber v. Davis, 44 Me. 147, 69 Am. Dec. 87; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Bailey v. Smith*, 43 N. H. 141; *Sigerson v. Kahmann*, 39 Mo. 206; *Tome v. Dubois*, 6 Wall. 548; *Dexter v. Norton*, 55 Barb. 272.

² *Willis v. Willis*, 6 Dana, 48; *Dailey v. Green*, 15 Pa. 118; *Joyce v. Adams*, 8 N. Y. 296; *Terry v. Wheeler*, 25 id. 520; *Taylor v. Lapham*, 13 Allen, 26.

³ The foregoing propositions are quoted and applied in *Hamilton v. Finnegan*, — Iowa, —, 91 N. W. Rep. 1039.

⁴ *Dixon v. Yates*, 5 B. & Ad. 313; *Barrett v. Goddard*, 3 Mason, 107; *Hotchkiss v. Hunt*, 49 Me. 213; *Merrill v. Parker*, 24 id. 89; *Mears v. Williamson*, 37 id. 556; *Waldron v. Chase*, id. 414, 59 Am. Dec. 56; *Page v. Carpenter*, 10 N. H. 77; *Felton v. Fuller*, 29 id. 121; *Willis v. Willis*, 6 Dana, 48; *Crawford v. Smith*, 7 id. 59; *Sweeney v. Owsley*, 14 B. Mon. 413; *Buffington v. Ulen*, 7 Bush, 231; *Martin v. Adams*, 104 Mass. 262; *Merchants' Nat. Bank v. Bangs*, 102 id. 291; *Thayer v. Lapham*, 13 Allen, 28; *Warden v. Marshall*, 99 Mass. 305; *Gardner v. Lane*, 9 Allen, 498, 85 Am. Dec. 779; *Rice v. Codman*, 1 Allen, 377; *Bethel St. M. Co. v. Brown*,

Where the contract respecting specific property requires certain acts to be performed upon the property itself, necessary to its completion, or for the ascertainment of what shall be paid for it on the terms of the contract, or to place the property elsewhere for the benefit of the vendee, then whether the sale is complete and the title passes before the performance of these acts depends on the intention of the parties. The authorities are not quite harmonious as to when, in such cases, the title does pass.¹ If there are any conditions precedent they must of course be performed or waived.² The title does not pass, and there is no right of action for the contract price, or for damages measured by the value of the subject of the sale, [355] when the agreement is for the sale of goods generally and there is in the contract no identification of any particular goods until such steps are taken afterwards by one or both of the parties in pursuance of the contract as are necessary to the selection and appropriation of the specific property to it, unless there is a stipulation to pay while the contract is executory. When those steps have been taken the contract ceases to be executory; it becomes a complete bargain and sale; the title passes and the vender is entitled to the price, equally as if the property so appropriated had been at the making of the contract described and identified in it.³

57 Me. 9, 99 Am. Dec. 752; *Dyer v. Libby*, 61 Me. 45; *Habenicht v. Lis-sak*, 77 Cal. 139, 19 Pac. Rep. 260; *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 497. See *Waldon v. Murdock*, 23 Cal. 540, 83 Am. Dec. 145; *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498; *Adams Mining Co. v. Senter*, 26 Mich. 73; 1 *Mechem on Sales*, § 483 *et seq.*; *Thayer v. Davis*, 75 Wis. 205, 43 N. W. Rep. 902; *Rail v. Little Falls Lumber Co.*, 47 Minn. 422, 50 N. W. Rep. 471; *Burcham v. Griffeth*, 31 Neb. 778, 48 N. W. Rep. 824.

¹ *Benj. on Sales*, book 2, ch. 3; *Lingham v. Eggleston*, 27 Mich. 324; *Hatch v. Fowler*, 23 id. 205; *Wilkinson v. Holiday*, 33 id. 386; *Chamblee v. McKenzie*, 31 Ark. 155. See *Byles v. Colier*, 54 Mich. 1, 19 N. W. Rep.

565; *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. Rep. 910; *Wadhams v. Balfour*, 32 Ore. 313, 51 Pac. Rep. 642; *Barker v. Freeland*, 91 Tenn. 112, 18 S. W. Rep. 60; *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. Rep. 1146; *Pacific Lounge Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. Rep. 392; *Towne v. Davis*, 66 N. H. 396, 22 Atl. Rep. 450; *Burke v. Shannon (Ky.)*, 43 S. W. Rep. 223; *Joyce v. Adams*, 8 N. Y. 291.

² *Id.*; *United Society v. Brooks*, 145 Mass. 410, 14 N. E. Rep. 622.

³ *Crofoot v. Bennett*, 2 N. Y. 258; *Crawford v. Earl*, 38 Wis. 312; *Thompson v. Alger*, 12 Met. 428; *Thorndike v. Locke*, 98 Mass. 340; *Bement v. Smith*, 15 Wend. 493; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Gordon v. Norris*, 49 N. H. 376;

Several cases in New York seem to affirm the right of a vendor to tender goods on an executory contract of sale and sue for the price, though the agreement did not give him the right of selecting and appropriating the particular goods to it.¹ When articles are ordered to be manufactured they are treated as the property of the vendee when made, and notice [356] thereof given to him with request to take them away. The vendor has then an immediate right of action for the price.² After goods are sold it is the duty of the buyer to take them away within a reasonable time, and if he neglects to do so the seller may charge for warehouse room, if prejudiced by the

Jenness v. Wendell, 51 id. 63, 12 Am. Rep. 48; Spicers v. Harvey, 9 R. I. 582; Scudder v. Worster, 11 Cush. 573; Browning v. Hamilton, 42 Ala. 484; Bailey v. Smith, 43 N. H. 141; Messer v. Woodman, 22 id. 172, 53 Am. Dec. 241; Garland v. Lane, 46 N. H. 245; Woolsey v. Bailey, 27 id. 217; Macomber v. Parker, 13 Pick. 175; Putnam v. Tillotson, 13 Met. 517; Stanton v. Eager, 16 Pick. 467; Johnson v. Stoddard, 100 Mass. 306; Odell v. Boston & M. R., 109 Mass. 50; Clafflin v. Boston & L. R. Co., 7 Allen, 341; Ballentine v. Robinson, 46 Pa. 179; Dustin v. McAndrew, 44 N. Y. 72; Krulde v. Ellison, 47 id. 36, 7 Am. Rep. 402; Rodgers v. Phillips, 40 N. Y. 519; Torrey v. Corliss, 33 Me. 336; Barry v. Palmer, 19 id. 303; Dutton v. Solomonson, 3 B. & P. 582; Aldridge v. Johnson, 7 El. & B. 885; Brown v. Hare, 3 H. & N. 484; Fragano v. Long, 4 B. & C. 219; Elliott v. Pybus, 10 Bing. 512.

In Lamkin v. Crawford, 8 Ala. 153, it was held that a purchaser at a sheriff's sale is liable to an action by the sheriff, and the right to recover the full price cannot be controverted, if the latter at the time of the trial has the ability to deliver the thing purchased, or if it has been placed at the disposal of the purchaser by tender.

¹ Bridgeford v. Crocker, 60 N. Y. 627; Westfall v. Peacock, 63 Barb. 207. See Bagley v. Findlay, 82 Ill. 524; McClure v. Williams, 5 Sneed, 718.

It is said in a late case that the title to chattels passes at once upon the execution of the contract of sale, "for it is the general rule that a mere contract for the sale of goods, where the subject is identified and nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the goods sold delivered to the purchaser." Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. Rep. 415.

In Dayton v. Rowland, 1 Daly, 446, it was held that where, by the custom of trade, a purchaser of goods on shipboard is bound to unload them within a definite time, and by reason of his failure to take the goods within that time the owner is obliged to pay lighterage and storage fees thereon, the purchaser is liable for such payments.

² Higgins v. Murray, 4 Hare, 565; Bement v. Smith, 15 Wend. 493; Ballentine v. Robinson, 46 Pa. 179; Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112; Morse v. Sherman, 106 Mass. 430; Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256.

delay.¹ Where goods are sold to be paid for by bill or note, payable at a future day, and the bill or note is not given, general *assumpsit* for goods sold and delivered cannot be maintained until the credit has expired;² but the vendor may sue at once on the special agreement, and recover the whole amount for which the bill or note should have been given, or the value of the goods.³ Such right of action rests not only upon the idea of the breach of a special promise to give the evidence of indebtedness, but also upon the theory that by the custom of merchants the note or bill might be made, by getting it discounted, the means of present payment. In a New York case it was suggested that there should be a rebate of interest during the stipulated period of credit.⁴

§ 645. **Recovery for part of stipulated quantity.** Where an entire contract is made for the sale and delivery of personal property, either for a gross sum or at a certain price per unit of its measure or weight, and it is only in part performed by the vendor, no action, of course, can be maintained on the contract for such part performance, and formerly there could be no recovery in any form;⁵ and that doctrine is still adhered to in some states.⁶ But a more just and equitable rule

¹ See *Greaves v. Ashlin*, 3 Camp. 426.

² *Dodge v. Waterman*, 36 N. H. 186; *Allen v. Ford*, 19 Pick. 217; *Yale v. Coddington*, 21 Wend. 175; *Scott v. Montague*, 16 Vt. 164.

³ *Hutchinson v. Reed*, 3 Camp. 329; *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Haskins v. Duperoy*, 9 East, 498; *Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410; *Loring v. Gurney*, 4 Pick. 16; *Hunne- man v. Grafton*, 10 Met. 454; *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122; *Barron v. Mullin*, 21 Minn. 374; *McCormick v. Basal*, 46 Iowa, 235; *Rinehart v. Olwine*, 5 W. & S. 157; *Bicknell v. Buck*, 58 Ind. 354; *Stoddard v. Mix*, 14 Conn. 12; *Carnahan v. Hughes*, 108 Ind. 225, 9 N. E. Rep. 79; *Stephenson v. Repp*, 47 Ohio St. 551, 25 N. E. Rep. 803, 10 L. R. A. 620; *Hanna v. Mills*, 21 Wend. 90, 34 Am.

Dec. 216; *American Manuf. Co. v. Klarquist*, 47 Minn. 344, 50 N. W. Rep. 243; *Aultman v. Daggs*, 50 Mo. App. 280; *Girard v. Taggart*, 5 S. & R. 19, 9 Am. Dec. 327; *Manton v. Gammon*, 7 Ill. App. 201; *Foster v. Adams*, 60 Vt. 392, 15 Atl. Rep. 169, 6 Am. St. 120; *Young v. Dalton*, 83 Tex. 497, 18 S. W. Rep. 819; *Osborne v. Bell*, 62 Mich. 214, 28 N. W. Rep. 841.

⁴ *Hanna v. Mills*, 21 Wend. 90, 34 Am. Dec. 216.

⁵ 2 Kent's Com. 509.

⁶ *Champlin v. Rowley*, 18 Wend. 187, 13 id. 258; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Youngs v. Kent*, 2 Sweeny, 257; *Flanagan v. Demarest*, 3 Robert. 183; *Moses v. Banker*, 2 Sweeny, 267; *McCormick v. Sarson*, 1 id. 161; *Currie v. White*, id. 166; *Keen v. Tupper*, 33 N. Y. Super. Ct. 465, 52 N. Y. 550; *Catlin v. Tobias*, 26 id. 217, 84 Am.

generally prevails. If the vendee retains the part delivered after the vendor has made default in respect to the residue it is a severance of the contract, and the vendor is entitled to recover the contract price for what is so delivered and retained, subject to recoupment of such damages as the vendee sustains for non-performance of the entire contract,¹ or the value, subject to like counter-claim.² The vendee may return the part delivered when delivery of the whole is due and not made, if he chooses; but if he retains it, it is deemed just that he should make compensation for it; and the same rule applies to other contracts, namely, that the party who accepts and appropriates the benefit of a partial performance should pay therefor to the extent of the benefit, but has the right to damages for the other party's failure to perform in full.³ A contract for property to be delivered in instalments, where each instalment is to be paid for separately, is not entire. The vendor will be entitled to recover for any delivered instalment, irrespective of default in the delivery of others.⁴

In contracts for the future delivery of goods, to be subsequently or concurrently paid for, the delivery being a condition on the performance of which the right to payment depends, if the contract is entire there must be a delivery of the whole to fulfill the condition.⁵ But where delivery is to be

Dec. 183; *Mead v. Degolyer*, 16 Wend. 632; *Witherow v. Witherow*, 16 Ohio, 238; *Williams v. Sherman*, 48 Barb. 402. See *Leavenworth v. Packer*, 52 id. 132.

¹ *Bowker v. Hoyt*, 18 Pick. 555; *Smith v. Foster*, 36 Vt. 705; *Abbott v. Wyse*, 15 Conn. 254; *Horn v. Batchelder*, 41 N. H. 86; *Richard v. Shaw*, 67 Ill. 222; *Polhemus v. Heiman*, 45 Cal. 573.

² *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Clark v. Moore*, 3 Mich. 55; *Chapman v. Dease*, 34 id. 375; *Wilson v. Wager*, 26 id. 452; *Begale v. McKinzie*, id. 470; *Oxendale v. Witherell*, 9 B. & C. 386; *Cooke v. Munstone*, 1 P. & B. N. R. 351; *Read v. Rann*, 10 B. & C. 441.

³ *Chapman v. Dease*, 34 Mich. 375.

⁴ *Morris v. Wibaux*, 159 Ill. 627, 648, 43 N. E. Rep. 837, quoting the text; *Williams v. Robb*, 104 Mich. 242, 62 N. W. Rep. 352; *Loomis v. Eagle Bank*, 10 Ohio St. 327; *Moore v. Logan*, 5 Up. Can. C. P. 294. See *Seymour v. Davis*, 2 Sandf. 239.

⁵ *Howe v. Huntington*, 15 Me. 350; *Warren v. Wheeler*, 21 id. 484; *Howland v. Leach*, 11 Pick. 151; *Swan v. Drury*, 22 id. 485; *Dana v. King*, 2 id. 155; *Lord v. Belknap*, 1 Cush. 279; *Gazley v. Price*, 16 Johns. 267; *Williams v. Henley*, 3 Denio, 363; *Cornwall v. Haight*, 8 Barb. 327; *Champion v. Rowley*, 18 Wend. 187; *Jones v. Marsh*, 22 Vt. 144; *Shaw v. Turnpike Co.*, 2 P. & W. 454; *Smith v. Liscomb*, 13 Tex. 532; *Barber v. Willard*, 4 McLean, 356; *Grundy v. McClure*, 2 Jones, 142; *Hough v.*

made in parcels or instalments, severable not only in bulk but [358] prices and times of delivery, the delivery of each parcel is a condition only to payment *pro tanto*.¹ Nor will a default in respect to one severable part entitle the other party to rescind, unless there is then a renunciation of the entire contract, persisted in afterwards.² In *Norrington v. Wright*³ Mr. Justice Gray reviews the English and American cases, and, speaking for the court, says that the seller is bound to deliver the quantity stipulated for and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity. When the property is to be shipped in certain proportions monthly the failure to ship the required quantity in the first month gives the purchaser the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once, if such right is distinctly and reasonably asserted.⁴

Rawson, 17 Ill. 588; *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*, 6 M. & Gr. 942; *Boyd v. Lite*, 1 C. B. 222; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowen*, L. R. 1 C. P. 484; *Murphy v. St. Louis*, 8 Mo. App. 483.

¹ *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. Rep. 569, 12 C. C. A. 306; *McLaughlin v. Hess*, 164 Pa. 570, 30 Atl. Rep. 491; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. Rep. 502, 39 Am. St. 415; *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. Rep. 248; *George H. Hess Co. v. Dawson*, 149 Ill. 138, 36 N. E. Rep. 557; *Smith v. Keith & P. Coal Co.*, 36 Mo. App. 567; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Brown v. Muller*, L. R. 7 Ex. 319. See *Deming v. Kemp*, 4 Sandf. 147; *Seymour v. Davis*, 2 id. 239.

² *Roper v. Johnson*, L. R. 8 C. P. 167; *Withers v. Reynolds*, 2 B. & Ad. 882; *Smoot's Case*, 15 Wall. 36; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Frost v. Knight*, L. R. 5 Ex. 323; *Burtis v. Thompson*, 42 N. Y. 246. See *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

Shipping cattle that do not fulfill the requirements of a contract with others that do, will not justify the purchaser in refusing other cattle subsequently shipped, if they are such as were contracted for, the contract providing for shipments at different times, to be paid for as fast as delivery is made. *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. Rep. 887.

³ 115 U. S. 188, 6 Sup. Ct. Rep. 12; *Lee v. Sickles Saddlery Co.*, 38 Mo. App. 201. *Norrington v. Wright*, *supra*, has been approved in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. Rep. 882; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. Rep. 304.

⁴ This rule is substantially in accord with *Hoare v. Rennie*, 5 H. & N. 19; *Coddington v. Paleologo*, L. R. 2 Ex. 193; *Bowes v. Shand*, 2 App. Cas. 455; *Reuter v. Sala*, 4 C. P. Div. 239; *Houck v. Muller*, 7 Q. B. Div. 92. It differs from that announced in *Simpson v. Crippin*, L. R. 8 Q. B. 14, and *Brandt v. Lawrence*, 1 Q. B. Div. 344. See *Hill v. Blake*, 97 N. Y. 216; *King Phillip's Mills v. Slater*, 12 R. I. 82, 34 Am.

§ 646. **Same subject.** Where the contract provides for a series of deliveries, and there is a renunciation of it by the seller and a consequent default in respect to all or several of them, it has been held, where action was delayed until after the time stipulated for the last delivery, that the proper measure of damages is the sum of the difference between the contract and market prices on the days when the several deliveries were due.¹ In *Barningham v. Smith*² the defendants contracted with the plaintiff to deliver from the 1st of January until the 31st of December, 1872, six thousand two hundred and sixty wagons of coal at 7s. 3d. per ton of two thousand pounds, at the fair average rate of twenty wagons per day; payment by three months' acceptance drawn on the 10th of each month for the previous month's supply. The deliveries were irregular in point of time, and insufficient as to quantity; they failed to comply with the condition that they should be at the fair average rate of twenty wagons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendant at any time during 1872, but on the 13th of February, 1873, he bought coal in the market to supply the whole deficiency at a very much higher price, namely 19s. per ton. Coal had been gradually rising in price throughout the successive months of 1872, and it rose more rapidly in the months of January and February, 1873. The plaintiff claimed to be entitled to damages [359] to the extent of the difference between the contract price of 7s. 3d. and the market price at the expiration of such a reasonable time after the 31st of December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole deficiency left undelivered by the defendants

Rep. 603; *Smith v. Keith & P. Coal Co.*, 36 Mo. App. 567; *Freeth v. Burr*, L. R. 9 C. P. 208; *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 439, 9 Q. B. Div. 648.

¹ *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. Rep. 569, 12 C. C. A. 306; *Brown v. Muller*, L. R. 7 Ex. 319; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Hill v. Chip-*

man, 59 Wis. 211, 18 N. W. Rep. 160; *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463; *Hamilton v. McGill*, 12 L. R. Ire. 186, 201; *Roper v. Johnson*, L. R. 8 C. P. 167.

² 31 L. T. (N. S.) 540; *Ex parte Llan-samlet Tin Plate Co.*, L. R. 16 Eq. 155; *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N. W. Rep. 864.

throughout the year 1872. The defendants contended he was not entitled to wait until the expiration of the year before assessing his damages; that a breach was committed as often as a month expired without the proper quantity having been delivered, and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price; or that the breaches were committed at some shorter periods, but that the damages should be calculated at the end of each month. It was held that as soon as the defendants failed to deliver a fair average of coal according to the terms of the contract a breach had taken place, for which at that time the plaintiff was entitled to damages as upon that breach, and so on from time to time, to the last; that it was an erroneous way of estimating the damages, by waiting until the full period of the contract had expired, and then claim the difference at that time.¹ If the purchaser notifies the vendor that no more property will be received under the contract after a specified date, and a tender is subsequently made of the undelivered portion, if there has been an advance in the price between the time of the notice and the tender and a diminution in the difference between the contract and the market price, the variance between these when the tender is made measures the damages.² If the purchaser's orders for the maximum quantity demandable in any month under the contract are not wholly filled, and in subsequent months more than that quantity is delivered and accepted, there is a waiver *pro tanto* of the earlier breach. In determining the disposition to be made of the excessive deliveries courts will apply the rule which governs the application of payments of money when no application thereof is made by the parties, and apply the excess on the first surplus delivery to the earliest deficient delivery, and the second excessive delivery to the next insufficient one;³ at least where it is not shown that the market price was higher when the first excessive delivery was made than when the earliest deficient one was.⁴

Where the contract is to furnish an indefinite quantity of

¹ See *Tyers v. Rosedale, etc. Co., L. R. 8 Ex. 305.*

² *Rhodes v. Cleveland Rolling Mill Co., 17 Fed. Rep. 426.*

³ *Johnson v. Allen, 78 Ala. 387, 394, 56 Am. Rep. 34.*

⁴ *Gallun v. Seymour, 76 Wis. 251, 45 N. W. Rep. 115.*

army supplies at a certain post for a specified time and no means exist by which it can be ascertained in advance how much will be required, each party owes the other the duty of exercising diligence in keeping himself and the other informed of facts which tend to lessen the uncertainty. The receiving officer may change or revoke his orders concerning the delivery of supplies any time before they are received. If he does so the government will be liable for such as the contractor had on hand ready to deliver and as to which he had incurred substantially all the cost and trouble which would have been taken if delivery had been made; as to these supplies it will be considered that he has complied with his agreement. For his preparations and progress towards furnishing other supplies, not substantially ready for delivery, he may recover the cost, expenses and losses actually incurred, but not the prospective profits.¹

§ 647. **Liability for not accepting goods.** An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale does not become a complete bargain and sale so as to vest the title in him, if he refuses to accept it.² In such case the vendor is entitled to recover damages only to the extent of his actual in-

¹ *Field v. United States*, 16 Ct. of Cls. 434.

² Where it is stipulated that an article to be furnished shall, unqualifiedly, be satisfactory to the party to whom it is to be supplied, the right to reject the article, as not being satisfactory, cannot be inquired into; the party's own determination must be taken as final and conclusive. *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 225, 57 Am. Rep. 318, 3 Atl. Rep. 306, 9 id. 126; *Andrews v. Belfield*, 2 C. B. (N. S.) 779; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Rossiter v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Gibson v. Cranage*, 39 Mich. 49; *Wood Reaping & M. Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. Rep.

906, 45 Am. Rep. 57; *Taylor v. Trustees of the Poor*, 1 Penne. 555, 43 Atl. Rep. 613. But this principle is not absolute where the stipulation is that the article to be supplied shall be such as shall be approved by, or be satisfactory to, some third person, though he be an agent of one of the parties to the contract. In such case the condition precedent is not binding if it be shown that the approval has been withheld because of selfish interest, bias, partiality or corruption; but no mere error of judgment will vitiate such person's determination. *Baltimore & O. R. Co. v. Brydon*, *supra*; *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. 344; *Martinsburg & P. R. Co. v. March*, 114 U. S. 559, 5 Sup. Ct. Rep. 1035; *Sharpe v. San Paulo R. Co.* L. R. 8 Ch. 597.

jury from the failure of the vendee to fulfill his contract,¹ which is ordinarily the difference between the contract price and the market value, at the time and place of the breach, with [360] interest.² The courts do not always specifically desig-

¹ *Loftus v. Riley*, 83 Iowa, 503, 50 N. W. Rep. 17; *Allen v. Jarvis*, 20 Conn. 38; *Dana v. Fiedler*, 12 N. Y. 48, 62 Am. Dec. 130; *Houston*, etc. R. Co. v. *Mitchell*, 38 Tex. 85; *Robinson v. Varnell*, 16 id. 382.

² *Id.*; *Taylor v. Trustees of the Poor*, 1 Penne. 555, 43 Atl. Rep. 613; *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. Rep. 837; *Murray v. Doud*, 167 Ill. 368, 47 N. E. Rep. 717, 59 Am. St. 302, (interest may be recovered if the contract of purchase was evidenced by "bought and sold notes"); *Beardsley v. Smith*, 61 Ill. App. 340; *James H. Rice Co. v. Penn Plate Glass Co.*, 88 Ill. App. 407; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. Rep. 348; *Gardner v. Caylor*, 24 Ind. App. 521, 56 N. E. Rep. 134; *Lawrence Canning Co. v. H. D. Lee Mercantile Co.*, 5 Kan. App. 77, 48 Pac. Rep. 749; *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. Rep. 172; *Williams v. Robb*, 104 Mich. 242, 62 N. W. Rep. 352; *Stresovich v. Kesting*, 63 Mo. App. 57; *Parlin v. Boatman*, 84 Mo. App. 67; *Funke v. Allen*, 54 Neb. 407, 74 N. W. Rep. 832, disapproving *Lincoln Shoe Manuf. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. Rep. 480, 69 Am. St. 716; *Tripp v. For-saith Machine Co.*, 69 N. H. 233, 45 Atl. Rep. 746; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. Rep. 415; *Gray v. Central R. Co.*, 82 Hun, 523, 31 N. Y. Supp. 704; *National Cash Register Co. v. Schmidt*, 48 App. Div. 472, 62 N. Y. Supp. 952; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. Rep. 117 (compare the case last cited with *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. Rep. 800, where it is held, one judge dissenting, that the measure of damages for the breach by a vendee of a contract for the pur-

chase of timber to be delivered at a designated point is the contract price less the cost of delivery); *Hooper v. Bromley Brothers Carpet Co.*, 11 Pa. Super. Ct. 634; *Corser v. Hale*, 149 Pa. 274, 24 Atl. Rep. 285; *Jones v. Jennings*, 168 Pa. 493, 32 Atl. Rep. 51; *Guillon v. Earnshaw*, 169 Pa. 463, 32 Atl. Rep. 545; *Woldert v. Arledge*, 4 Tex. Civ. App. 692, 23 S. W. Rep. 1052; *Adler v. Kiber*, 5 Tex. Civ. App. 415, 27 S. W. Rep. 23; *T. B. Scott Lumber Co. v. Hafner-Lothman Manuf. Co.*, 91 Wis. 667, 65 N. W. Rep. 513; *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573, 81 N. W. Rep. 666; *Cherry Valley Iron Works v. Florence Iron River Co.*, 64 Fed. Rep. 569, 12 C. C. A. 306; *Fisher v. Newark City Ice Co.*, 62 Fed. Rep. 569, 10 C. C. A. 546, 76 Fed. Rep. 427, 23 C. C. A. 261; *Friedenstein v. United States*, 35 Ct. of Cls. 1; *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 497, 507; *Thurman v. Wilson*, 7 Ill. App. 312; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211, 15 N. E. Rep. 571; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. Rep. 436; *Cullen v. Bimm*, 37 Ohio St. 236; *White v. Matador Land & C. Co.*, 75 Tex. 465, 12 S. W. Rep. 866; *Geiss v. Wyeth Hardware & Manuf. Co.*, 37 Kan. 130, 14 Pac. Rep. 463; *Unexcelled Fireworks Co. v. Polites*, 130 Pa. 536, 17 Am. St. 788, 18 Atl. Rep. 1058; *Girard v. Taggart*, 5 S. & R. 19, 539, 9 Am. Dec. 327; *Davis v. Adams*, 18 Ala. 264; *Clement*, etc. Manuf. Co. v. *Meserole*, 117 Mass. 362; *Danforth v. Walker*, 37 Vt. 239; *Beals v. Terry*, 2 Sandf. 127; *Whitmore v. Coats*, 14 Mo. 9; *Rand v. White Mountains R. Co.*, 40 N. H. 79; *An-*

nate interest, and where it is expressly allowed, at least in some cases, it is done by way of indemnity, and not as interest, strictly so called.¹ Interest may be recovered from the date of the termination of the contract; the right to it is not dependent upon making a demand for the exact sum due.² Under the code of California there cannot be a recovery of interest on the excess of the contract price over the value of the property to the seller if the property had no established or reasonably well-known market value.³ The difference between the contract price and the market value may be ascertained and

draws v. Hoover, 8 Watts, 239; Ganson v. Madigan, 13 Wis. 67; Rider v. Kelly, 32 Vt. 268, 76 Am. Dec. 176; Weltners v. Riggs, 3 W. Va. 445; Pickering v. Bardwell, 21 Wis. 562; Hale v. Trout, 35 Cal. 229; Dustan v. McAndrew, 44 N. Y. 72; Lewis v. Greider, 49 Barb. 606, 51 N. Y. 231; Pollen v. Le Roy, 10 Bosw. 38, 30 N. Y. 549; Bridgeford v. Crocker, 60 N. Y. 627; Mettler v. Moore, 1 Blackf. 342, 12 Am. Dec. 248; Lucas v. Heaton, 1 Ind. 264; Ellison v. Dove, 8 Blackf. 571; Zehner v. Dale, 25 Ind. 433; Williams v. Jones, 12 id. 561; Young v. Mertens, 27 Md. 114; Hall v. Pierce, 4 W. Va. 107; Springer v. Berry, 47 Me. 330; Hall v. O'Hanlan, 1 Brev. 471; Clifton v. Newsom, 1 Jones, 108; Haskell v. McHenry, 4 Cal. 411; Nixon v. Nixon, 21 Ohio St. 114; Barr v. Logan, 5 Harr. 52; Hewitt v. Miller, 61 Barb. 567; Rickey v. Tenbroeck, 63 Mo. 563; McNaughten v. Cassally, 4 McLean, 530; Chapman v. Cochran, 30 Wis. 295; Marshall v. Piles, 3 Bush, 249; Camp v. Hamlin, 55 Ga. 259; Sanborn v. Benedict, 78 Ill. 309; Pittsburgh, etc. R. Co. v. Heck, 50 Ind. 303, 19 Am. Rep. 713; Schnebly v. Shirtcliff, 7 Phila. 236; McNaught v. Dodson, 49 Ill. 446; Gibbons v. United States, 8 Wall. 269; Jochams v. Ong, 45 La. Ann. 1289, 14 So. Rep. 247; Peters v. Cooper, 95 Mich. 191, 54 N. W. Rep. 694; Cole v. Zucarello, 104 Tenn. 64, 56 S. W. Rep.

850, citing the text; Hill v. McKay, 94 Cal. 5, 29 Pac. Rep. 406; Minneapolis Threshing Machine Co. v. McDonald, 10 N. D. 408, 87 N. W. Rep. 993; Duluth Furnace Co. v. Iron Belt Mining Co., 117 Fed. Rep. 138, 55 C. C. A. 154; Gehl v. Milwaukee Produce Co., — Wis. —, 93 N. W. Rep. 26; Nelson v. Hirschberg, 70 Ark. 39, 66 S. W. Rep. 347, citing the text; Kincaid v. Price, — Colo. App. —, 70 Pac. Rep. 153.

The depreciation in the value of cattle and the expense of keeping them after the vendee's default may be proven without being specially pleaded. Peters v. Cooper, 95 Mich. 191, 54 N. W. Rep. 694; Smith v. Sloss Marblehead Lime Co., 51 Ohio St. 518, 49 N. E. Rep. 695.

It is no objection to the recovery of such damages that the contract was to run for a period of years, as where there was a purchase of all the ice which should be stored for five years. The profits are not too remote, contingent or speculative to be brought within a reasonable estimate of damages. Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. Rep. 1020.

¹ McCall Co. v. Icks, 107 Wis. 232, 88 N. E. Rep. 300.

² International Contracting Co. v. McNichol, 105 Fed. Rep. 553.

³ Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. Rep. 853.

fixed by a resale within a reasonable time,¹ and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible.²

These rules apply to all sales of personal property, including a

¹ "The rule is, where facts are undisputed or admitted, what is reasonable time is a question of law, but where what is reasonable time depends upon controverted points, or where the motives of the parties enter into the question, the whole is necessarily submitted to the jury to be determined from the facts whether the time was or was not reasonable." *Morris v. Wibaux*, 159 Ill. 627, 645, 43 N. E. Rep. 837, citing *Hill v. Hobart*, 16 Me. 168.

Though the price of goods was declining and the vendor retained them for two months or more, his right to recover was not thereby affected. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737. Compare *Jochams v. Ong*, 45 La. Ann. 1289, 1294, 14 So. Rep. 247, where it is said that the sale should be made at the earliest practicable period after an absolute refusal to accept.

A delay of ten days after the time fixed for delivery, the market price of the goods having declined and the season for them being almost over, was not such diligence as made the price on the resale the measure of the vendee's liability. *Gehl v. Milwaukee Produce Co.*, — Wis. —, 93 N. W. Rep. 26.

² *Leonard v. Portier*, 15 S. W. Rep. 414, quoting the text and holding that notice is necessary (Ct. of App. of Texas); *Scribner v. Schenkel*, 128 Cal. 250, 60 Pac. Rep. 860; *Colorado Springs Livestock Co. v. Godding*, 2 Colo. App. 1, 29 Pac. Rep. 529; *Magnes v. Sioux City Nursery & Seed Co.*, 14 Colo. App. 219, 59 Pac. Rep. 879; *Davis Sulphur Ore Co. v. Atlanta Guano Co.*, 109 Ga. 607, 34 S. E. Rep. 104, citing the text; *James*

H. Rice Co. v. Penn Plate Glass Co., 88 Ill. App. 407; *Ridgley v. Mooney*, 16 Ind. App. 362, 45 N. E. Rep. 348, citing the text as to the necessity of giving notice; *Ingram v. Wacker-nagel*, 83 Iowa, 82, 48 N. W. Rep. 998; *Clore v. Robinson*, 100 Ky. 402, 38 S. W. Rep. 687; *Mattingly v. Mathews*, 14 Ky. L. Rep. 300 (Ky. Super. Ct.); *Williams v. Robb*, 104 Mich. 242, 62 N. W. Rep. 352; *Strauss v. Labsap*, 59 Mo. App. 260; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. Rep. 415; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. Rep. 750; *Baltimore Smelting Co. v. Ammonia Co.*, 2 Pa. Super. Ct. 555; *Woldert v. Arledge*, 4 Tex. Civ. App. 692, 23 S. W. Rep. 1052; *T. B. Scott Lumber Co. v. Hafner-Lothman Manuf. Co.*, 91 Wis. 667, 65 N. W. Rep. 513; *Pratt v. S. Freeman & Sons Manuf. Co.*, — Wis. —, 92 N. W. Rep. 368; *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573, 81 N. W. Rep. 666; *Penn v. Smith*, 93 Ala. 476, 9 So. Rep. 609, 98 Ala. 560, 12 So. Rep. 818; *Strickland v. McCulloch*, 8 N. S. W. (law) 324; *Whitney v. Boardman*, 118 Mass. 242; *McEachron v. Randles*, 34 Barb. 301; *Williams v. Godwin*, 4 Sneed, 558; *Rickey v. Tenbroeck*, 63 Mo. 563; *Saladin v. Mitchell*, 45 Ill. 79; *Barr v. Logan*, 5 Harr. 52; *Pollen v. Le Roy*, 30 N. Y. 549; *Cook v. Brandies*, 3 Met. (Ky.) 555; *Dustan v. McAndrew*, 44 N. Y. 72; *McClure v. Williams*, 5 Sneed, 718; *Jackson v. Covert*, 5 Wend. 139; *Young v. Mertens*, 27 Md. 114; *Hall v. O'Hanlan*, 1 Brev. 471; *Lewis v. Greider*, 49 Barb. 606; *Lamkin v. Crawford*, 8 Ala. 153; *Camp v. Hamlin*, 55 Ga. 259; *Ullman v. Kent*, 60 Ill. 271; *Hughes' Case*, 4 Ct. of Cls. 64; *Bell v. Offutt*, 10

partnership interest in the assets of realty and personalty,¹ and in corporate stocks.² On the refusal of the receiver of a vendee to accept and pay for chattels the vendor may resell them in order to fix the amount of his damages without violating an order of court prohibiting the transfer of any property of the vendee except to deliver it to the receiver.³ The right to recover damages is not affected because the purchaser made a deposit with the seller, which was to be considered as part of the cash payment if the contract was executed, otherwise to be forfeited and become the absolute property of the seller; but in estimating the damages the deposit was to be considered.⁴ According to some authorities, if the buyer has notice of the facts which give the vendor the right to resell and absolutely refuses to comply with his contract, notice of an intention to resell is not essential.⁵ The resale need not be at auction unless such is the customary method of selling the sort of property in question, "nor is it absolutely essential that notice of the time and place of sale should be given to the vendee."⁶ Still, as the sale must be fair, and such as is

Bush, 632; Van Horn v. Rucker, 33 Mo. 391, 84 Am. Dec. 52; Bigelow v. Legg, 102 N. Y. 652, 6 N. E. Rep. 107; Anderson v. Frank, 45 Mo. App. 482; Tufts v. Grewer, 83 Me. 407, 22 Atl. Rep. 382; Woods v. Cramer, 34 S. C. 508, 13 S. E. Rep. 660.

A considerable disparity between the original price and that realized on the resale may be accounted for by showing a decline in the market value of the property intermediate those events. Penn v. Smith, 104 Ala. 445, 18 So. Rep. 38.

¹ Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. Rep. 415.

² Herd v. Thompson, 149 Pa. 484, 24 Atl. Rep. 282. Butsee Reynolds v. Callender, 19 Pa. Super. Ct. 610, as to the sale of specific shares represented by a particular certificate.

³ Moore v. Potter, 155 N. Y. 481, 50 N. E. Rep. 271, 63 Am. St. 692.

⁴ Leslie v. Macnichol, 2 N. S. W. (law) 250 (1881). The court relied

upon Icely v. Grew, 6 Nev. & Man. 467.

⁵ Magnes v. Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. Rep. 879; Wrigley v. Cornelius, 162 Ill. 92, 44 N. E. Rep. 406; Morris v. Wibaux, 159 Ill. 627, 646, 43 N. E. Rep. 837; Clore v. Robinson, 100 Ky. 402, 38 S. W. Rep. 687; Rosenbaums v. Weeden, 18 Gratt. 785, 98 Am. Dec. 737; Waples v. Overaker, 77 Tex. 7, 19 Am. St. 727, 13 S. W. Rep. 527; Ullman v. Kent, 60 Ill. 273.

If the purchaser is informed that on his failure to accept the property the vendor will take the steps authorized by law to protect himself, it is sufficient; the notice need not state what that action would be. Ingram v. Wackernagel, 83 Iowa, 82, 48 N. W. Rep. 998.

⁶ Pratt v. S. Freeman & Sons Manuf. Co., — Wis. —, 92 N. W. Rep. 368.

likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit it.”¹ In California the seller is not required, in order to recover from the purchaser the difference between the contract price and the value of the goods to him, to sell them in the manner prescribed by the code for the sale of pledged property; if he does so sell them such sale is conclusive as to their value; if they are not so sold he must prove their value to him in the action against the buyer.² The resale is made on the theory (which is a mere legal fiction) that the property is that of the vendee retained by the vendor as a means of realizing the contract price; he acts as the agent of the vendee,³ and deducts from the proceeds all the expenses incurred.⁴ He is not entitled to compensation for his own services in making the sale,⁵ nor for loss of time or the recovery of expenses in connection therewith.⁶ Where the purchaser at an execution sale refused to comply with the terms thereof, he was liable for the necessary expense of keeping and storing the property pending the second sale.⁷ The agency or trusteeship of the seller is

¹ Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. Rep. 415.

² Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. Rep. 853.

³ “It is not required that the resale shall be made by the vendor as the agent of the vendee.” Morris v. Wibaux, 159 Ill. 627, 646, 43 N. E. Rep. 837.

⁴ Pollen v. Le Roy, 30 N. Y. 549; Dustan v. McAndrew, 44 id. 72; Westfall v. Peacock, 63 Barb. 209; Croke v. Moore, 1 Sandf. 297; Bagley v. Findlay, 82 Ill. 524; Young v. Mertens, 27 Md. 114; Chapman v. Larin, 4 Can. Sup. Ct. 349; Mattingly v. Mathews, 14 Ky. L. Rep. 300 (Ky. Super. Ct.).

⁵ Gehl v. Milwaukee Produce Co., 105 Wis. 573, 81 N. W. Rep. 666.

⁶ Penn v. Smith, 93 Ala. 476, 9 So. Rep. 609.

⁷ Barnes v. Bluthenthal, 101 Ga. 598, 28 S. E. Rep. 1017, 65 Am. St. 339; Robertson v. Smith, 37 Ga. 604.

In a case which arose in Quebec a merchant bought the assets of an insolvent trader, but refused to receive them. The curator of the estate obtained judgment against the purchaser, who thereupon accepted the goods and paid the purchase-money. Thereafter the curator sued to recover special damages incurred in the care and preservation of the goods from the time of their sale until delivery. His right to recover was sustained, and the judgment in the first mentioned action was not *resjudicata* on that question. Hyde v. Lindsay, 29 Can. Sup. Ct. 595 (1899).

On the other hand, it is said in a recent case that the vendor cannot by any act of his increase the damages. Upon the refusal of the vendee to accept the goods they were at the risk and cost of the vendor, who could not charge the former with the storage of them nor with the

coupled with an interest, and if he deems it necessary to protect his interest he may buy the goods; having done so, he holds them subject to redemption if the buyer acts seasonably. The latter may have the goods bought by the seller returned to him upon tender of the contract price, less the amount realized from that part of them sold to third parties; or, if the return is impossible, upon tendering the original purchase price, the buyer is entitled to a credit for the actual market value of the goods which his vendor bought, regardless of what they brought at the resale.¹ A vendor does not become the agent of the vendee in reselling property which the latter has refused to accept, and the beneficial title does not pass to the vendee, although the vendor purchases at the sale.² The fact that the vendor outbid all the competitors at a sale conducted by a licensed auctioneer, made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public and personal notice to the vendee, does not render the sale invalid, "for he had a right to bid, provided he took no advantage by trying to prevent others from bidding, or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified, but the mere fact that he was the highest bidder at a public sale, the fairness of which was not questioned in any other respect," did not prevent the amount of the vendor's bid from being evidence of the value of the property.³ And it is immaterial, so far as the effect of the sale as evidence of value is concerned, that the vendor subsequently sold the property bought by him at the auction at a figure which equaled

taxes upon them; that the vendee was not chargeable with the expense of the auction sale as such. It must be deducted from the gross proceeds in order to obtain the net auction price; but that is quite another and different thing in principle. *Tripp v. Forsaith Machine Co.*, 69 N. H. 233, 45 Atl. Rep. 746.

¹ *Strauss v. Labsap*, 59 Mo. App. 260.

² *Moore v. Potter*, 155 N. Y. 481, 50 N. E. Rep. 271, 63 Am. St. 692.

³ *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. Rep. 750; *Strickland v. McCulloch*, 8 N. S. W. (law) 324, 343, 346 (1887).

or exceeded the price at which he sold to the defendant. If the latter had accepted the property the vendor could have used his capital to buy other goods which might have made him an equal profit.¹

After notice of the vendor's intention to resell, no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade.² If at the time fixed for its delivery there is a market for the property the vendor cannot keep it for a rise in price at the vendee's expense.³ If the net proceeds of the sale are less than the contract price, he may recover the deficiency in an action on the contract.⁴ The vendor may, if necessary, transport the goods to

¹ Strickland v. McCulloch, *supra*.

² Cases cited in seventh preceding note; Morris v. Wibaux, 159 Ill. 627, 43 N. E. Rep. 837; Pratt v. S. Freeman & Sons Manuf. Co., — Wis. —, 92 N. W. Rep. 368.

In Hickock v. Hoyt, 33 Conn. 553, it was held that where the title to property passes by a sale, and the vendor retains the possession as security for the purchase-money, and finally sells to other parties for a less price, and seeks to recover the difference from the first purchaser, it is necessary that specific notice of the time and place of sale should be given. But in a case where the contract is executory, no such notice is necessary.

In Georgia where there is an executory contract and the buyer promises to pay for the goods at a time subsequent to their delivery, and becomes insolvent before they are delivered, the seller, who makes a resale of the goods after their stoppage *in transitu*, cannot recover the difference between the contract price and the price realized upon the resale unless he gave the buyer notice of his intention to resell or made a tender of the goods and demanded payment and the buyer refused to take the goods or to pay for them.

Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 34 S. E. Rep. 1011.

³ Friedenstien v. United States, 35 Ct. of Cls. 1; Sanders v. Bond, 23 Ky. L. Rep. 2084, 66 S. W. Rep. 635; Thurman v. Wilson, 7 Ill. App. 312.

⁴ Id.; Springer v. Berry, 47 Me. 330; Williams v. Godwin, 4 Sneed, 557; Barr v. Logan, 5 Harr. 52; Hall v. O'Hanlan, 1 Brev. 471; Jackson v. Covert, 5 Wend. 139; Boorman v. Nash, 9 B. & C. 145; MacLean v. Dunn, 4 Bing. 722; Sands v. Taylor, 5 Johns. 395, 4 Am. Dec. 374; McClure v. Williams, 5 Sneed, 718; Pratt v. S. Freeman & Sons Manuf. Co., — Wis. —, 92 N. W. Rep. 368; Salem Iron Co. v. Lake Superior Consolidated Iron Mines, 112 Fed. Rep. 239, 50 C. C. A. 213.

Where the goods were sold at an unusual place and not in the usual way, it was said that the buyer was entitled to the benefit of any evidence which tended to show their market value at the time fixed for delivery. It is not a hard and fast rule that the market price of property is to be determined by a public sale, though that be properly advertised. Hooper v. Bromley Brothers Carpet Co., 11 Pa. Super. Ct. 634.

another place at the expense of the vendee, for a market.¹ The place of resale is not necessarily restricted to that where by the contract the vendees were bound to receive the property; the vendor is authorized to exercise a reasonable discretion as to the place of sale, and may also, at the expense of the vendee, insure the property.² If there are several modes of sale open to the vendor he may adopt such as his judgment approves; if he uses diligence in pursuing the one adopted nothing more can be required of him.³ Unless it is absolutely necessary he is not bound to incur any expense involving an advance of money.⁴ The sale must be for cash, and the rejection of a larger offer for the property on credit does not affect the cash price as evidence of the market value of the property.⁵

If the title to the property has passed the vendor is not bound to resell it; it may be abandoned and the contract price be recovered.⁶ If the refusal to accept a portion of the property is unauthorized the vendor may recover the market value of that accepted without deduction for the non-delivery of the remainder, which is excused by the vendee's act.⁷

¹ *Ingram v. Wackernagel*, 83 Iowa, 82, 48 N. W. Rep. 998; *Sawyer v. Dean*, 114 N. Y. 481, 11 Am. St. 683, 21 N. E. Rep. 1012; *White v. Matador Land & C. Co.*, 75 Tex. 465, 12 S. W. Rep. 866; *Jackson v. Covert*, 5 Wend. 139; *Lewis v. Greider*, 51 N. Y. 231, 49 Barb. 606; *Hill v. McKay*, 94 Cal. 5, 29 Pac. Rep. 406. *Contra*, *Chapman v. Ingram*, 30 Wis. 295; *Rickey v. Tenbroeck*, 63 Mo. 563.

² *Lewis v. Greider*, *supra*; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. 727, 13 S. W. Rep. 527.

But in the absence of proof that there was no market for the goods at the place fixed for their delivery a sale thereof, a month after the buyer refused to accept them, in a distant market, made without notice, was held not to be evidence of their market value. *Lawrence Canning Co. v. H. D. Lee Mercantile Co.*, 5 Kan. App. 77, 48 Pac. Rep. 749.

The sale of goods in St. Louis, it has been said, is not evidence of their value in Kansas City. *Woldert v.*

Arledge, 4 Tex. Civ. App. 692, 697, 23 S. W. Rep. 1052.

³ If the sale is made at a general market for which the purchaser intended the property, he cannot object because it was not made at a nearer and less important market place. *Anderson v. Frank*, 42 Mo. App. 482.

If the vendor mixes with the goods an inferior grade of goods, which the vendee has not bought, to further the sale of the whole, and such mixture results in a less price than the market price of the goods sold to the vendee, the vendor must account for the market price of the latter. *Guillon v. Earnshaw*, 169 Pa. 463, 32 Atl. Rep. 545.

⁴ *Wonderly v. Holmes Lumber Co.*, 56 Mich. 412, 23 N. W. Rep. 79.

⁵ *Pratt v. S. Freeman & Sons Manuf. Co.* — Wis. —, 92 N. W. Rep. 368.

⁶ *Hunter v. Wetsell*, 84 N. Y. 549.

⁷ *Smith v. Keith & P. Coal Co.*, 36 Mo. App. 567.

The general rule of damages heretofore stated is sometimes regarded as inadequate to compensate the vendor for the loss he has sustained in consequence of the vendee's refusal to accept the goods. In a Virginia case¹ there was a refusal to receive crude iron ore, and it was adjudged that the vendor could recover damages for the loss resulting from the delay to receive it and also for the profits that would have been realized if the whole amount contracted for had been delivered. In answering the objection to such recovery, the court said it would not be double. "The object of the law in awarding damages is to make amends or reparation. It aims to put the party injured in the same position, so far as money can do it, as he would have been in if the contract had been performed. He is entitled to recover all damages resulting directly from its violation. There may be several elements of damages. It may, as in this case, consist of the expense incurred in taking care of unemployed stock, and paying the wages of idle employees that were necessary to the performance of the contract, while the plaintiff was unnecessarily and unreasonably prevented from doing the work contracted for, and may also consist of profits which would have been realized if the party had been allowed to complete the contract. Otherwise a contract from which a profit was reasonably certain might result, without his fault, in an absolute loss to the party who should have realized the profit. One might enter into an agreement to do certain work at a stipulated time, which required for its performance teams and hands, and though ready to begin work at the appointed time, be prevented by the other party from doing so through one pretext or another until the daily expenses of his equipment, of idle teams and hands, exceeded the entire profit to be expected from the performance of the work, and then finally not be allowed to do the work at all. Is it possible that, in an action for the breach of the contract, he could only recover the profits that he could show he would have made from the performance of the work if he had been allowed to do it, and nothing for the loss resulting from the delay induced by the misconduct of the other party to the contract? If so, instead of gains or profits, he

¹ Alleghany Iron Co. v. Teaford, 96 Va. 372, 31 S. E. Rep. 525 (1898).

would have to suffer an actual pecuniary loss without fault on his part, but caused solely by the misconduct of the other party. Such a result would directly conflict with the very object of the law in awarding damages for the violation of a contract, which is to place the party injured pecuniarily in the same condition that he would have been in if the contract had been kept and performed."

The general rule was also departed from by Judge Dallas of the circuit court for the eastern district of Pennsylvania in a case¹ in which the purchaser gave notice of his refusal to accept the property contracted for. It was contended in his behalf that the damages were restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing of the suit. The court refused assent to that proposition, because, it was said, "it conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit, and the measure of damages which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken or a wrong has been committed, compensation must be made. This is the underlying principle, and any standard or measure which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted to."² In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and, whatever might be the rule in a case in which this could not be shown, I am of opinion that where, as in this instance, that fact appears, the difference between

¹ Horst v. Roehm, 84 Fed. Rep. 565 (1898).

² Citing Carroll-Porter Boiler & Tank Co. v. Columbus Machine Co., 55 Fed. Rep. 451, 5 C. C. A. 190.

the price at which such subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable.”¹ Where the defendant refused to accept the quantity of gravel per day which he had stipulated to receive, the same judge ruled that the damages could not be measured by the earning capacity of the vessels engaged in delivering the gravel, but that the correct measure was the costs and expense suffered by reason of the failure to take the full amount stipulated.²

Where there was a contract to take and pay cash for so many shares of a company as should not be otherwise subscribed for, in consequence of which the subscriber became liable for 25,000 shares at 1*l.* each, and after his bankruptcy the trustee in bankruptcy disclaimed the contract, it was ruled, the company having gone into liquidation, with liabilities of 16,000*l.* and assets of 4,000*l.*, that the estate was liable only for 10,500*l.*, that being the difference between the then estimated assets and liabilities of the company; that the trustee’s disclaimer had terminated the contract, and the company’s claim could not exceed the damages resulting from the breach of the undertaking.³

§ 648. Effect of notice by vendee of refusal to accept goods. It is not competent for the purchaser of property which is to be delivered in the future to impose upon the vendor the legal duty to take such steps with reference to the subject of the contract, as by at once reselling the property on the market on the buyer’s account or making a forward contract for the purchase of other property of like amount, to be delivered at the same time, as shall most effectually mitigate the damages to be paid by the buyer in consequence of his refusal, though no loss would thereby result to the vendor. He is not bound to act upon a notice given by the vendee of his intention not to perform the contract. He may so act and treat the contract as at an end, and immediately bring an action for the

¹ Citing *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. Rep. 875; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. Rep. 876.

² *International Contracting Co. v. McNichol*, 105 Fed. Rep. 553.

³ *In re Hooley*, [1899] 2 Q. B. 579.

breach,¹ or he may await the time for its performance and hold the buyer responsible for all the consequences of his breach. If he does this, he perpetuates the contract for the latter's benefit as well as his own. If he exercises his option to terminate it, it will be his duty to make a resale of the property within a reasonable time for the buyer's benefit.² If the purchaser's notice to the vendor has been acted upon by the latter it cannot be retracted if he has changed his position.³

It is a well established rule that a party to a contract which has been broken by the other party must so conduct his affairs, after he has knowledge of the breach, as to lessen the damage he may sustain as the result of it; and to the extent that loss can thus be avoided the vendee will be relieved from liability.⁴

¹ *Dingley v. Oler*, 11 Fed. Rep. 372, citing *Hochster v. De Latour*, 2 El. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Roper v. Johnson*, L. R. 8 C. P. 167; *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Fox v. Kitton*, 19 Ill. 519; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daley*, 61 N. Y. 362, 19 Am. Rep. 285, and disapproving *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. To the same effect as *Dingley v. Oler* are *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. Rep. 83, 8 C. C. A. 14; *Edward Hines Lumber Co. v. Alley*, 73 Fed. Rep. 603, 19 C. C. A. 599; *Horst v. Roehm*, 84 Fed. Rep. 565.

² *James H. Rice Co. v. Penn Plate Glass Co.*, 88 Ill. App. 407; *Roth v. Taysen*, 1 Com. Cas. 306, 73 L. T. 628, 8 Asp. Marit. Cas. 120; *Roebbling Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. Rep. 518; *Leigh v. Patterson*, 8 Taunt. 540; *Philpots v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Ex. 359; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. Rep. 436. See *Stewart v. Cauty*, 8 M. & W. 160; *Boorman v. Nash*, 9 B. & C. 145; *Cort v. Ambergate, etc. R. Co.*, 17 Q. B. 127; *Ripley v. McClure*, 4 Ex. 345; *Reid v. Haskins*, 6 El. & B. 953.

Clement & H. Manuf. Co. v. Meserole, 107 Mass. 362; *Smith v. Lewis*, 25 Conn. 624; *Haines v. Tucker*, 50 N. H. 307; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. Rep. 938, 38 L. R. A. 760; 2 *Mechem on Sales*, §§ 1707-1713; § 647, *supra*.

If the repudiation takes place before the goods are delivered the vendor may sue at once and have his damages assessed at the time he does so. "In such case the damages are not the difference between the contract and market price on the day the action is brought. It is the duty of the jury to assess them, having regard to, and making allowance for, the fact that the plaintiff is receiving damages before the date of delivery has arrived." *Roth v. Taysen*, 1 Com. Cas. 306 (1896), 73 L. T. 628, 8 Asp. Marit. Cas. 120.

³ *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. Rep. 436.

⁴ *James H. Rice Co. v. Penn Plate Glass Co.*, 88 Ill. App. 407; *Frost v. Knight*, L. R. 7 Ex. 111; *Sonka v. Chatham*, 2 Tex. Civ. App. 312, 21 S. W. Rep. 948, quoting the text; *American Publishing & Engraving Co. v. Walker*, 87 Mo. App. 503, § 88; *Kincaid v. Price*, — Colo. App. —, 70 Pac. Rep. 153, quoting the text.

[362] Thus, where the defendant contracted with the plaintiff for a quantity of potatoes to be delivered during the ensuing winter, as called for by the defendant, and before they were all purchased by the plaintiff the defendant notified him not to purchase any more until further advices, it was held that this order was not a rescission of the contract, but a refusal to receive any more than the potatoes already purchased, and that the measure of damages as to the residue to be purchased when the direction was received was the difference between the price the defendant had stipulated to pay and what it would cost the plaintiff to procure and deliver the potatoes according to the contract. The general principle was stated that in executory contracts a party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped at that point or stage in the execution of the contract.¹ The vendor in that case had no right, after receiving the direction to buy no more, to proceed with his purchases, and afterwards recover for loss sustained on the potatoes by frost and rot. His damages as to such after-purchases must be limited to the difference between the agreed price and what it would cost the plaintiff to procure and deliver them.² Where a party contracted to take a certain quantity of ice each month at a fixed price and the seller bound himself not to sell ice to any other person, the seller could not recover for the buyer's refusal to take the ice when he neither tendered it nor tried to dispose of it at the market price. The prohibition in the contract became inoperative when the buyer refused to accept the ice, and the seller was bound to make reasonable exertion to render the loss as light as possible.³

§ 649. Rule of damages where articles made to order. The rule which measures the vendor's damages on the refusal to accept goods contracted for by the difference between the contract price and the market value at the time and place of the breach, with interest, will not, some courts have said, al-

¹ Kingman v. Western Manuf. Co., 92 Fed. Rep. 486, 34 C. C. A. 489; But compare Southern Cotton Oil Co. v. Hefflin, 99 Fed. Rep. 339, 39 Danforth v. Walker, 37 Vt. 239; Col. C. C. A. 546.
² Danforth v. Walker, 115 Mass. 159.
³ Gardner v. Caylor, 24 Ind. App. 521, 56 N. E. Rep. 134.

ways afford compensation when there is a breach of a contract to accept an article which has been manufactured after a prescribed measure, pattern or style. The measure of damages in such a case is held to be the full amount of the contract price. The reason for the distinction was thus stated by Bunn, J., in a case where a water-wheel so made was not accepted: There is presumably no certain market value for goods made according to such specific order, and the manufacturer, having done all that is required of him to entitle him to the full benefit of his contract, cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value or no appreciable value at all for any person except the one ordering it. In such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and the chances of finding a purchaser should fall upon the party who is in fault in not fulfilling his contract rather than upon the party who is in no fault and is claiming nothing but just what the other party agreed to do.¹ The same principle applies where the purchaser fails to give directions for the completion of an article which cannot be finished without them, and then refuses to take it. The manufacturer is not bound to complete it, make a tender of it, and on the purchaser's refusal to accept sell it in the market. He may recover the difference between the cost of making the article and the price agreed to be paid for it,² or the purchase price, less the cost of finishing the article according to the contract.³

¹ *Bookwalter v. Clark*, 11 Biss. 126, 10 Fed. Rep. 793; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. Rep. 210; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Smith v. Wheeler*, 7 Ore. 49; *Ballentine v. Robinson*, 46 Pa. 177; *Scott v. Kittaning Coal Co.*, 89 Pa. 231, 33 Am. Rep. 753; *Muskegon Curtain Roll Co. v. Keystone Manuf. Co.*, 135 Pa. 132, 19 Atl. Rep. 1008; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72. But see latter part of this section. The rule has been applied in Massachusetts where a certificate of stock was made in the name of the vendee. *Thompson v. Alger*, 12 Met. 428.

² *Hinckley v. Pittsburgh Bessemer*

³ *Eastern Granite Co. v. Heim*, 89 Iowa, 698, 57 N. W. Rep. 437.

If an order for an article to be manufactured at a specified price is countermanded after labor has been put upon it and materials used in its construction, but before its completion, so long as the materials remain in the manufacturer's hands he cannot recover on the common counts for their value, nor the cost of the labor. He must sue on the special contract and claim his damages for its breach or for being wrongfully prevented from completing it. In such a case the defendant has no interest in the materials, and no concern with the amount of labor; the plaintiff's labor is upon his own materials to increase their value for the purpose of effecting a sale to the de-

Steel Co., 121 U. S. 264, 7 Sup. Ct. Rep. 875, 17 Fed. Rep. 584; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. Rep. 210; Crescent Manuf. Co. v. Nelson Manuf. Co., 100 Mo. 325, 13 S. W. Rep. 503; Cort v. Ambergate & N. R. Co., 17 Q. B. 127; Knowlton v. Oliver, 28 Fed. Rep. 516; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. Rep. 165; Dolph v. Troy Laundry Machine Co., 28 Fed. Rep. 553; Olyphant v. St. Louis Ore & Steel Co., id. 729; Kimball v. Deere, 108 Iowa, 676, 685, 77 N. W. Rep. 1041, quoting the text, and citing Walsh v. Myers, 92 Wis. 297, 66 N. W. Rep. 250; Collins v. Delaporte, 115 Mass. 159; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Atkinson v. Morse, 63 Mich. 276, 29 N. W. Rep. 711; Hale v. Trout, 35 Cal. 229; Muskegon Curtain Roll Co. v. Keystone Manuf. Co., 135 Pa. 109, 19 Atl. Rep. 1008; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. Rep. 1020; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. Rep. 992. To the same effect, Gaither v. Bland, 7 Ky. L. Rep. 518 (Ky. Ct. of App.); Kingman v. Hanna Wagon Co., 176 Ill. 545, 52 N. E. Rep. 328, 74 Ill. App. 22; Bishop v. Autographic Register Co., 19 App. Div. 268, 46 N. Y. Supp. 97; American Publishing & Engraving Co. v. Walker, 87 Mo. App. 503; Dryfoos v. Uhl, 69 App. Div. 118, 74 N. Y. Supp. 532; Masterton v. Mayor, 7 Hill, 61.

Before an order for machinery was revoked the seller had placed orders for the larger part of it with manufacturers, and after the revocation completed and shipped it to the point where it was required to be delivered. This was contrary to his duty to stop performance under the contract. The stipulated price was regarded as the standard by which to measure the seller's loss; from it should be deducted the market value of such parts of the machinery as he had in stock, and the cost of their shipment; also such further sums as the parts purchased cost unless it should be shown that they could not be sold for their cost, in which case the amount which could have been reasonably realized therefrom, had they not been shipped, should be deducted, as also the cost of shipping. *Sonka v. Chatham*, 2 Tex. Civ. App. 312, 21 S. W. Rep. 948.

A subscription for a work published in a series of parts is equivalent to a contract for a manufacture to order, and where some only of the parts have been accepted, it seems that the publishers sustain a loss of the whole price. *Jessup v. Picturesque Atlas Pub. Co.*, 10 N. Z. 358.

fendant of the article ordered when completed. The law, however, will not compel the plaintiff, after such countermand, to go on and complete the article ordered before he can recover pay for what he has done, but he may treat the countermand and refusal as a prevention of performance on [363] his part, and sue upon the contract on that ground. The value of the labor expended on the materials is not the proper criterion of the damages; for it may have enhanced their worth to the plaintiff; if so, he is to that extent compensated; but it may have diminished their value, and in that event payment for the labor will not be adequate compensation. Whether the labor has enhanced or diminished the value of the materials is a question of fact for the jury in estimating the damages.¹ The vendee may show the value of the manufactured product which is in the possession of the vendor.² The fact that such product may be marketable does not preclude the recovery of damages beyond the profits that would have been made on the contract, unless the value of the product in the condition it was when the buyer repudiated his contract was equal to the cost of the labor and materials put into it.³ On the countermand of an order for the manufacture of a part of a larger number of articles the damages for those not furnished are measured by the difference between the cost of manufacturing and the contract price, less a reasonable deduction because of the trouble, risk and responsibility attendant upon a full execution of the contract.⁴

In Maine acquiescence in the rule of damages stated in the first proposition in this section is withheld on the theory that the title to the property remains in the vendor until acceptance by the vendee.⁵ In answer to the contention that the

¹ *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Keeler Co. v. Schott*, 1 Pa. Super. Ct. 458; *Heiser v. Mears*, 120 N. C. 443, 27 S. E. Rep. 117. See *Chicago v. Greer*, 9 Wall. 726.

² *Keeler Co. v. Schott*, *supra*.

³ *Deery v. Williams*, 27 App. Div. 131, 50 N. Y. Supp. 138; *Keeler Co. v. Schott*, *supra*.

⁴ *Kimball v. Deere*, 108 Iowa, 676, 684, 77 N. W. Rep. 1041.

⁵ A vendor of goods manufactured according to the order of the vendee is entitled to the stipulated price when they are completed and held for the latter. A judgment therefor vests the title in him. *Moline Scale Co. v. Beed*, 52 Iowa, 307, 35 Am. Rep. 272; *McCormick Harvesting Machine Co. v. Markert*, 107 Iowa, 340, 78 N. W. Rep. 33.

difference between the contract price and the price which may be realized on a resale is inadequate to afford compensation because the manufactured article may be of little value to any one beside the vendee, it is observed that the less the goods are worth to sell in the market the more the plaintiff recovers, and if they are worth nothing at all, then he recovers the full contract price.¹ This seems to be in accordance with the rule in England, though the cases depend upon such varying circumstances that the deduction of a rule from them is a matter of no little difficulty. In a case² on a contract for supplying three thousand nine hundred tons of iron railway chairs, deliverable from time to time, the buyer refused to accept or pay for more than one-half of them and gave notice to that effect. It was shown that the plaintiff had bought premises necessary for carrying out so large a contract, had made contracts for iron, and had put himself in a situation to fill the contract; he also had a quantity of chairs ready for delivery. The damages were measured by such sum as would leave him in the situation he would have occupied if the contract had been performed. In another case³ there was a breach of a contract to take the quantity of coal stipulated to be accepted each month. The coal was of a perishable nature and could not readily or profitably be disposed of in the market except occasionally and in small quantities. The plaintiff was not bound to raise and sell the coal, or to have made other forward contracts; he was entitled to recover the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine, and the contract price. In an action by the vendor for the breach of a contract for the manufacture of iron rails at 5*l.* 7*s.* 6*d.* per ton for American shipment, brought before any rails were made, the plaintiff offered evidence of what his profit would have been if the contract had been carried out, and of his loss because the works lay idle. He proved that the demand for rails ceased soon after the contract was made, and that he had been unable to obtain an offer for the rails to be manufactured at 5*l.* per ton. The trial

¹ *Tufts v. Grewer*, 83 Me. 407, 22 Atl. Rep. 332.

² *Cort v. Ambergate, etc. R. Co.*, 17 Q. B. 127.

³ *Silverstone, etc. Coal & Iron Co. v. Joint Stock Coal Co.*, 35 L. T. 668; approved in *Todd v. Gamble*, 148 N. Y. 382, 390, 42 N. E. Rep. 982.

judge said that the ordinary rule was that the plaintiff was entitled to the difference between the contract price and the market price at the date of the breach, and he could not find that it made any difference whether for a manufactured or for an unmanufactured article. If there was no market, some other means of estimating the damage must be resorted to. The plaintiff was awarded the sum of 7s. 6d. per ton, that being assumed to be his loss.¹ "The result of these cases," as has been said by a Canadian judge, "seems to be that while there are general principles on which the damages are to be estimated for the breach of such contracts, yet there is, nevertheless, a considerable degree of elasticity in their application, whether the damages are assessed by a jury or a judge; and where the evidence does not admit of their being assessed with precise accuracy, or, as it were, in moneys numbered, they are, within certain limits, left somewhat at large." In the case quoted from² the buyer of a large number of shells for electric light lamps, which were to be delivered monthly for twenty months, gave notice that he would not accept them; at the time this was done no steps were taken toward carrying out the contract. The right to recover the full amount of the expected profits was denied because of the many contingencies involved in the period for fulfilling the contract, and because of the doubt as to whether there was proof of any substantial damage. An allowance of \$250 was made.

A case in the New York court of appeals goes far toward removing the obscurity involved in the question being considered. The subject of the contract of sale was an article perishable in its nature when kept for any length of time, for which there was but a limited demand and no real market, and which was only manufactured in quantities upon orders by consumers. The purchaser gave notice that he would not continue to receive the article, whereupon the plaintiff ceased to manufacture under the contract. The jury found that there was no market value for the article, and awarded damages based upon the difference between the cost of production and the contract price of the quantity used by the defendant dur-

¹ Tredegar Iron & Coal Co. v. Gielgud, Cab. & Ell. 27.

² Ontario Lantern Co. v. Hamilton Brass Manuf. Co., 27 Ont. App. 346.

ing the period covered by the contract, which provided for the purchase of whatever quantity the latter would require. That rule of damages was approved because there was no market value for the article. To justify a departure from the rule that the damages are measurable by the difference between the contract price and the market value, it must appear that there is no such value, in which case the measure is the difference between the contract price and the cost of production. It was contended that because the plaintiff sold to dealers from one hundred to one hundred and fifty barrels of the article during the year, and usually kept about fifteen barrels on hand to meet the demands of the trade, a market price was shown to exist. The answer was that to so hold would be doing great injustice and result in the establishment of a commercial rule which would work injuriously in similar cases.¹

Where only part of the stipulated quantity of manufactured goods had been received, and less than the quantity ordered had been manufactured, though more than had been accepted, the court announced the following rules for the measurement of damages as applied to the facts, the goods being marketable and the market price being proven: 1. The measure of damages for a breach of a contract to purchase personal property is the difference between the market value and the contract price at the time of the breach. 2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer,² but it is not the rule for

¹ *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. Rep. 982, distinguishing *Dolph v. Troy Laundry Machine Co.*, 28 Fed. Rep. 553; *Kelso v. Marshall*, 24 App. Div. 128, 49 N. Y. Supp. 728.

² *Heiser v. Mears*, 120 N. C. 443, 27 S. E. Rep. 117, applying the rule to an executory contract for the manufacture of shoes, which were finished after notice given that they would not be received. See *Southern Cotton Oil Co. v. Hefflin*, 99 Fed. Rep. 339, 39 C. C. A. 546, which is in

harmony with the text, and distinguishes the case next stated.

In *Hemmingway Manuf. Co. v. Council Bluffs Canning Co.*, 62 Fed. Rep. 897, an order was given for two machines which were to be made, the sale being at the usual price, which did not change after the order was given. The machines were of the seller's usual make and were covered by a patent held by him. The rule of damages applicable in cases of sale generally was applied.

the measure of damages resulting from the breach on account of those not then made and ready for delivery. 3. Where materials have been purchased and labor has been bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value. 4. If materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost. 5. The measure of damages upon articles covered by such a contract for which no materials had been bought, and upon which no work had been expended at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that price is greater than the cost.¹

§ 650. Vendee's right to return property. The recovery of damages by a vendor against a vendee for not accepting and paying for goods contracted for proceeds on the ground

It was sought to take the case out of that rule because of the patent, it being contended that all purchasers of the article must buy from the plaintiff, thereby giving it a profit upon each sale, and that if the plaintiff was required to sell the article made for the defendant it would thereby be deprived of the profit of the sale which it could make to the second buyer of another set of the patented articles. This contention was pronounced plausible, but it did

not prevail. There were other machines used for the same purpose as the plaintiff's; hence it could not be known that a purchaser would buy of the plaintiff; and, furthermore, if the defendant should be compelled to pay for the machines, they would become his property, and he could sell them, thereby causing the plaintiff to lose the profit of a sale to a third party.

¹Kingman v. Western Manuf. Co., 92 Fed. Rep. 486, 34 C. C. A. 489, 493.

that the former has been ready to do his part, and has offered performance of the precedent or concurrent condition of delivering goods which will answer the requirements of the contract in all respects — in time, quality and quantity, and confer a good title.¹ A want of punctuality may be waived by accepting for inspection of quality after the date fixed for delivery,² and afterwards rejecting the goods on other grounds. In a contract for the sale of goods by sample the seller agrees to deliver, and the buyer to accept, goods of the same kind and quality as the sample. The identity of those sold in kind, condition and quality with the sample is of the essence of the contract.³ In such cases it is the privilege of the vendee to decline and return the goods if they are found not to correspond with it.⁴ Where the vendor delivers property on an executory contract which requires a particular quality or description, and the vendee has not had an opportunity to examine it, he may receive and retain it sufficiently long to make a fair examination, and if found substantially inferior to that described in the contract he may, within a reasonable time, return it to the vendor and refuse to accept it.⁵ He may [364] decline to receive it if not conformable to the contract, by being superior to, or otherwise different from, the goods described therein.⁶ If the vendee fails to give notice within a reasonable time that he declines to receive the goods because not conformable to the contract, or if he exercises ownership

¹ Kirkpatrick v. Alexander, 44 Ind. 595; Baker v. Higgins, 21 N. Y. 397; Newberry v. Furnival, 46 How. Pr. 139; Byers v. Bonsall, 3 Pittsb. 482; Bell v. Offutt, 10 Bush, 632.

² Newberry v. Furnival, *supra*.

³ Gunther v. Atwell, 19 Md. 157; Young v. Cole, 3 Bing. N. C. 724; Mondel v. Steel, 9 M. & W. 858, 871; Beirne v. Dord, 5 N. Y. 95; Hargous v. Stone, *id.* 73; Waring v. Mason, 18 Wend. 425; 1 Smith's Lead. Cas. (5th ed.) 256 *et seq.*

⁴ *Id.*; Field v. Kinnear, 4 Kan. 476; Beebee v. Robert, 12 Wend. 413; Brantley v. Thomas, 22 Tex. 270, 73 Am. Dec. 264; Bradford v. Manly, 13 Mass. 139; Pierson v. Crooks, 115 N. Y. 539, 25 N. E. Rep. 349, 12 Am. St. 831; Hudson v. Germain Fruit Co., 95 Ala. 621, 10 So. Rep. 920; Holmes v. Gregg, 66 N. H. 621, 28 Atl. Rep. 17; Holt v. Pie, 120 Pa. 425, 14 Atl. Rep. 389; Schloss v. Feltus, 96 Mich. 619, 55 N. W. Rep. 1010, 36 L. R. A. 161; Charles v. Carter, 96 Tenn. 607, 36 S. W. Rep. 396.

⁵ Hodge v. Tufts, 115 Ala. 366, 22 So. Rep. 422; Wolf v. Dietsch, 75 Ill. 205; Haase v. Nonnemacher, 21 Minn. 486; Knoblauch v. Kronschnabel, 18 *id.* 300; Cahen v. Platt, 40 N. Y. Super. Ct. 483; Neaffie v. Hart, 4 Lans. 4.

⁶ Newmarket Iron Foundry v. Harvey, 23 N. H. 395.

over them, as by selling part, he cannot afterwards repudiate the contract or refuse the goods.¹ If those sent upon a contract or order, when received, are found to be inferior, or otherwise not conformable to the contract, and the vendee rejects them after having paid freight, or incurred other expenses in obtaining the temporary possession, he has a claim on the vendor for reimbursement.² And if they are of a kind which must be used to ascertain their quality and a test proves that they are inferior to those ordered, the purchaser cannot

¹ Taylor v. Saxe, 134 N. Y. 67, 31 N. E. Rep. 258; McFadden v. Wetherbee, 63 Mich. 390, 29 N. W. Rep. 881; Watkins v. Paine, 57 Ga. 50; Wolf v. Dietsch, 75 Ill. 205. See Nelson v. Overman, 19 Ky. L. Rep. 161, 38 S. W. Rep. 882; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. Rep. 28, 36 Am. St. 895, 21 L. R. A. 135; Holmes v. Gregg, 66 N. H. 621, 28 Atl. Rep. 17.

In Kidd v. Belden, 29 Barb. 266, it appeared that the plaintiff had manufactured and put into the defendant's steamboat a boiler, engines and other machinery, under a contract by which he was to be paid a certain specified price, a portion of which was to be secured by a chattel mortgage upon the property, to be executed by the defendant when the plaintiff had completed his contract. After the engine and boiler had been placed and partially fastened in the boat, but before the work was completed or ready to be delivered, the defendant clandestinely went off with the boat to Canada, and, on his return, refused either to execute the mortgage, pay for the machinery or permit the plaintiff to remove it. In replevin by the plaintiff, the jury having found that there had been no absolute and unconditional delivery of the machinery to defendant, nor such an annexation of it that it could not be removed without injury to the boat, it

was held that plaintiff had not lost his title to the property, but might maintain the action. It was also held that in estimating the damage the plaintiff had sustained the jury were to be governed by the value of the machinery as established by the parties in their contract, so far as it could be applied; and that its value was to be assessed in the condition it was at the time of the demand. The defendant was not permitted to show, in mitigation of damages, that the machinery was not placed in the boat in a workmanlike manner. He was concluded by his election to take the work in its unfinished condition, and held to have accepted the job as finished, and to have waived all objection on account of defects. It was held that the defendant could not be allowed to show, in mitigation of damages, what would be the value of the machinery detached from the boat. The plaintiff's labor in putting it into the boat entered into and formed part of the value to be assessed by the jury.

² Taylor v. Saxe, 134 N. Y. 67, 31 N. E. Rep. 258; Rucker v. Donovan, 13 Kan. 251; Coit v. Schwartz, 29 id. 344; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. Rep. 881 (also cost of insurance); Barnett v. Terry, 42 Ga. 283.

be charged for the quantity necessarily used for that purpose if he promptly rejects the remainder on being assured of that fact.¹ The vendee may, in addition to recovering payments made for freight, duty and storage, recover damages for the failure to deliver goods of the quality specified upon the basis of the difference between the value of those contracted for at the place of delivery and the contract price.²

SECTION 2.

VENDEE AGAINST VENDOR.

§ 651. **Recovery for non-delivery of property contracted [365] for.** The breach of contract now to be considered is that of a vendor who has violated his executory agreement to sell goods or other property of a personal nature by not delivering it. The same rule or measure of damages will not apply where there is a sale of specific property and the vendor subsequently refuses to deliver it. The general rule is, where payment and delivery are concurrent acts and the vendor refuses to deliver, that the vendee is entitled to recover as damages the difference between the contract price and the market value of the goods at the time and place appointed for delivery and interest.³ If earnest money paid was to be applied to

¹ Philadelphia Whiting Co. v. Detroit White Lead Works, *supra*.

² Taylor v. Saxe, 134 N. Y. 67, 31 N. E. Rep. 258.

³ Bunch v. Potts, 57 Ark. 257, 21 S. W. Rep. 437; Staab v. Borax Soap Co., 12 Colo. App. 286, 55 Pac. Rep. 618; Pitcher v. Lowe, 95 Ga. 423, 429, 22 S. E. Rep. 678; Rau v. Trumbull, 68 Ill. App. 490; Delaware & H. Canal Co. v. Mitchell, 92 Ill. App. 577; York-Draper Mercantile Co. v. Lusk, 6 Kan. App. 629, 49 Pac. Rep. 788; Belcher v. Sellards, 19 Ky. L. Rep. 1571, 43 S. W. Rep. 676; McGrath v. Gegner, 77 Md. 331, 26 Atl. Rep. 502, 39 Am. St. 415; Leo Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. Rep. 50, 34 Am. St. 359, citing the text; Hewson-Herzog Supply Co. v. Minnesota Brick Co., 55

Minn. 530, 57 N. W. Rep. 129; Boyer v. Cox, 34 Neb. 813, 52 N. W. Rep. 715; Graham v. Frazier, 49 Neb. 90, 68 N. W. Rep. 367; Saxe v. Penokee Lumber Co., 159 N. Y. 371, 54 N. E. Rep. 14; Ellis v. Miller, 164 N. Y. 434, 58 N. E. Rep. 516; Smith v. Sloss Marblehead Lime Co., 57 Ohio St. 513, 49 N. E. Rep. 695; Lloyd Lumber Co. v. Solon, 17 Ohio Ct. Ct. 194; Arnold v. Blabon, 147 Pa. 372, 23 Atl. Rep. 575; Kinports v. Breon, 193 Pa. 309, 44 Atl. Rep. 436; Paragon Refining Co. v. Lee, 98 Tenn. 643, 41 S. W. Rep. 362; Lawrence v. Porter, 63 Fed. Rep. 62, 11 C. C. A. 27, 26 L. R. A. 167; Yellow Poplar Lumber Co. v. Chapman, 74 Fed. Rep. 444, 20 C. C. A. 503; Moffitt-West Drug Co. v. Byrd, 92 Fed. Rep. 290, 34 C. C. A. 351; Ashmore v. Cox, [1899] 1 Q. B.

the purchase price it may be recovered,¹ and so may money paid to a third person in pursuance of the contract.² Where delivery is to be made at stated periods and in designated quantities, on the total or partial failure of the vendor the

- 436; *Fleming v. Grigg*, 14 N. Z. 499; *Reeve v. Gallivan*, 89 Hun. 59, 34 N. Y. Supp. 1000; *Buist v. Guice*, 96 Ala. 256, 11 So. Rep. 280; *Cawthon v. Lusk*, 97 Ala. 674, 11 So. Rep. 731; *Davis v. Grand Rapids School-Furniture Co.*, 41 W. Va. 717, 24 S. E. Rep. 630; *Warren v. A. B. Mayer Manuf. Co.*, 161 Mo. 112, 61 S. W. Rep. 644; *Kuhn v. McKay*, 7 Wyo. 42, 65, 49 Pac. Rep. 473, 51 id. 205; *Cole v. Cheovenda*, 4 Colo. 17; *Capen v. De Steiger Glass Co.*, 105 Ill. 185; *Young v. Cureton*, 87 Ala. 727, 6 So. Rep. 352; *Trunkey v. Hedstrom*, 131 Ill. 204, 23 N. E. Rep. 587; *Buckley v. Holmes*, 19 Ill. App. 530; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. Rep. 174; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. Rep. 887, 1 L. R. A. 655; *Black v. De Camp*, 78 Iowa, 718, 43 N. W. Rep. 625; *Faulkner v. Closter*, 79 Iowa, 15, 44 N. W. Rep. 208; *Gray v. Hall*, 29 Kan. 704; *Crawford v. Geiser Manuf. Co.*, 88 N. C. 554; *West Republic Mining Co. v. Jones*, 108 Pa. 55; *Ullman v. Babcock*, 63 Tex. 68; *Koch v. Godshaw*, 12 Bush, 318; *Harris v. Rodgers*, 6 Heisk. 626; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. Rep. 450; *Coit v. Schwartz*, 29 Kan. 344; *Rahm v. Deig*, 121 Ind. 283, 23 N. E. Rep. 141; *Sweeney v. Jamieson*, 2 Wash. Ty. 254, 6 Pac. Rep. 42; *Bush v. Holmes*, 53 Me. 417; *Furlong v. Polleys*, 30 id. 491, 50 Am. Dec. 635; *Tradewater Coal Co. v. Lee*, 23 Ky. L. Rep. 215, 68 S. W. Rep. 400; *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. Rep. 1087; *Trotter v. Tousey*, — Mich. —, 92 N. W. Rep. 544; *Crug v. Gorham*, 74 Conn. 541, 51 Atl. Rep. 519; *P. P. Emory Manuf. Co. v. Salomon*, 178 Mass. 582, 60 N. E. Rep. 377; *Randon v. Barton*, 4 Tex. 289; *Williamson v. Dillon*, 1 H. & G. 444; *Duncan v. McMahon*, 18 Tex. 597; *Fessler v. Love*, 48 Pa. 407; *Gilpin v. Consequa*, 3 Wash. C. C. 184; *Kipp v. Wiles*, 3 Sandf. 585; *Bartlett v. Blanchard*, 13 Gray, 429; *Clark v. Pinney*, 7 Cow. 681; *Northup v. Cook*, 39 Mo. 208; *Somers v. Wright*, 115 Mass. 292; *Worthen v. Wilmot*, 30 Vt. 555; *Doak v. Snapp*, 1 Cold. 180; *Blackwood v. Brennan*, 1 Harp. 144; *Hinde v. Liddell*, 32 L. T. (N. S.) 449, L. R. 10 Q. B. 265; *Paine v. Sherwood*, 21 Minn. 225; *Miles v. Miller*, 12 Bush, 134; *Brown v. Muller*, L. R. 7 Ex. 319; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *Camp v. Hamlin*, 55 Ga. 259; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Watrous v. Bates*, 5 Up. Can. C. P. 366; *Woodworth v. Curtis*, 7 Wend. 112; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Crosby v. Watkins*, 12 Cal. 85; *Burnham v. Roberts*, 70 Ill. 19; *Davis v. Shields*, 24 Wend. 322; *Sanborn v. Benedict*, 78 Ill. 309; *Duncan v. Post*, 3 Cal. 373; *Pittsburg, etc. R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Harrolson v. Stein*, 50 Ala. 347; *Hill v. Smith*, 32 Vt. 433; *Parsons v. Sutton*, 66 N. Y. 92; *Stewart v. Power*, 12 Kan. 596; *Boies v. Vincent*, 24 Iowa, 387; *Brent v. Richards*, 2 Gratt. 539; *Meserve v. Ammidon*, 109 Mass. 415; *Shepherd v. Hampton*, 3 Wheat. 200; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *Gregory v. McDowell*, 8 Wend. 435; *Boorman v. Nash*, 9 B. &

¹ *Joyce v. Adams*, 8 N. Y. 291; *Gossard v. Woods*, 98 Ind. 195; *Weber v. Squier*, 51 Mo. App. 601.

² *Bullard v. Stone*, 67 Cal. 477, 8 Pac. Rep. 17.

damages are to be estimated on those quantities and as of such periods. And if the vendor absolutely repudiates his contract at any period previous to the final date specified and the vendee elects to treat the contract as at an end, the damages are to be estimated with reference to the times stipulated for performance. "If this were not the rule, there might be great injury and injustice done to a party where the periods of performance extended through a great many years, and the market prices or values might vary during the different periods of performance."¹

[366] If the contract is for a cargo, or for all the goods of a specified description in a given vessel, the vendee is not entitled to recover damages on the basis of what they are worth in broken parcels.² Nor will this general standard of damages be departed from though one or both of the parties were mistaken in respect to material facts affecting the market price. Thus, in an action against a vendor for not delivering goods the court say: "The relation of buyer and seller is not a con-

C. 145; *Barrow v. Arnaud*, 8 Q. B. 604; *Valpy v. Oakeley*, 16 id. 941; *Josling v. Irvine*, 6 H. & N. 512; *Chinery v. Viall*, 5 id. 288; *Griffiths v. Perry*, 1 E. & E. 680; *Peterson v. Ayre*, 13 C. B. 353; *Donald v. Hodge*, 5 Hayw. 85; *Connell v. McClean*, 6 Harr. & J. 297; *Kitzinger v. Sanborn*, 70 Ill. 146; *Wilson v. Lancashire, etc. R. Co.*, 9 C. B. (N. S.) 632; *Orr v. Bigelow*, 14 N. Y. 556; *Bailey v. Clay*, 4 Rand. 346; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Brackett v. McNair*, 14 Johns. 170, 7 Am. Dec. 447; *Gordon v. Norris*, 49 N. H. 376; *Stevens v. Lyford*, 7 id. 360; *West v. Pritchard*, 19 Conn. 212; *Shaw v. Nudd*, 8 Pick. 9; *Quarles v. George*, 23 id. 400; *Davis v. Richardson*, 1 Bay, 105; *Whitmore v. Coates*, 14 Mo. 9; *Lippert v. Saginaw Milling Co.*, 108 Wis. 512, 84 N. W. Rep. 831; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. Rep. 321; *Laporte Improvement Co. v. Brock*, 99 Iowa, 485, 68 N. W. Rep. 810. See *Harrison v. Charlton*, 37 Iowa, 134.

¹*Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 535, 57 N. W. Rep. 129.

²*Duncan v. Post*, 3 Cal. 373.

Where a contract was for the sale of the entire product of a sawmill during a certain period, not to be less nor more than designated quantities, at a fixed price per thousand feet, certain proportions of the product to grade as to quality as specified, and in the deliveries there was an excess in some of the grades and a shortage in others, it was ruled that the vendee's damages were the amount of the difference between the value of the product of the mill so contracted for and the value of that which was delivered, and that, to establish such difference, evidence was admissible respecting the value of the various grades of lumber as well as concerning the value of the entire product of the mill. *Sloan v. Alleghany Co.*, 91 Md. 501, 46 Atl. Rep. 1003.

fidential one, and each of the parties is supposed to judge of his ability to perform his part for himself;” declarations of the plaintiff that he knew at the time of making the contract that the article contracted for could not be procured were not admissible in evidence to mitigate the damages. A contract to perform an impossible thing may be void; but it is never impossible to procure and deliver an article of commerce which may be had in the market in some quarter in the world.¹ So, where alcohol was contracted to be delivered on board a vessel under the tax law from August 20 to August 31, 1862, duty paid at a fixed price, the subsequent suspension, until after the time fixed for delivery, of an act of congress which practically rendered alcohol sold for exportation duty free did not relieve the vendor from the obligation to make delivery according to his contract, although such suspension was not contemplated by the parties.² But where goods are sold in close pack- [367] ages, and there is a mutual mistake of the parties as to the quantity, it will be corrected in an action between them on the basis of the purchase price.³ If the sale is of a car load of goods, no particular car being specified, the damages are to be assessed on the basis of the quantity which an ordinary car will contain.⁴

If a purchaser for a price below the market agrees that, should he desire to sell the property, he will sell it back to his vendor at the same price, and afterwards sells to another for more than the market price, he will be liable on his agreement for the difference between the amount he paid and the sum he sold for.⁵ This rule of damages, the difference between the contract and the market price, is founded on the consideration that the articles withheld are worth the market price to the vendor, and the vendee may immediately after the breach of the contract go into the market and supply himself at the market price, and having done so, he is in as good condition as if the contract had been performed.⁶ If the property can,

¹ Myers v. Drake, 10 Watts, 110.

⁵ Brent v. Richards, 2 Gratt. 539;

² Baker v. Johnson, 2 Robert. 570.

Duncan v. McMahon, 18 Tex. 597.

³ Hargous v. Ablon, 3 Denio, 406, 45 Am. Dec. 481.

⁶ Frink v. Tatman, 36 Ind. 259, 10 Am. Rep. 19; Beard v. Straw, 38 Ind.

⁴ Seefeld v. Thacker, 93 Wis. 518, 67 N. W. Rep. 1142.

128; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Furlong v. Polleys, 30

not be purchased in the market where the delivery was to be made the vendee may go into the nearest market and buy, and add the cost of transportation to the purchase price;¹ or, if circumstances are such as to make it prudent for the vendee to purchase from his vendor at a price in excess of that stipulated for in the broken contract, such excess may be recovered.²

The general rule that the difference between the contract and the market price on the day fixed for delivery measures

Me. 493, 50 Am. Dec. 635; *Deere v. Lewis*, 51 Ill. 254; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. Rep. 174. See *Alder v. Keighley*, 15 M. & W. 117; *Arnold v. Blabon*, 147 Pa. 372, 23 Atl. Rep. 575; *Theiss v. Weiss*, 166 Pa. 9, 31 Atl. Rep. 63, 45 Am. St. 638; *Ralli v. Rockmore*, 111 Fed. Rep. 874.

An instruction to the jury in an action for breach of a contract to sell and deliver lumber that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery is erroneous. The true measure is the difference between the contract price and what it would have cost the plaintiff to procure, at the place of delivery and at the time or times when it was reasonable and proper to supply themselves, lumber of the kind and quantity they were to receive on the contract; and, if it were impracticable for them thus to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants. *Haskell v. Hunter*, 23 Mich. 305.

¹ *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. Rep. 129; *South Gardiner Lumber Co. v. Bradstreet*, — Me. —, 53 Atl. Rep. 1101; *Reeves v. Cress*, 89 Minn. 466, 83 N. W. Rep. 443; *Yellow Poplar Lumber Co. v. Chapman*, 74 Fed. Rep. 444, 20 C. C. A. 503; *Electric R. Co. v. Tennessee Coal, Iron & R. Co.*, 98 Ga. 189, 26

S. E. Rep. 741; *Capen v. De Steiger Glass Co.*, 105 Ill. 185; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. Rep. 495.

In *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, *supra*, there was a failure to supply brick. It appeared that the vendee could obtain brick of a particular manufacture elsewhere, but that he could not sell such brick in some of the territory in which he was authorized to sell the brick made by the vendor. The vendee's duty to procure such brick was recognized, as was the vendor's liability for the increased cost of it. Such duty and liability existed to the extent that the vendee could sell the substituted brick. The measure of damages as to the territory in which the brick obtainable by the vendee could not be sold by him was the difference between the contract price of that to which he was entitled from the vendor, at the place of manufacture, with the cost of freight to such territory added and the price which the plaintiff could, as a jobber or middleman, procure brick for at the lowest market value, or for a less price if reasonably possible, of a similar kind, and in sufficient quantities, and at the times mentioned in the contract for delivery, to the amount or quantity which could be sold in such territory.

² *Pittsburg Iron & Steel Engineering Co. v. National Tube Works Co.*, 184 Pa. 251, 39 Atl. Rep. 76.

the vendee's damages is sometimes varied if he has no knowledge or means of knowing on that date that a breach had occurred or was contemplated. If the vendee uses diligence in seeking to learn the cause of the delay and is informed that the delivery will not be made, the recovery may be based on the market price on the day he is so notified.¹ The vendee may so conduct himself as to forfeit his right to recover damages, as where he attempts to secure goods for the use of others in violation of his contract with his vendor. In such a case the latter may refuse to fill the order for goods without becoming liable for damages, regardless of whether he had knowledge of the purpose for which they were ordered.² The vendor's liability is not lessened because a great part of the vendee's damages resulted from the breach of contracts made with persons who were engaged in a business prohibited by law and who would have used the property contracted to be sold in aid of the prosecution of that business.³ Neither are the rights or liabilities of the parties affected because of the motive which prompted the vendor to break his contract — as that it had violated the anti-trust law. That fact did not impose liability for attorneys' fees.⁴

§ 652. **Same subject.** The agreement may relate to property which may not be found in the market, and can only be produced at an expense greatly above the contract price. In such a case it has been held that if the course pursued by the purchaser in obtaining other like property, as timber, for example, was the only way it could be obtained, or was a reasonable and prudent way of obtaining it, irrespective of any special use or exigence, the difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser as damages naturally arising from the breach itself.⁵ Where a contract to furnish granite of a certain qual-

¹ *Boyd v. L. H. Quinn Co.*, 18 N. Y. Misc. 169, 41 N. Y. Supp. 391, affirming 17 N. Y. Misc. 278, 40 N. Y. Supp. 370.

² *H. D. Williams Cooperage Co. v. Scofield*, 116 Fed. Rep. 119, 53 C. C. A. 23; *Trinidad Asphalt Manuf. Co. v. Trinidad Asphalt Refining Co.*, 119 Fed. Rep. 134, 55 C. C. A. 566.

³ *Crystal Ice Co. v. Wylie*, 65 Kan. 104, 68 Pac. Rep. 1086. See § 5.

⁴ *Id.*

⁵ *McFadden v. Henderson*, 128 Ala. 221, 235, 29 So. Rep. 640; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Paine v. Sherwood*, 21 Minn. 225, 19 id. 215; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Hamilton v. Kirby*, 199 Pa.

ity and color was abandoned after its partial completion and granite of the same quality and color could be procured in only two quarries, one of which was not accessible, and the other being unopened, the vendee was justified in opening the latter, and the expense of doing so, the payment of the freight and the cost of dressing the stone were elements in determining the cost of completing the contract, and such cost furnished the measure of damages.¹ But in order to bring himself within the rule which allows recovery of the increased cost paid for an article, the vendee must act with considerable prudence of judgment. Where the defendant broke his contract to furnish lumber of a particular grade, cut into strips for a special purpose, and which could not be procured in the market, the vendee was not justified in buying mill stuffs, and cutting it into strips for the purpose of using it as a substitute for the lumber he was entitled to. Instead, he should have selected lumber of the contract grade, and cut the strips from logs, thereby materially lessening the waste. The difference between the cost of the strips thus substituted and the contract price would then have measured the vendor's liability. "If the plaintiff's business was interrupted by reason of his inability to procure materials, another rule of damages would necessarily be resorted to, but the value of the material not supplied, and for which no substitute was procured, must be arrived at through persons qualified to judge by determining what strips, similar in kind, quality and amount, would have cost or would have been worth at that time and place."²

[368] The recovery is governed by the market price, if there

466, 49 Atl. Rep. 214; Consolidated Coal Co. v. Block & Hartman Smelting Co., 53 Ill. App. 565; Canovan v. Neeld, 189 Pa. 208, 42 Atl. Rep. 115; Davis v. Grand Rapids School Furniture Co., 41 W. Va. 717, 24 S. E. Rep. 630; Border City Ice & Coal Co. v. Adams, 69 Ark. 219, 62 S. W. Rep. 591; Tradewater Coal Co. v. Lee, 24 Ky. L. Rep. 215, 68 S. W. Rep. 400; Thomas Iron Co. v. Jackson Iron Co., — Mich. —, 91 N. W. Rep. 137; Den Bleyker v. Gaston, 97 Mich. 354, 56 N. W. Rep. 763.

¹ Gallagher v. Baird, 54 App. Div. 398, 66 N. Y. Supp. 759, citing Forsyth v. Mann, 68 Vt. 116, 34 Atl. Rep. 481, 32 L. R. A. 788; Todd v. Gamble, 148 N. Y. 382, 42 N. E. Rep. 982. See Canovan v. Neeld, 189 Pa. 208, 42 Atl. Rep. 115; Puritan Coke Co. v. Clark, — Pa. —, 54 Atl. Rep. 350.

² Den Bleyker v. Gaston, 97 Mich. 354, 56 N. W. Rep. 763. Two justices dissented as to the propriety of the vendee's action. See Hamilton v. Kirby, *supra*.

be one, although it may be enhanced by the fact that the article is patented, and the right to sell held exclusively by the vendor. The vendee has a right to the benefit of the patent in whatever degree it entered into the market value of the article.¹ Where the contract is for the sale of property which has no market value it is presumed that the parties have bargained with that fact in view; if the vendee cannot supply himself in the market he may recover the amount lost by reason of not receiving an advance or profit through agreements which he has made in reliance upon the fulfillment by the vendor of his contract.² Thus, on the breach of a contract to sell silver ore of a specified grade to the operator of smelting works, the loss sustained by the buyer measures the damages.³ If resort is necessarily had to an inferior article for use in manufacturing in order to fill contracts, the resulting damage may be recovered, so far as it proceeds from experiments which it was prudent to make.⁴ The purchaser may manufacture other goods to take the place of those which the vendor has failed to deliver, and may recover the difference between the contract price and the raw material, plus the cost of manufacturing, but cannot add to the latter sum a manufacturer's profit.⁵ Knowledge of the fact that the article sold is not obtainable has the same effect to make the vendor liable for consequential losses as his knowledge of pre-existing contracts made by the vendee has to make him so liable when the market furnishes the needed article. The amount reasonably expended by a purchaser to avert the loss impending because of the non-delivery of goods which are not procurable in the market may be recovered.⁶ Thus, where the defendant had

¹ *Frink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19.

² *McKay v. Riley*, 65 Cal. 623, 4 Pac. Rep. 667; *Loescher v. Deisterberg*, 26 Ill. App. 520; *Culin v. Woodbury Glass Works*, 108 Pa. 220; *Guetzkow Brothers Co. v. Andrews*, 92 Wis. 214, 66 N. W. Rep. 119, 53 Am. St. 909.

³ *Australian Smelting Co. v. British Broken Hill Proprietary Co.*, 22 Vict. L. R. 190.

⁴ *McHose v. Fulmer*, 73 Pa. 365; *Electric R. Co. v. Tennessee Coal,*

Iron & R. Co., 98 Ga. 189, 26 S. E. Rep. 741; *Carroll-Porter Boiler & Tank Co. v. Columbus Machine Co.*, 55 Fed. Rep. 451, 5 C. C. A. 190.

⁵ *Pittsburg Sheet Manuf. Co. v. West Penn Sheet Steel Co.*, 201 Pa. 150, 50 Atl. Rep. 935.

⁶ § 89; *Hamilton v. Kirby*, *supra*. In *Watson v. Gray*, 16 T. L. Rep. 308 (1900), the defendant breached his contract to furnish steel plates which he knew were wanted by the plaintiff for building certain barges

contracted to supply to the plaintiff two thousand pieces of gray shirting to be delivered on the 20th day of October certain, at so much per piece, and was informed that the property was intended for shipment, and shortly before the 20th of October notified the plaintiff that he would not be able to complete his contract, whereupon the plaintiff endeavored to get the shirting elsewhere, but, being unable to do so, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirting of a somewhat superior quality at an increase of price, the sub-vendee, having accepted the substitute, but paying no advance in price to the plaintiff, he sued to recover against the defendant, for the breach of his contract, the difference between what he paid for the substituted shirting and the price contracted to be paid to him. It appeared that the shirting which the plaintiff bought was the nearest in quality and price that could be got by the 20th of October, and it was held that, there being no market for the article contracted for, the measure of damages was the value at the time of the breach, and the plaintiff, having done the best thing he could, was entitled to recover the difference in the price.¹ In *Barker v. Mann*,² after sale of specific goods, the vendors refused to make delivery and gave immediate notice to the vendee to that effect. The court say: "In this case the appellants promptly informed the appellees of their intention to abandon the sale, and there is no reason assigned or appearing why they could not procure a supply of [369] the same articles within a few days from other vendors in the L. market [where the transaction took place]. Had

which were then at such stages of construction that delivery of the plates as agreed was of the utmost importance to the plaintiff. The defendant also knew that the plates could not be procured elsewhere. He was held liable for damages for loss and expenditure occasioned in connection with the barges for which the defendant knew the plaintiff required the plates. It was also sought to hold the defendant for the loss by the plaintiff of business generally, but *Kennedy, J.*,

thought such loss could not be recovered, there being no evidence to show that the defendant knew the extent of the business. Such a claim, he said, was purely speculative and could not be said to be within the contemplation of the parties.

¹ *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Haskell v. Hunter*, 23 Mich. 305; *Miller v. Stern*, 25 N. Y. Misc. 690, 55 N. Y. Supp. 765.

² 5 Bush, 672, 96 Am. Dec. 373.

they done so, their necessary expense, together with their time and trouble, and any possible advance in the price of such goods at L. which they would have had to pay, should be regarded as elements making up their damages."¹

A vendee is not bound to go into a foreign market and procure other goods until the vendor has given him notice that he will not fulfill his contract.² But the better rule is that "a notice which gives the vendee no right to damages cannot bind him as conclusive that the contract will not be performed, and so put upon him a responsibility to see that the damages are no greater than they need be. It is a mere prophecy, and as such may be disregarded. Until the moment when a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done."³ Indeed, the vendee of property which has a marketable value is entitled, according to the weight of authority and upon reason, to the benefit of his bargain and may recover to that extent without availing himself of the opportunity to purchase like property elsewhere.⁴ If, after receiving notice of the vendor's refusal

¹ See *Taylor v. Reed* 4 Paige, 561; *Feehan v. Hallinan*, 13 Up. Can. Q. B. 440.

It is for the defaulting seller who has given the buyer notice that he will not deliver to show that the latter could have purchased the article in the market where the delivery was to have been made. *York-Draper Mercantile Co. v. Lusk*, 45 Kan. 182, 25 Pac. Rep. 646.

² *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. Rep. 49; *Shouse v. Neiswanger*, 18 Mo. App. 236.

³ *P. P. Emory Manuf. Co. v. Salomon*, 178 Mass. 582, 60 N. E. Rep. 377; *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. Div. 460, 470, 473; *Roehm v. Horst*, 178 U. S. 1, 19, 20 Sup. Ct. Rep. 780; *South Gardiner Lumber Co. v. Bradstreet*, — Me. —, 53 Atl. Rep. 1110.

⁴ *Follansbee v. Adams*, 86 Ill. 13; *Summers v. Hibbard*, 153 Ill. 102, 38

N. E. Rep. 899, 46 Am. St. 872; *Rau v. Trumbull*, 68 Ill. App. 490. See *Trade-water Coal Co. v. Lee*, 24 Ky. L. Rep. 215, 68 S. W. Rep. 400.

Referring to the rule of law which imposes upon every injured party the duty to so act as to make his damages as small as he can, the New York court of appeals has said it is without practical application to a case where the subject-matter of the contract has a market value at the time and place of delivery. Very rarely can there come a case where the vendee suffers special damages if, at the time and place of delivery, there was a market value for the article purchased by him. A market value at a given place presupposes that merchandise of that character was at that time and place sold or offered for sale, and thus the opportunity is presented the vendee of buying the article in the open market to be used for the special purpose in-

to perform, and before the time fixed for the delivery of the property, the vendee goes into the market and buys property of the same kind at its then value, which is an advance on the contract price, he cannot recover at the rate of the price paid if the market value of the property is at or below the contract price at the time the vendor was to make delivery.¹ But it is said in the *Kansas* case cited that if the defendant should show that the plaintiff could have bought at or below the contract price at any time between the notice of rescission and the time of delivery, he could recover only nominal damages. The purchaser is not bound to consider the contract broken before the time fixed for its full performance.² Where there was a breach of a contract to sell and deliver a building the vendor was liable for everything which was the natural and probable consequence of the breach — the actual loss sustained.³

Where the general rule concerning the market price applies the jury cannot give damages in excess of it, though the refusal to deliver may have been made with a view to profit.⁴ But it is said if the price was not fixed, and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate according to the conduct of the defendant.⁵ It is the market price, when there is

tended, and of recovering of the defendant the difference between such market value and the contract price. But he cannot neglect to buy when he has the opportunity in the market and then charge the defendant with the special damages resulting. Nor does the law require him to buy in order to secure the damages actually sustained by a breach of the contract. It would not advantage the defaulting party if he should do so; for, if he buys at the market value, the result to the other party is the same as if he simply proved the market value. *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 378, 54 N. E. Rep. 14.

¹ *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463; *York-Draper Mercantile Co. v. Lusk*, 6 Kan. App. 629, 49 Pac. Rep. 788.

² *Goodrich v. Hubbard*, 51 Mich. 62, 70, 16 N. W. Rep. 232; *Leo Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. W. Rep. 50, 34 Am. St. 350.

³ *Bradley v. McHale*, 19 Pa. Super. Ct. 300.

⁴ *Blydenburgh v. Welsh*, Baldwin, 331; *Kincaid v. Price*, — Colo. App. —, 70 Pac. Rep. 153, quoting the text. See *Grand Tower Co. v. Phillips*, 23 Wall. 471.

⁵ *Blydenburgh v. Welsh*, *supra*. *Hopkinson, J.*, vindicating this rule, upon a motion for a new trial for excessive damages, said: "In assessing the damages for the breach of a contract [for the sale and delivery of coffee], the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a

one, at the date of the breach which governs in the estimate of damages. Whether the contract fixes a day for the delivery or allows a reasonable time, delay of the vendor, although by consent, but without any valid agreement for such delay which

rule as could be given. The damage to be recovered is to be governed by the *price* of the article at the time when it should have been delivered, compared with the contract price. This rule is founded on an hypothesis, not always true in fact, perhaps not often so, and very favorable to the plaintiff, that is, that he would certainly have sold the article, if he had received it, at the advance of that day, and not have retained it subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of the coffee on the day the defendant was bound to deliver this parcel to the plaintiff, we must settle the true meaning or interpretation of the rule, what is intended by the *price* of the article? On the one side it is contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract, and put into his possession the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be anything unjust in this rule—anything of which any one has a right to complain who has broken his engagements. But is it the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price—the *market price*—of the article that is to furnish the measure of damages. Now, what is

the price of a thing, particularly the market price? We consider it to be the *value*—the rate at which the thing is sold. To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour for instance, under a false rumor, which if true would augment its value, may suspend their sales, or put a price upon it, not according to its value in the *actual* state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance. The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter.

“With this explanation of the rule which prescribes the market price of

would preclude the purchaser from bringing an action at once, does not extend the time so that an advance in the market price meanwhile can be considered in computing damages on

the article on the day of delivery, we must examine whether the jury in this case have executed it clearly in the verdict which they have rendered. It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff, on [371] the 14th of April, 1825, at nineteen and three-fourths cents a pound. Does the evidence support this calculation or estimate for such coffee on so large a quantity on that day? Was this the buying and selling price? We feel, as the jury probably did, no inclination to force the testimony in favor of the defendant; on the contrary, his unaccounted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him a profitable, contract, was calculated to induce the jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff has been given up at the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to [the vendor] a sordid design, we confess ourselves unable to discover the cause of his departure from the course it was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the

application of it to the evidence. Juries may sometimes yield honestly to excitement which judges must not feel. To correct such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury that we would not oppose ourselves to their opinion upon it unless where we were assured that they have either mistaken the rule of law or contradicted the clear purport of the evidence. We inquire, then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April, 1825? . . .

"There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th, inclusive, which, in our minds, show such an advance as would have raised the value [372] of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them. . . . It is enough that we think the jury have so far overrated the value of this coffee as to support the objection of excessive damages to their verdict. It is not unlikely that they may not have exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the re-

a failure to deliver after such delay.¹ And the market value at the place of delivery is that which must fix the measure [373] of damages.²

fusal of the defendant to perform his contract to be wilful or inadvertent; proceeding from an unjust violation of his engagement, or a conscientious although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it, substituting a fictitious, unreal value which nobody would give, for that at which the article might be bought and sold. It has grown into a proverb that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it."

¹ *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. Rep. 450; *Norton v. Wales*, 1 Robert. 561; *Sleuter v. Wallbaum*, 45 Ill. 43. Compare *Hickman v. Haynes*, L. R. 10 C. P. 598; *Williams v. Woods*, 16 Md. 220; *Hill v. Smith*, 34 Vt. 433, 34 id. 535; *Ogle v. Earl Vane*, L. R. 3 Q. B. 372, 2 id. 275.

In *Hickman v. Haynes*, L. R. 10

C. P. 598, the plaintiff agreed in writing to deliver and the defendant to accept property at a specified date. The delivery was postponed pursuant to defendant's requests. In an action to recover for non-acceptance pursuant to the written contract the defendant contended that because of the verbal arrangement, made before there was a breach of the original contract, there could not be a recovery upon the latter, on the ground that there was never any readiness and willingness to make delivery. It was held that the true effect of the verbal arrangement was that the plaintiff voluntarily withheld delivery at defendant's request; that no new contract resulted; plaintiff was entitled to recover damages estimated at the market price of the property at a reasonable time after the last request of the defendant to withhold delivery.

It is said in *Smith v. Snyder*, 77 Va. 432, that where the time for performing a contract of sale is postponed at the request of either party and is ultimately broken, the period at which the breach takes place is

² *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. Rep. 692; *Merritt v. Wittich*, 20 Fla. 27; *Adams v. Sullivan*, 100 Ind. 8; *McCormick Harvesting Machine Co. v. Jensen*, 29 Neb. 102, 45 N. W. Rep. 160; *Pape v. Ferguson*, 28 Ind. App. 298, 62 N. E. Rep. 712; *Phelps v. McGee*, 18 Ill. 155; *Deere v. Lewis*, 51 id. 254; *Barker v. Mann*, 5 Bush, 672, 96 Am. Dec. 373; *McKenney v. Haines*, 63 Me. 74; *Young v. Lloyd*, 65 Pa. 199; *Hill v. Canfield*, 56 id. 454; *Gregory v. McDowell*, 8 Wend. 435; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Bennett v. Greg-*

ory, 9 Ky. L. Rep. 194 (Ky. Super. Ct.).

Evidence as to the market price need not be restricted to property equal in quantity to that in question. It is not of substantial importance whether the supply is obtained from one or repeated purchases. *Faulkner v. Closter*, 79 Iowa, 15, 44 N. W. Rep. 208.

Expenses incurred by the vendee in sending an agent to the vendor on account of the purchase are not recoverable. *Crawford v. Geiser Manuf. Co.*, 88 N. C. 554.

§ 653. **Same subject.** In the absence of a market¹ at that place the value there is to be ascertained; this may be done by proving the market price at the nearest point where the goods of the quantity in question could be bought or sold, with such addition or deduction of the cost of transportation as will be necessary to determine the value at the place of delivery depending on its relation to the controlling market of sale.² For the purpose of showing the plaintiff's loss from

deferred until the final refusal to deliver.

If the property is to be furnished as needed the vendee may go into the market and supply himself as his necessities may require unless it is shown that he might have contracted for deliveries according to the vendor's contract. *Long v. Conklin*, 75 Ill. 32.

A refusal to deliver the first instalment of goods is a repudiation of the entire contract. *Delaware & Hudson Canal Co. v. Mitchell*, 92 Ill. App. 577.

If no time is fixed for delivery the market value will be estimated as of the time of the refusal to deliver. *Guice v. Crenshaw*, 60 Tex. 344; *Summers v. Hibbard*, 153 Ill. 102, 111, 38 N. E. Rep. 899, 46 Am. St. 872; *Northwestern Iron & Metal Co. v. Hirsch*, *infra*. And so if the delivery has been postponed from time to time. *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. Rep. 393.

If delivery is postponed by agreement the rights of the vendee are to be measured by the market price at the time fixed by the subsequent agreement. *Brown v. Sharkey*, 93 Iowa, 157, 61 N. W. Rep. 364; *Northwestern Iron & Metal Co. v. Hirsch*, 94 Ill. App. 579.

Where the delivery is to be made on or about a stated time the market price within a reasonable time after the date named governs. *Kipp v. Wiles*, 3 Sandf. 585.

If the delivery is made in instal-

ments, but not according to the contract, and the property is received without protest or inducement, the market price will be determined as of the dates the shipments were received. *West Republic Mining Co. v. Jones*, 108 Pa. 55.

Growing crops are deliverable at their maturity (*Smock v. Smock*, 37 Mo. App. 56); or when they can be harvested with ordinary diligence. *Harris v. Rodgers*, 6 Heisk. 626.

If the purchaser selects the carrier by which the property is to be shipped delivery to him is complete when made to the carrier; the latter is the purchaser's agent to receive and carry. *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. Rep. 858, 54 Am. St. 672; *Gill v. Johnson-Brinkman Commission Co.*, 84 Mo. App. 456.

¹ If a great deal of lumber is bought and sold at a designated place, and it may be disposed of there by barter or sale, a market for it exists there, although it is not shown that just the kind and description of lumber which is the subject of litigation was at the time thereof on sale in such place. *Bennett v. Gregory*, 9 Ky. L. Rep. 194 (Ky. Super. Ct.).

² *Cobb v. Whitsett*, 51 Mo. App. 146; *Vanstone v. Hopkins*, 49 Mo. App. 386; *Capen v. De Steiger Glass Co.*, 105 Ill. 185; *White v. Matador Land & C. Co.*, 75 Tex. 465, 12 S. W. Rep. 866, quoting the text; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Barry v. Cavanagh*, 127 Mass. 394;

non-fulfillment of the contract, he is not confined to any particular species of evidence to prove the value of the property at the place of delivery. He may show it by the market price there, if there have been sales enough to make such a price; or he may show its value at the market where such commodities are usually sent for sale and the cost of transportation from the place of delivery.¹ There may be a custom of a particular trade so long and well established that the parties may be presumed to have contracted with that in view. If according to such a custom the damages are measured by the market price at the place of shipment, the courts will give it effect.² If the vendor knows when he makes his contract that the property is to be sold in another market his liability is measured by adding to the contract price at the agreed time and place of delivery the cost of transporting the property to such market, less the price there at the time it would have reached its destination if there had been no breach.³

Berry v. Dwinel, 44 Me. 255; *Furlong v. Polleys*, 30 id. 491, 50 Am. Dec. 635; *Washington Ice Co. v. Webster*, 63 Me. 463; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Harris v. Panama R. Co.*, 58 N. Y. 660; *Gregory v. McDowell*, 8 Wend. 435; *McHose v. Fulmer*, 73 Pa. 365.

¹ *McDonald v. Unaka Timber Co.*, 88 Tenn. 38, 12 S. W. Rep. 420; *Pape v. Ferguson*, 28 Ind. App. 298, 62 N. E. Rep. 712, citing the text; *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N. W. Rep. 864; *Stevens v. Lyford*, 7 N. H. 360; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Hanson v. Lawson*, 19 Kan. 201; *Hazelton Coal Co. v. Buck Mt. Coal Co.*, 57 Pa. 301; *Sellar v. Clelland*, 2 Colo. 532; *Wemple v. Stewart*, 22 Barb. 154; *Muller v. Eno*, 14 N. Y. 597; *Durst v. Burton*, 37 id. 167.

If there is no general market in the place of delivery for raw material bought for manufacturing purposes, and the cost of transportation from the place where there is such a market will largely exceed the

contract price, the market value may be arrived at by deducting the cost of manufacturing and of such material from the market value of the manufactured article. *Equitable Gas Light Co. v. Baltimore Coal Tar & Manuf. Co.*, 65 Md. 73, 3 Atl. Rep. 108.

² *Haas v. Hudmon*, 83 Ala. 174, 3 So. Rep. 302.

³ *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. Rep. 49; *Hendrie v. Neelon*, 12 Ont. App. 41, 3 Ont. 603; *Louis Cook Manuf. Co. v. Randall*, 62 Iowa, 244, 17 N. W. Rep. 507; *McCormick Harvesting Machine Co. v. Jensen*, 29 Neb. 102, 45 N. W. Rep. 160; *Campbellsville Lumber Co. v. Bradley*, 96 Ky. 494, 29 S. W. Rep. 313; *Loughridge v. Allen*, 18 Ky. L. Rep. 894, 38 S. W. Rep. 698; *Boyd v. L. H. Quinn Co.*, 17 N. Y. Misc. 278, 40 N. Y. Supp. 370; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Hockersmith v. Hanley*, 29 Ore. 27, 44 Pac. Rep. 497.

If the purchaser is compelled to

Where the inquiry is properly confined to the ascertainment of the actual value at the place and time of delivery, it is not admissible to inquire as to the probable effect of adding the goods in question to the quantity in market;¹ nor of the [374] plaintiff's going into the market to buy goods of the kind and in the quantity contracted for and not delivered.²

If the market is fluctuating, and especially if it be raised or depressed by transient causes, or by interested and illegitimate combinations for temporary, special and selfish objects, independently of the influences of lawful commerce, the market price on the precise day of delivery will not necessarily govern. The law in regulating the measure of damages contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time.³ Where there is a stimulated market price, created by artificial or fraudulent practices, it is not the true or only test of value. The market price being only evidence of value, the

pay a carrier for specially furnishing and holding in readiness the necessary cars for shipping cattle to the market with reference to which they were bought and sold, and the buyer and seller understood that such special arrangement would necessarily be made, the latter is liable for the expense thereof. *Hockersmith v. Hanley*, *supra*, citing *Borries v. Hutchinson*, 18 C. B. (N. S.) 460; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. Rep. 19, 30 Am. St. 421.

¹ *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. In this case questions to witnesses had been excluded. Referring to them Johnson, J., said: "The evident object of all these inquiries was to show that if the defendant had performed, and the plaintiff had desired to sell the whole quantity [one hundred and fifty tons of madder], the market price would have been lowered by throwing so large a quantity at once upon the market. A sufficient answer to all these exceptions is that they are

founded upon an attempt to substitute a hypothetical market value for the actual market value. They call upon the jury to speculate as to the consequences which would have resulted to the plaintiff if the defendant had performed his contract. The rule of damages was correctly laid down by the court (*Clark v. Pinney*, 7 Cow. 681; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *Davis v. Shields*, 24 Wend. 322), and the market value of the article on the day of delivery, which that rule fixes as a test, requires an investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist."

² *Jemmison v. Gray*, 29 Iowa, 537.

³ *Adams v. Sullivan*, 100 Ind. 8, quoting the text; *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Cahen v. Platt*, 69 N. Y. 343, 25 Am. Rep. 199; *Paragon Refining Co. v. Lee*, 98 Tenn. 643, 41 S. W. Rep. 362.

law adopts it as a natural inference of fact and not as a conclusive legal presumption. It stands as a criterion of value because it is a common test of the ability to purchase the thing.¹ In such cases, what is called the market price, or the quotations of the articles for a given day, is not the only evidence of value; the true value may be drawn from other sources.²

The defaulting vendor cannot be charged with more than that price merely because the vendee had a contract for resale at a higher price;³ nor can he claim any mitigation where the vendee has contracted for a resale at less than the market price.⁴ The vendor is not liable for the profits made on a resale, of which he was informed by the vendee, because he breaches his contract to make sales on credit, but offers to deliver the property at a reduced price for cash, the reduction being in excess of the interest demandable during the period of credit, notwithstanding the vendee was unable to obtain the goods from others than the vendor, it not appearing that he could not pay cash for them. The vendee was bound to minimize his loss by buying from the vendor upon the terms offered or prove that he was unable to meet those terms.⁵ To have done so would not have resulted in the surrender or waiver of any right of action for the breach of the original contract.⁶ In the absence of special circumstances duly made known to the seller he is not liable for the loss of time by the purchaser, the loss of the salary paid his employee and other such expenses incurred in preparation for putting the goods on the market. "Such damages are not implied by the contract, cannot be reasonably foreseen or anticipated as the re-

¹ *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. Rep. 901, 13 L. R. A. 770, stated in § 642; *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687; *Muller v. Eno*, 14 N. Y. 597. See *Trout v. Kennedy*, 47 Pa. 387.

² *Id.*; *Pape v. Ferguson*, 28 Ind. App. 298, 62 N. E. Rep. 712.

³ *Hewson-Herzog Supply Co. v. Minnesota Brick Co.*, 55 Minn. 530, 57 N. W. Rep. 129; *Coffin v. State*, 144 Ind. 578, 43 N. E. Rep. 654, 55 Am. St. 188; *Williams v. Reynolds*, 6 B. & S. 495; *Cole v. Swanston*, 1 Cal. 51,

52 Am. Dec. 288. But see *Trigg v. Clay*, stated in § 662.

⁴ *Josling v. Irvine*, 6 H. & N. 512.

⁵ *Lawrence v. Porter*, 63 Fed. Rep. 62, 11 C. C. A. 27, 26 L. R. A. 167, citing *Warren v. Stoddart*, 105 U. S. 224; *Deere v. Lewis*, 51 Ill. 254.

⁶ *Lawrence v. Porter*, *supra*; *Pittsburg Iron & Steel Engineering Co. v. National Tube Works*, 184 Pa. 251, 39 Atl. Rep. 76. Compare *Louis Cook Manuf. Co. v. Randall*, 62 Iowa, 244, 17 N. W. Rep. 507, which is disapproved of in *Lawrence v. Porter*.

sult of a breach of it, do not ordinarily flow from such a breach, and cannot be permitted to form the basis of a judgment."¹ But if the vendor sells the goods which he contracted, the party to whom they were bargained may recover on the basis of the amount the vendor has sold for.² Where [375] the market price is less than the contract price at the date when the contract requires delivery, the vendee can suffer no actual injury; he is, however, entitled to nominal damages.³ If the vendor sells a part of the goods to another purchaser, and thus puts it out of his power to perform his contract, the vendee, if he has received none of the property, is entitled to the difference between the contract and the market price of all the goods purchased, and not merely of those which the vendor has sold to another.⁴ Where by the terms of a con-

¹ *Moffitt-West Drug Co. v. Byrd*, 92 Fed. Rep. 290, 34 C. C. A. 351, reversing the court of appeals of the Indian Territory, 43 S. W. Rep. 864, 1 Ind. Ty. 612, and the United States court of appeals thereof. See *Trigg v. Clay*, stated in § 662.

² *Peterson v. Ayre*, 13 C. B. 353; *Gainsford v. Carroll*, 2 B. & C. 624.

³ *Rose v. Bozeman*, 41 Ala. 678; *Bush v. Canfield*, 2 Conn. 485; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680; *Maher v. Riley*, 17 Cal. 415; *Wire v. Foster*, 62 Iowa, 114, 17 N. W. Rep. 174; *Harrison Wire Co. v. Hall & W. Hardware Co.*, 97 Mo. 289, 10 S. W. Rep. 619; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. Rep. 502, 39 Am. St. 415; *Weber v. Squier*, 51 Mo. App. 601.

⁴ *Crist v. Armour*, 34 Barb. 378.

In *Somers v. Wright*, 115 Mass. 292, A. agreed to sell by warranty deed a lot of land to B. for a certain sum, payable in lumber "at current retail prices." A. bound himself to discharge an existing mortgage on or before a certain day, and it was also agreed that B. should not pay the lumber agreed upon as the price above the amount of the mortgage, computed at the current retail prices,

until the discharge of such mortgage. A. did not discharge the mortgage, and B. paid it to prevent a foreclosure. It was held that B., in an action on A.'s contract to discharge the mortgage, was entitled to recover the loss of profits which would have accrued by the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber.

In *Harrison v. Charlton*, 37 Iowa, 134, C. bought of H. a lumber yard, the stock to be invoiced and delivered at a future day; H. in the meantime to make no additions thereto. H. made additions, which were unknowingly included and paid for by C. Held, the measure of damages was the difference between the price paid by him for the additional lumber and the market price at which he could have purchased the same.

Where the plaintiff and the defendant each had a claim against premises which were about to be sold on foreclosure, and the defendant, a prior lienor, agreed with the plaintiff, a subsequent lienor, that he would bid the amount of his

tract between the owner of property and another it is agreed that the latter is not a purchaser of the property, but is to sell it, and account to the owner for the avails of the sales at a certain rate, the rule of damages as between vendor and vendee does not apply.¹ Neither does that rule apply to the breach of a contract to sell the sole right to go upon land and cut and remove a crop of flax thereon. The liability of the vendor is for the value of the raw material he would have sold if there had been a market for it, less the expense of marketing it. In the absence of a market price his liability is measured by the value of the raw material to the manufacturer, and not by the entire profit which would have been made by the subsequent manufacture of the flax.²

§ 654. Proof of value. The proof of the value of property is generally by the judgments or opinions of witnesses.³ If the article in question has a market price, that will usually control as the best evidence of its value.⁴ If this test has been applied by an actual sale of it the fact may be proved as evidence of its value.⁵ It is not conclusive, but tends to show

claim upon the sale and convey his title and assign any judgment for a deficiency to the plaintiff, who was to pay the amount of the defendant's judgment, the costs, taxes, expenses of sale, etc., the contract was construed as a sale of the plaintiff's claim to the defendant, and not as a mere contract to convey to the plaintiff the premises in question in the event that the defendant bought them. Upon the breach of such contract the defendant's liability was the amount of the purchase-money he had agreed to pay. *Schmaltz v. Weed*, 27 App. Div. 309, 50 N. Y. Supp. 168. The case is considered in another aspect in 57 App. Div. 245, 68 N. Y. Supp. 212.

¹ *Giles v. Morrison*, 50 Barb. 50.

² *Richardson v. Reid*, 8 N. Z. 760 (1890).

³ §445; *Gulf, etc. R. Co. v. Dunman*, 85 Tex. 176, 19 S.W. Rep. 1073, citing the text.

⁴ *Cahan v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Warren v. A. B. Mayer Manuf. Co.*, 161 Mo. 112, 61 S. W. Rep. 644. See *Parks v. Morris Ax & T. Co.*, 54 N. Y. 586.

If there was a market price for the goods in question at the time and place stipulated for their delivery, proof of the price in another market is only competent as an aid in determining the true value in the place of delivery. *Rau v. Trumbull*, 68 Ill. App. 490.

⁵ *Muller v. Eno*, 14 N. Y. 597; *Deck v. Feld*, 38 Mo. App. 674; *Stevens v. Springer*, 23 id. 375.

Where the price to be paid for a boiler was 281*l.* 8*s.*, and it was sold by one of the defendants to the other, and admittedly at a bargain, for 500*l.*, it did not lie in the mouth of the defendants to say that the market price was less than 500*l.* *Wills v. Marshall*, 1 N. Z. L. R. (Sup. Ct.) 28.

the value thereof, and, in the absence of other evidence, would suffice.¹ Even the amount goods cost is admissible for the same purpose.² On the breach of a contract by the vendee of a note and mortgage to repurchase the same, the measure of damages is conclusively established by the foreclosure sale of the mortgaged premises.³ When the cost was the price at which a regular dealer in such articles had sold it when new, in the ordinary course of trade, it is evidence of the market value; and if afterwards deteriorated by use, like furniture, its present value can be ascertained by reference to the former price and the extent of depreciation.⁴ So proof of the amount it sold for at auction has been admitted.⁵ Witnesses having the requisite knowledge may testify as to market prices. In doing so they testify to facts rather than opinions. It is knowledge more or less special, though it is largely, and may be exclusively, hearsay.⁶

Market prices themselves are the estimate or opinion of those who influence the market; that opinion is expressed in actual transactions; and it is a knowledge of these, in such form as is usually relied on, which qualifies the witness to testify. Such a witness—that is, one who has thus informed himself in respect to market prices which are relevant, and

¹ *Id.*; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. Rep. 345; *Trustees of Howard College v. Turner*, 71 Ala. 429, 46 Am. Rep. 326 (sale of college scholarship).

² *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898.

When the sale is made by a manufacturer to a purchaser who has ordered the goods, the price agreed upon is presumably the market value. *Geiss v. Wyeth Hardware & Manuf. Co.*, 37 Kan. 130, 14 Pac. Rep. 463.

³ *Loeb v. Stern*, 198 Ill. 371, 64 N. E. Rep. 1043, 99 Ill. App. 637.

⁴ *Luse v. Jones*, 39 N. J. L. 707; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.*, 27 Fla. 157, 9 So. Rep. 661, 17 L. R. A. 33.

⁵ *Cronnse v. Fitch*, 14 Abb. Pr. 346. See *Bissell v. Starr*, 32 Mich. 297; *Willamet Falls Canal & L. Co. v. Kelly*, 3 Ore. 99; *Wilson v. Holden*, 16 Abb. Pr. 133.

⁶ *Harrison v. Glover*, 72 N. Y. 451; *Washington Ice Co. v. Webster*, 68 Me. 463; *Whitney v. Thatcher*, 117 Mass. 523; *Lush v. Druse*, 4 Wend. 313; *Savercool v. Farwell*, 17 Mich. 308; *Cliquot's Champagne*, 3 Wall. 114; 1 Whart. Ev., §§ 446, 449; *Stone v. Covell*, 29 Mich. 359.

The random statement of a third party to the effect that, for a special purpose, wholly unconnected with any commercial use, he would be willing to pay a sum stated for the notes in question, does not tend to prove their value. *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. Rep. 486.

not presumed to be within the actual knowledge of all jurors — may testify to them though he knows nothing of the property in question.¹ He may be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates and has not heard all the evidence given in the case.²

Merchandise brokers in Boston and members of firms doing business and having houses established in Boston and New York, who are familiar with the value of a particular [377] line of goods in New York, and whose information is derived from the daily price-current lists, and returns or sales daily furnished them in Boston from their New York houses, may testify to such value in the latter market at a given time.³ The market price of a marketable commodity may be determined as well by offers to sell, made by dealers in the usual course of business, as by actual sales; and statements of dealers, in answer to inquiries as to price, are competent evidence.⁴ A price-current published in a newspaper is not competent evidence of market value, without proof as to the sources from which the information which formed its basis was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given to the paper must depend upon such extrinsic proof; it cannot be determined by the publication itself.⁵ An unaccepted offer, as an isolated transaction, is not competent evidence upon the question of value. But in a market regularly attended by buyers and sellers, an offer as well as a sale of an article of recognized uniform character, constantly bought and sold there, so as to

¹ *Miller v. Smith*, 112 Mass. 475; *Beecher v. Denniston*, 13 Gray, 354; *Fitchburg R. Co. v. Freeman*, 12 id. 401, 74 Am. Dec. 600; *Brady v. Brady*, 8 Allen, 101; *Lawton v. Chase*, 108 Mass. 238; *McCullum v. Seward*, 62 N. Y. 316; *Reynolds v. Robinson*, 64 id. 589.

² *Woodbury v. Obear*, 7 Gray, 467; *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169, 172, 85 Am. Dec. 697; *Cornell v. Dean*, 105 Mass. 435; *Browne v. Moore*, 32 Mich. 254. See § 446.

³ *Whitney v. Thacher*, 117 Mass. 523.

⁴ *Harrison v. Glover*, 72 N. Y. 451.

⁵ *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article and examined their books, thus giving the sources of his knowledge. In *Cliquot's Champagne*, 3 Wall. 114, it appeared that the price-current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. See § 447.

have a place on the daily price-current list, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market makes the fact one that may properly be considered in evidence.¹

Whether the very property to be valued corresponds with that to which the market prices apply is a matter of judgment. A witness who has knowledge of market values and [378] knows the property in question may give his opinion of its value.² Every one is supposed to have some idea of the value of such property as is in general use; it is not necessary to have a drover or a butcher to prove the value of a cow;³ and an expert is not an indispensable witness.⁴ If the article in question has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, utility and use. And opinions of witnesses properly informed on the subject may also be given in respect to its value.⁵ The purchaser of

¹ *Whitney v. Thacher*, 117 Mass. 523.

² *Id.*; *Brill v. Flagler*, 23 Wend. 354; *Parks v. Morris Ax & T. Co.*, 54 N. Y. 593; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Whiteley v. China*, 61 Me. 199; *Snow v. Boston & M. R.*, 65 Me. 230; *Shattuck v. Stoneham, etc. R.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Kronschnable v. Knoblauch*, 21 Minn. 56; *Thatcher v. Kaucher*, 2 Colo. 698; *Clarion Bank v. Jones*, 21 Wall. 325; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 204; *Covey v. Campbell*, 52 Ind. 157; *Chamness v. Chamness*, 53 id. 301; *Williams v. Brown*, 28 Ohio St. 547; *Lush v. Druse*, 4 Wend. 313; *Cliquot's Champagne*, 3 Wall. 114; *Lafayette, etc. R. Co. v. Winslow*, 66 Ill. 219;

Toledo, etc. R. Co. v. Kickler, 51 Ill. 157; *White v. Hermann*, id. 243; *Eagle & P. Manuf. Co. v. Browne*, 58 Ga. 240; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. 279; *Holten v. Board, etc.*, 55 Ind. 194; *Carpenter v. Robinson*, 1 Holmes, 67; *Barger v. Northern Pacific R. Co.*, 22 Minn. 343. ³ *Ohio & M. R. Co. v. Irvin*, 27 Ill. 178.

⁴ *Ohio & M. R. Co. v. Taylor*, 27 Ill. 207.

⁵ *Masterton v. Mayor*, 7 Hill, 61; *Gulf, etc. R. Co. v. Dunman*, 85 Tex. 176, 19 S. W. Rep. 1073, citing the text; *Murray v. Stanton*, 99 Mass. 345; *Lafayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *White v. Hermann*, 51 Ill. 243; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Eaton v. Mellus*, 7 Gray, 566; *Berry v. Dwinel*, 44 Me. 255; *Wemple v. Stewart*, 22

a store who has been defrauded thereof by his vendor may show the profits he had realized therefrom during the time he had carried on business there under his bargain.¹ In an action for the conversion of the bonds of a California corporation, which had never been put on the market, and therefore had no market value, it was held that, though being payable in dollars, so that legally paper dollars would discharge them, yet it might be shown that in California they were treated as payable in coin and were practically payable in gold, with a view to their valuation by that standard.² In New Hampshire the rule appears to be to exclude opinions upon the subject of value.³

§ 655. Rule in favor of vendor when delivery impossible.

The vendor may be relieved from the payment of dam- [379] ages by delivery being rendered impossible by the act of God. Thus, where a contract is made for the sale and delivery of specific articles of personal property under such circumstances that the title does not pass, if the property is destroyed by accident, without the fault of the vendor, he is not liable to the vendee in damages for non-delivery.⁴ And it has been said in a comparatively recent case in England⁵ that "where a contract has been made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if

Barb. 154; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Trout v. Kennedy*, 47 Pa. 387; *Saunders v. Clark*, 106 Mass. 331; *Jemmison v. Gray*, 29 Iowa, 537; *Graham v. Maitland*, 1 Sweeney, 149; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.*, 27 Fla. 157, 9 So. Rep. 661, 17 L. R. A. 33, 61, quoting the text; *Warren v. A. B. Mayer Manuf. Co.*, 161 Mo. 112, 61 S.W. Rep. 644; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. Rep. 898, quoting the text, and holding that the pedigree of an animal may be proven. See *Kirschmann v. Lediard*, 61 Barb. 573.

¹*Collins v. Lavelle*, 19 R. I. 45, 31 Atl. Rep. 434, citing *Montgomery, etc. Agricultural Society v. Har-*

wood, 126 Ind. 440, 26 N. E. Rep. 182, 10 L. R. A. 532; *Goebel v. Hough*, 26 Minn. 252; *Chapman v. Kirby*, 49 Ill. 211, and cases cited in §§ 52, 54, 65, vol. 1, 2d ed. of this work.

²*Simpkins v. Low*, 54 N. Y. 183.

³*Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jaffrey*, 6 id. 462; *Whipple v. Walpole*, 10 id. 130; *Hoitt v. Moulton*, 21 id. 586.

⁴*Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Thomas v. Knowles*, 128 Mass. 22; *Gould v. Murch*, 70 Me. 288; *McMillan v. Fox*, 90 Wis. 173, 62 N. W. Rep. 1052. See *Chicago, etc. R. Co. v. Hoyt*, 149 U. S. 1, 13 Sup. Ct. Rep. 779.

⁵*Taylor v. Caldwell*, 3 B. & S. 826.

the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.”¹ In the case from which this quotation is made, Blackburn, J., delivering the unanimous decision of the court, said: “The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance.”² This principle was applied where there was a contract to sell potatoes to be grown on the defendant’s land in W., which was rendered impossible of full performance because a disease attacked them;³ and where the defendant sold a cargo of goods to be shipped from A. in a designated month by a named steamer, the contract providing that in case of prohibition of export, blockade, or hostilities preventing shipment, it was to be canceled. Two months before the time stipulated for the shipment of the cargo the steamer stranded and was so damaged that repairs could not be made in time for her to load. A majority of the court was of opinion that it was an implied condition of the contract that it should not become operative if performance became impossible by reason of the steamer, without default of the defendant, ceasing to exist as a cargo-carrying vessel before the time for performance.⁴ The vendor may likewise be excused, as may all contracting parties, when the act stipulated to be done has become unlawful,—as would be the case if, after making the agreement, a statute is passed rendering performance of it illegal.⁵ If a condition arises

¹ *Rugg v. Minett*, 11 East, 210.

² *Appleby v. Meyers*, L. R. 1 C. P. 615, 2 id. 651; *Robinson v. Davidson*, L. R. 6 Ex. 269; *Knight v. Bean*, 22 Me. 531; *Dickey v. Linscott*, 20 id. 453, 37 Am. Dec. 66; *Raisin Fertilizer Co. v. Barrow*, 97 Ala. 694, 12 So. Rep. 388.

³ *Howell v. Coupland*, 1 Q. B. Div. 258.

⁴ *Nickoll v. Ashton*, [1901] 2 K. B. 126, [1900] 2 Q. B. 298.

⁵ *Cordes v. Miller*, 39 Mich. 581, 33

Am. Rep. 430; *Jamieson v. Indiana Gas Co.*, 128 Ind. 555, 28 N. E. Rep. 76, 12 L. R. A. 652; *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680; *Mississippi R. Co. v. Green*, 9 Heisk. 588; *Bailey v. De Crispigny*, L. R. 4 Q. B. 180; *Baylies v. Fettyplace*, 7 Mass. 325; *Clancy v. Overman*, 1 Dev. & Bat. 402; *Jones v. Judd*, 4 N. Y. 412; *Davis v. Cary*, 15 Q. B. 418.

“If the thing promised be possible in itself, it is no excuse that the promisor became unable to perform

which excuses the performance of the contract the vendee is bound to endeavor to mitigate the loss, and his damages will be measured by the difference between the contract price and the market price at the date of his receiving notice of the existence of the condition.¹

§ 656. **Damages if purchase price paid.** The measure of damages is the same whether the purchase-money has been paid or not. The consideration of a contract does not measure the damages for the breach of it. If the property is worth less than the price and the contract has been rescinded the buyer may sue to recover the consideration, which will then measure his damages; but so long as he stands on the contract, as by suing for its breach, he must be content if the law places him in the position he would have occupied if the contract had been performed.² This it does by permitting the recovery of the market value of the property at the time and place when and where it should have been delivered.³ In some states the highest

it by causes beyond his own control, for it was his own fault to run the risk of undertaking, unconditionally, to fulfill a promise, when he might have guarded himself by the terms of his contract." *Benj. on Sales*, § 571 and note g. See, also, § 572; and *Jones v. United States*, 96 U. S. 24; *Booth v. Spuyten Duyvil Rolling Mill*, 60 N. Y. 487.

¹ *Nickoll v. Ashton*, [1900] 2 Q. B. 298.

² *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. Rep. 486; *Wells v. Abernethy*, 5 Conn. 222; *Smet-hurst v. Woolston*, 5 W. & S. 106; *Rose v. Bozeman*, 41 Ala. 678; *Humphreysville Co. v. Vermont Copper Mining Co.*, 33 Vt. 92; *Lydecker v. Valentine*, 71 Hun, 194, 24 N. Y. Supp. 567.

³ *Vann v. Lunsford*, 91 Ala. 576, 8 So. Rep. 719 (the rule has no application to the sale of a house which the seller promises to remove to the purchaser's lot, but fails to do); *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. Rep. 486; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387;

Wells v. Abernethy, 5 Conn. 222; *Bozeman v. Rose*, 40 Ala. 212; *Rose v. Bozeman*, 41 id. 678; *McGehee v. Posey*, 42 id. 330; *Moore v. Fleming*, 34 id. 49; *Neil v. Clay*, 48 id. 252; *Rutan v. Hinchman*, 29 N. J. L. 112; *Fenton v. Perkins*, 3 Mo. 23; *Farwell v. Kennett*, 7 Mo. 595; *Alexander v. Macauley*, 6 Md. 359; *Dyer v. Rich*, 1 Met. 180; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Leach v. Smith*, 25 Ark. 246; *Kirschmann v. Lediard*, 61 Barb. 573; *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180; *Underhill v. Goff*, 48 Ill. 198; *Butler v. Baker*, 5 Ohio St. 484; *Bicknall v. Waterman*, 5 R. I. 43; *Marshall v. Ferguson*, 23 Cal. 65; *Enders v. Board of Public Works*, 1 Gratt. 372; *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *McDonald v. Hodge*, 5 Hayw. 86; *Doak v. Snapp*, 1 Cold. 180; *Hamilton v. Ganyard*, 34 Barb. 204; *Haywood v. Haywood*, 42 Me. 229; *West v. Pritchard*, 19 Conn. 212; *Whitsett v. Forehand*, 79 N. C. 230; *Kitzinger v. Sanborn*, 70 Ill. 146; *Kribbs v. Jones*, 44 Md. 396; *Parsons v. Sutton*,

market price between the date of the breach and the commencement of the action or the trial is the measure of damages where the price has been paid, if there has been no unreasonable delay in commencing or prosecuting the suit.¹ This doctrine has been held in New York,² but the tendency of the [381] later decisions is towards the standard of value at the time

66 N. Y. 92; *Sadler v. Bean*, 37 Iowa, 439; *Moorehead v. Hyde*, 38 id. 382; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 id. 484; *Furlong v. Polleys*, 30 id. 491, 50 Am. Dec. 635; *Berry v. Dwinel*, 44 Me. 255; *Bush v. Holmes*, 53 id. 417; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176; *Hill v. Smith*, 32 Vt. 483; *Copper Co. v. Copper Mining Co.*, 33 id. 92; *Wyman v. American Powder Co.*, 8 Cush. 168; *Pinkerton v. Manchester, etc. R.*, 42 N. H. 424.

In *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137, a vendor sued on a contract of sale, by which he agreed to deliver property, and for which only a nominal sum was paid down, was liable for the value of the property because he did not set up the fact of non-payment, and was thereby precluded from bringing a subsequent action for the value of the goods. The legal measure of damages for the non-delivery of goods sold, but not paid for, is the difference between the contract price and the market value at the time when they should have been delivered.

On the rescission by the vendor of a conditional contract for the sale of furniture he is liable to the buyer, in an action for money had and received, for the amount of the partial payments made, less a reasonable sum for the hire of the furniture during the time of the buyer's possession of it, and less, also, any depreciation in its value by damage or injury over and above the ordinary wear and tear. The buyer cannot recover for money paid by a previous purchaser unless he accounts for the

hire or damage such purchaser was liable for. *Snook v. Raglan*, 89 Ga. 251, 15 S. E. Rep. 364.

Where the consideration for the personal property on a farm was the care and support of the vendee's parents during the life-time of his father and the payment of the father's existing debts, and the care and support were furnished and the greater part of the debts paid, some of the property being disposed of during the father's life-time, the vendee, on surrendering part of that which remained to the executors of the father without prejudice to his claim against the estate, was entitled to the value of it, less the amount of the unpaid debts. *Wamsley v. Wamsley*, 48 App. Div. 330, 62 N. Y. Supp. 954.

¹ *Gilman v. Andrews*, 66 Iowa, 116, 23 N. W. Rep. 291; *Harrison v. Charlton*, 37 Iowa, 134; *Fisher v. Dow*, 72 Tex. 432, 10 S. W. Rep. 455; *Masterson v. Goodlett*, 46 Tex. 402; *Randon v. Barton*, 4 id. 489; *Calvit v. McFadden*, 13 id. 324; *Brasher v. Davidson*, 31 id. 190, 85 Am. Dec. 525; *Gregg v. Fitzhugh*, 36 Tex. 127; *Cartwright v. McCook*, 33 id. 612; *West v. Pritchard*, 19 Conn. 212; *Davenport v. Wells*, 3 Iowa, 242; *Cannon v. Folsom*, 2 id. 101; *Stapleton v. King*, 40 id. 278; *Kent v. Ginter*, 23 Ind. 1; *Maher v. Riley*, 17 Cal. 415.

² *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Wilson v. Little*, 2 N. Y. 443; *Lobdell v. Stowell*, 51 id. 70.

and place of the breach.¹ They establish the rule that the pledgee of stock who converts it in good faith by making an unauthorized sale of it and refuses to replace it on demand is liable for its highest market price between the time the owner

¹ *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623; *Tyng v. Commercial Warehouse Co.*, 58 id. 308; *Mechanics' & T. Bank v. Farmers' & M. Nat. Bank*, 60 id. 40; *Whelan v. Lynch*, id. 469, 19 Am. Rep. 202; *Wintermute v. Cooke*, 73 N. Y. 107.

In *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, the previous decisions in cases of conversion were reviewed, and the law held to be that there is not a fixed and unqualified rule giving the plaintiff, in all cases of conversion, the highest market price from the time of conversion to the trial, and that such a rule cannot be upheld on any sound principle of reason or justice. Referring to *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91, affirmed, 22 id. 248; *West v. Wentworth*, 3 Cow. 82, and *Clark v. Pinney*, 7 id. 596, *Rapallo, J.*, said: "These were actions for the non-delivery of merchandise in pursuance of a contract of sale, and the extreme rule was applied of allowing to the vendor, as damages, the highest value up to the time of trial. This rule was, however, strictly confined to cases where the purchase price had been paid in advance, it being conceded that in the ordinary case, where the price was to be paid on delivery, the only rule is the market value on the day appointed by the contract for the delivery. It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this state in respect to contracts for the sale and delivery of goods. The reason upon which it is founded is that, where the purchaser has not paid for the goods, he may, on the refusal of his vendor to deliver, go

into the market and buy goods of a similar quality, and that what it would cost him to do this is the just measure of his damages; but where he has paid the purchase-money it is unreasonable to require him to pay it a second time; and therefore all fluctuations in price should be at the risk of the vendor who refuses to deliver while retaining the purchase-money. The very reasoning upon which these decisions are founded demonstrates their inapplicability to a case like the present, where the purchase-money of the stocks [bought on a margin] has not been paid by the complaining party, and the only additional payment which he would be required to make for the purpose of replacing the stocks would be such as was occasioned by the rise in the market price."

The general reasoning in this opinion is against the rule of the highest price after conversion or delivery due on contract, though the facts of the case were considered as not requiring the court to go the length of an unqualified reversal of the rule which had been so generally followed in that state. But subsequent cases, which have just been cited, and others referred to in the next note, show that *Baker v. Drake* has been accepted and followed as a case which has accomplished that departure.

The facts of the case and the law involved are thus stated and commented on in the opinion: "All that appears upon the subject (of the terms of the contract) in the evidence is that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants,

receives notice of his act and such reasonable time thereafter as it may be necessary for him to use in replacing such stock by purchasing it in the market.¹ This rule applies as well where the pledgee is a broker and carries the stock on a mar-

and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited, which they did. No agreement as to margin or as to carrying of stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should, from time to time, require; and that they would purchase the stock and hold and carry the same subject to the plaintiff's direction as to the sale and disposition thereof as long as the plaintiff should desire, and would not sell or dispose of the same unless the plaintiff's margins should be exhausted or insufficient, and not then unless they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale and due opportunity to make good his margin. The answer denies only the agreement to give notice of the time and place of sale, admitting, by implication, that in other respects the agreement is correctly set forth. . . . It appears that the plaintiff had during the whole course of his transactions with the defendants advanced, in the aggregate, but \$4,240 towards the purchase of shares which at the time of the alleged wrongful sale, November 18, 1868, had cost the de-

fendants upwards of \$66,800 over and above all the sums so advanced by the plaintiff. By the stock lists in evidence it appears that these shares were then of the market value of less than \$67,000, and the surplus arising from the sale after paying the amount due the defendants amounted to only \$558, which sum represents the value at that time of the plaintiff's interest in the property sold.

"It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, November 24, 1863, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action and before the trial the stock underwent an alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale of thirty shares at one hundred and seventy per cent. was proved. It afterwards declined, and on the day preceding the trial, October 20, 1879, the price was one hundred and forty-three, having for a month previous to the trial ranged between one hundred and thirty-seven and one hundred and forty-five. The jury in obedience to the rule laid down by the trial court found a verdict for plaintiff for \$18,000, being just the difference between one hundred and thirty-four, which was the average price

¹ *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. Rep. 79, 1 L. R. A. 289; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 id. 368, 47 N.

Y. Super. Ct. 430; *Barnes v. Brown*, 130 N. Y. 371, 29 N. E. Rep. 760, reversing *Barnes v. Seligman*, 55 Hun, 339, 8 N. Y. Supp. 834.

gin for a customer as where the owner has paid in full for it and was holding it for an investment.¹ It will be at once perceived that these cases rest upon the principle that it is the legal duty of the person wronged to use reasonable means to lessen the damage which may result from the wrong. It is

at which the defendant sold, and one hundred and seventy, the highest price touched before the trial,—thirty-six per cent. on five hundred shares. More than two-thirds of this supposed damage arose after the bringing of the suit. This enormous amount of profit given under the name of damages could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supported the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

"In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct the defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in a further loss as in profit, to lay down as an inflexible rule of law as damages for its wrongful interruption the largest amount of profit which subsequent development disclosed might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of

plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded. . . . But the rule adopted in *Markham v. Jaudon* (41 N. Y. 235), passing far beyond the scope of reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good, and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss; but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instance as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss." The court reached the conclusion that the dissenting opinions of Grover and Woodruff, JJ., in the case referred to, embody the sounder law.

¹ *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. Rep. 79, 1 L. R. A. 289.

believed that the same principle applies to contracts for the sale of goods, and that the same result will be reached by the higher court of New York if the question shall arise.

A payment is not made within the rule by the transfer of earnest money, at least where that is repaid before a tender is made of the balance.¹ In Texas interest is not recoverable from the time of the breach, but only from the date of the valuation.² It is held in Iowa that if property has been paid for the purchaser is not bound to go into the market to lessen the liability of the vendor.³

[382] § 657. **Contracts for delivery of stocks.** Bellows, J., in a New Hampshire case, thus sums up the reasons for the prevailing rule respecting damages for the non-delivery of stocks to a vendee: "The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and [383] elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered [384] into the common consumption of the country, in the shape of provisions, perishable or otherwise, to hold that the plaintiff might elect as the rule in all cases the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would in many cases be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial or otherwise. Shall there be dif-

¹ Worthen v. Wilmot, 30 Vt. 555.

³ Mann v. Taylor, 78 Iowa, 355, 43

² Masterson v. Goodlett, 46 Tex. N. W. Rep. 220.

402; Fisher v. Dow, 72 id. 432, 10 S.

W. Rep. 455.

ferent measures of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are doubtless cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of failure to deliver such stocks, the right to elect their value at any time before trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances, of unjust extortion, which no court could contemplate without pain.”¹ The rule in England is indicated by a quotation from *Mayne on Damages*, and some cases later than the last edition of that work accessible in this country.²

¹ *Pinkerton v. Manchester, etc. R. R.*, 42 N. H. 424.

² In *Mayne on Damages* (6th Eng. ed.), p. 190, this subject is thus treated: “In the cases above discussed, no payment had been made for the goods, and on this ground they were distinguished from actions for not replacing stock, because in that case the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. *Gainsford v. Carroll*, 2 B. & C. at p. 625. Accordingly, where there has been a loan of stock, and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such a rate as will indemnify the plaintiff. Therefore, where the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial. *Downes v. Back*, 1 Stark. 318; *Harrison v. Harrison*, 1 C. & P. 412; *Shepherd v. Johnson*, 2 East, 211; *Owen v. Routh*, 14 C. B. 327. In the last case the

rule stated was laid down as the invariable one, without any reference to a rise or fall in the price. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. Per *Grose*, 2 East, 212. In one case where it had fallen, it was estimated at its price on the day it ought to have been replaced (*Sanders v. Kentish*, 8 T. R. 162; see 2 East, 212); and in another case, where no day was named for its replacement, and it had fallen in value, at its price on the day when it was transferred to the borrower. *Forrest v. Elwes*, 4 Ves. 492. But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day (*McArthur v. Lord Seaforth*, 2 Taunt. 257; see *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. at p. 284, 60 J. L. (Ch.) 313); because such a measure

[385] There are cases in this country which distinguish contracts for the delivery or replacing of stocks from other contracts of sale, by allowing for the breach of the former the highest value up to the time of trial, while the damages for

involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim damages for any profit which he might have made, had he possessed the stock, at all events unless his wish to have it back for that express purpose was distinctly communicated to the defendant. Therefore, when the defendant lent five per cent. stock which was to be replaced on a fixed day, and after that day government gave the holders an option to be paid off at par, or to commute their stock for three per cents.; the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take the new stock; held, that he was not entitled to recover the price of so much of three per cent. stock as he might have obtained in exchange for his five per cents. *McArthur v. Lord Seaforth, supra.*

"In the case cited the profits claimed were both contingent in their nature, and collateral to the breach of contract. But where a bond was given to secure the replacement of stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus was afterwards declared upon the stock, it was held by Sir John Leach, M. R., that in equity, and perhaps even at law, the lender was entitled to be placed in the same situation as if the stock had remained in his name, and was therefore entitled to the replacement of the original stock, increased by the amount of the bonus, and to dividends, in the meantime, as well upon the bonus as upon the original stock. *Vaughan v. Wood, 1 Myl. & K. 403.*

"The rules established in the case of a loan of stock were held to be equally applicable where the loan was of mining shares. *Owen v. Routh, 14 C. B. 327.* There appears to be great similarity between these cases and that of a contract for the purchase of goods, in which payment is made beforehand. The plaintiff is equally kept out of his money, and, therefore, equally unable to protect himself by going into the market to buy that which the defendant had agreed to sell him. The defendant has equally the use of the plaintiff's property, and is therefore able to make all the profits by means of it which the plaintiff could have made. If the case is to be governed by exactly the same rules as that of stock, it will require no farther discussion. But upon this point there seems to be very little agreement. . . . The only two cases in England which touch the subject specifically do not tend to clear it up very much. . . . (*Dutch v. Warren, 2 Burr. 1010; Startup v. Cortazzi, 2 Cr., M. & R. 165.*) . . .

"Such is the unsettled state of the law upon the subject. Mr. Sedgwick is of the opinion that the period of breach is the true time, in all cases, in estimating the damages, unless it can be shown that the article was to be delivered for some specific object known to both parties at the time, and thus a loss within the contemplation of both parties has been sustained. *Sedgwick on Dam. 310 (4th ed.).* This doctrine cannot be maintained in England, if, as he also thinks, there is no valid reason for making any difference between stock and any other vendible commodity. It is quite settled that the

the breach of the others have been measured by the [386] value at the time when the goods should have been delivered.¹ But there appears to be no sound reason for this distinction. The market price of stocks fluctuates; so does the market price of other kinds of personal property; both are liable to factitious changes; but all stocks do not, nor do all other kinds of property, in fact, fluctuate to the same extent, or from the same immediate causes. The same considerations which commend the rule of the value at the time of the breach in [387] the case of a contract for the sale and delivery of merchandise

price of stock may be taken at the time of trial. The case may, however, be distinguished on the ground that stock may be supposed to be purchased rather as an investment than for resale, while goods are bought expressly to sell again. Consequently, it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated, in regard to stock, at the price it bore at the time of trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz.: the time they ought to have been delivered."

The courts of England, in actions for non-delivery of railway shares, have given the value at the date of the breach, and not of the trial, and such cases are distinguished from those for failing to replace borrowed stock. *Shaw v. Holland*, 15 M. & W. 116; *Tempest v. Kilner*, 2 C. B. 300; *Barned v. Hamilton*, 2 Eng. Railw. Cas. 624. And in *Elliott v. Hughes*, 3 F. & F. 387, the measure of damages for non-delivery of goods was determined by the highest price up to the trial.

In *Anderson v. Beard*, [1900] 2 Q. B. 260, the defendant employed a

broker to purchase for him certain shares on the stock exchange, and afterwards directed him to "carry over" the shares to the next account. The broker, following the regulations of the exchange, purchased the shares in his own name from the plaintiff, a jobber on the exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed until afterwards. Before the next settling day the broker was declared a defaulter on the exchange, and, in accordance with the rules of that body, his contract with the plaintiff was closed, and the latter took back the shares at a price fixed by the official assignee of the exchange and known as the "hammer price." The defendant denied responsibility for the shares, and the plaintiff at once sold them for the best price obtainable. The defendant was liable for the difference between the price at which the shares had been carried over and that at which the plaintiff sold them, and not merely for the difference between the price at which they had been carried over and the "hammer price."

¹ *Wells v. Abernethy*, 5 Conn. 222; *Bank of Montgomery v. Reese*, 26 Pa. 143; *Kent v. Ginter*, 23 Ind. 1; *McKenney v. Haines*, 63 Me. 74; *Musgrave v. Beckendorff*, 53 Pa. 310.

apply with equal force to contracts for the sale and delivery of stocks. And it is believed the weight of American authority is in favor of assessing the damages for the breach of contracts of sale by the same rule, whether they relate to stocks or merchandise, and whether the price has been paid or not.¹ In Pennsylvania the rule allowing the highest intermediate market price in stock transactions has been restricted to cases in which a trust relation exists between the parties.² In New York, after great discussion, the court of appeals has settled the law to be that the vendor or pledgee of stock is liable for the highest market price between the time of the sale or conversion and such reasonable time as the vendee or owner can, after knowledge of the other's act, supply himself with stock by going into the market.³ This rule, as applied to stock transactions between a broker and his principal, is approved by the federal supreme court.⁴

In a Virginia case stock was borrowed to be returned at specified times; dividends to be paid in lieu of interest. It was not returned, but the borrower continued to pay the

¹ *Enders v. Board of Public Works*, etc., 1 Gratt. 372; *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *White v. Salisbury*, 33 Mo. 150; *Alexander v. Macauley*, 6 Md. 359; *Eastern R. Co. v. Benedict*, 10 Gray, 212; *Noonan v. Ilsley*, 17 Wis. 314, 84 Am. Dec. 742; *Doak v. Snapp*, 1 Cold. 180; *Smith v. Dunlap*, 12 Ill. 184, 193; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306; *Smethurst v. Woolston*, 5 W. & S. 106; *Coldren v. Miller*, 1 Blackf. 296; *Van Vleit v. Adair*, id. 346; *Columbia v. Amos*, 5 Ind. 184; *Coffin v. State*, 144 Ind. 578, 43 N. E. Rep. 654, 55 Am. St. 188 (state bonds); *Kuhn v. McKay*, 7 Wyo. 42, 57, 49 Pac. Rep. 473, 51 id. 205; *Brewster v. Van Liew*, 119 Ill. 554, 8 N. E. Rep. 842, 59 Am. Rep. 823. See *Redding v. Godwin*, 44 Minn. 355, 46 N. W. Rep. 563.

² *Huntingdon, etc. R. & C. Co. v. English*, 96 Pa. 247, 42 Am. Rep. 543.

³ See last section.

In *Barnes v. Brown*, 130 N. Y. 371,

29 N. E. Rep. 760, there was a breach of a contract to assign full-paid stock of a certain corporation; stock not full paid was accepted and returned. The stock stipulated for had no actual or market value at the time the pretended delivery of it was made. It was held (reversing *Barnes v. Seligman*, 55 Hun, 339, 8 N. Y. Supp. 834) that the plaintiff was only entitled to nominal damages, although the defendant, in order to perform the contract, would have been obliged to pay par for the stock. The plaintiff's recovery could not exceed the sum which would indemnify him for his loss.

One who has bought and paid for stock which has never been issued cannot obtain redress in an action for damages, but may recover the money paid. *Rose v. Foord*, 96 Cal. 152, 30 Pac. Rep. 1114.

⁴ *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. Rep. 335.

dividends for some time after the date fixed for returning the stock. It was held the general rule of damages against a vendor was the value of the property at the time it should have been delivered, and interest from that date until paid; that there is no distinction in this respect between contracts for the sale and delivery of stocks and other executory contracts of sale; that under the circumstances the lender might recover the value of the stocks at the time the borrower ceased to pay dividends, with interest from that date.¹ But in a later case² stock was sold and paid for, but the company which issued it denied that the seller owned it, and the buyer, without unreasonable delay, sued for damages. The sale was made at \$3.50 per share. The verdict was for damages on the basis of a value of \$20 per share, the value at the time of the trial, which was less than it had previously been after the breach of the contract. It was said that this, no matter what may be regarded as the proper rule, cannot be deemed excessive. The general rule, where there has been no unreasonable delay in the commencement and prosecution of a case, is to treat the refusal as amounting to a conversion, and gives as the measure of damages the value or its highest price in market at any time after demand and refusal.

In an action at law against a corporation for refusing to issue or transfer stock the rule of damages is the same as upon a sale; the plaintiff may claim in the same suit the value of the stock and the dividends thereon, and the measure of damages is its value at the time of the demand, together with the dividends accrued thereon at that time with interest,³ or at the time of the refusal to register, the officers being entitled to a reasonable time for the consideration of every transfer before they register it.⁴

§ 658. Sale of good-will. The property known as good-will is intangible and consists in "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in

¹ *Enders v. Board of Public Works*, 1 Gratt. 372.

² *Carter's Heirs v. Edwards*, 88 Va. 205, 13 S. E. Rep. 352 (1891).

³ *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *Wilson*

v. London & Globe Finance Corporation, 14 L. T. Rep. 15 (1897); *Saunders v. United States Marble Co.*, 25 Wash. 475, 485, 65 Pac. Rep. 782.

⁴ *In re Ottos v. Kopje Diamond Mines*, [1893] 1 Ch. 618.

consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.”¹ Owing to the peculiarity of the property, the degree of certainty as to the proof of damages which result from the breach of contracts for the sale of it is not as attainable as in the breach of contracts for the sale of tangible property. This uncertainty is not to work a denial of justice to a party who has been wronged; the damages must be ascertained from all the facts and circumstances as best they may. They are to be measured by the injury done, not by ineffectual attempts to injure.² The standard is the same whether relief is sought in an independent action or by counter-claim.³ Where the plaintiff purchased, not merely the good-will attached to the premises transferred, but the property and good-will of the business and the exclusive right to use a trade-mark, it was held that proof of the damages resulting from a breach need not be made by showing specific loss of business and profits as of a bill of particulars of his injuries.⁴ In such a case the wrong done by the vendor is a wilful one, and the case is such as he has chosen to make it; hence his is the loss which may arise from the uncertainty pertaining to the nature of it and the difficulty of accurately estimating the results of his own wrongful act.⁵

¹ Story's Part., § 99. See *Barber v. Connecticut, etc. Ins. Co.*, 15 Fed. Rep. 312; *Wedderburn v. Wedderburn*, 22 Beav. 84.

The distinction between good-will and profits of trade is obvious. "Profits are the gains realized from trade; good-will is that which brings trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term 'good-will.' What the trader gains from the trade so acquired are profits. If by any means customers are driven from a

particular locality to which they resort for trade, it is plain that the trade loses that which we have described as good-will." *Carey v. Gunnison* (Iowa), 17 N. W. Rep. 881, 885; *Nelson v. Hiatt*, 38 Neb. 478, 56 N. W. Rep. 1029.

² *Burckhardt v. Burckhardt*, 86 Ohio St. 261; *Nelson v. Hiatt*, 38 Neb. 478, 56 N. W. Rep. 1029; *Noble v. Wilder*, 25 Tex. Civ. App. 311, 61 S. W. Rep. 325.

³ *Burckhardt v. Burckhardt*, *supra*.
⁴ S. C., 42 Ohio St. 474, 497, 51 Am. Rep. 842.

⁵ *Id.*; *Mellersh v. Keen*, 28 Beav. 453; *Helphenstine v. Downey*, 7 D.

The following language indicates the trend of judicial thought respecting the certainty of proof in actions for the breach by vendors of contracts for the sale of good-will, though the doctrine declared is not everywhere acquiesced in:¹ "With reference to the defendant's contention as to damages, we have no doubt that the judge who tried the case was warranted in finding substantial damages from the defendant's competition in a small place, without evidence specifically directed to what the damage would be, just as in the case of words affecting a trader in the way of his trade."² It is said in another recent case in which the facts showed a wilful and malicious breach of contract, that it was one where the law will not nicely attempt to limit the amount of reparation, but will extend the line of relief so as to embrace all the consequences of the wrong-doer's act, although quite remote from the original transaction. "That it cannot be demonstrated to a mathematical certainty what profits have or have not come from a certain source of business, is no objection to their recovery. In cases for personal injuries the loss of earning capacity, both past and prospective, is considered as an element of damage. The proof of such loss should be as certain as that of loss of profits in business; yet when there is evidence that the capacity is lessened, and that the accident was the probable cause thereof, the injured party is given compensation therefor. So in this case, so far as it was proved that the loss of profits during the term of the contract was caused by the defendant's illegal competition, the plaintiffs were entitled to recover. The fact that the finding rested upon probability only, or was made by drawing inferences from circumstantial evidence, would not render it improper. If, upon the evidence as a whole, there was the slightest balance of probability in favor of the plaintiffs, it would be as erroneous to find against them as it would if their claim had been demonstrated to be true."³

The Missouri supreme court has declared that the good-will of a business which consists of labels and wrappers bearing the

C. App. Cas. 343; *Turner v. Burns*, 24 Ont. 28, citing *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

¹ See *Taylor v. Howard*, 110 Ala. 468, 18 So. Rep. 311.

² *Smith v. Brown*, 164 Mass. 584, 24

N. E. Rep. 101; *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. Rep. 188, 5 Utah, 140, 13 Pac. Rep. 363.

³ *Salinger v. Salinger*, 69 N. H. 589, 45 Atl. Rep. 558.

name of the vendor, or other marks or brands, will be protected on principles analogous to those which govern the infringement of trade-marks; the plaintiff who has obtained the exclusive right to manufacture and sell articles so wrapped may recover all the profits made by the defendant therefrom, regardless of the effect upon his own business or profits.¹ This view is not usually acquiesced in, and seems not to be maintainable on principle. It was observed by the writer of the opinion that in computing the extent of the plaintiff's injury the profits made by the defendant constitute an element; "but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiff's factory, and the amount of their sales, and the reduction in the price of the articles sold, if any, in consequence of the unlawful competition of defendant." These remarks were doubtless *obiter*, and are thus answered: If the profits made by a party who had violated his contract respecting the good-will of a business which he had sold constituted an element of damage, it would necessarily seem to follow that, if he conducted a competing business in such a manner as to keep up the running expenses only, and no profit accrued, he would not be liable for a breach of his covenant, regardless of how much injury he could thus inflict upon his credulous victim. The bare statement of the consequences which would result from the converse of such a proposition establishes its absurdity, and shows that, upon principle, the statement thus made, in a matter to which the court's attention was not particularly attracted, cannot be the law.² On the breach of a contract not to resume the practice of a profession the damages are measured by the value of the practice lost by the plaintiff, regardless of the gains or losses of the defendant, less the sum due under the contract of purchase.³ The damage sustained,

¹ Peltz v. Eichele, 62 Mo. 171.

² Dose v. Tooze, 37 Ore. 13, 60 Pac. Rep. 380; Noble v. Wilder, 25 Tex. Civ. App. 311, 61 S. W. Rep. 235.

³ Gregory v. Spieker, 110 Cal. 150, 42 Pac. Rep. 576, 52 Am. St. 70, citing Peltz v. Eichele, 62 Mo. 171, 180; Lashus v. Chamberlain, 5 Utah, 140, 13

not the consideration paid, measures the recovery.¹ A contract for the sale of the good-will of a business, the vendor binding himself not to engage in the like business for a specified term, contemplates not only that the plaintiff should reap the profits of the business during the term, but also that at the end of the term he would own the good-will of the business. Its loss must be compensated for. If during the term the plaintiff's profits were reduced he is entitled to be recompensed therefor; and if, in addition to that, the good-will of the business at the end of the term was worth a certain amount less than it would have been but for the defendant's illegal act, there may be a recovery for that damage. "The damages are not remote or consequential, either in the sense that they are not the immediate and direct result of the wrongful act complained of, or that they would not have been reasonably anticipated by the parties. . . . But the loss of profits after the termination of the contract cannot be allowed as an element of damages in this case. It cannot be said that, when the contract was made, the parties had in mind that the plaintiff would continue in business indefinitely. Their contract did not involve rights that might exist after its termination, and so a breach of it cannot be said to infringe such rights. So far as the reasonable anticipation of such profits was an element in the value of the business at the termination of the contract, it should be considered. Evidence of the loss of such profits, which had occurred before the trial and as the result of the defendant's illegal acts, was competent upon the question of the reduced value of the business (good-will) when the contract expired."² Where the contract for the sale of a livery-stable and outfit covered the good-will and bound the vendor not to compete with the vendee so long as he remained in business, it was ruled that the measure of damages for its breach was not the difference in the value of the property with the good-will and without the competition of the defendant and such value with-

Pac. Rep. 363; *Howard v. Taylor*, 90 Ala. 241, 8 So. Rep. 36. To the same effect: *Rigney v. Monette*, 47 La. Ann. 648, 17 So. Rep. 211; *Dose v. Tooze*, 37 Ore. 13, 60 Pac. Rep. 380; *Warfield v. Booth*, 33 Md. 63.

¹*Stewart v. Challacombe*, 11 Ill. App. 379.

²*Salinger v. Salinger*, 69 N. H. 589, 45 Atl. Rep. 558.

out the good-will and with such competition. That rule would be practically impossible of application because of the difficulty of determining the difference in the value of the property or contract under the differing conditions; no witness could know how long the plaintiff would continue in business. It was suggested that the plaintiff's most effective remedy would be an injunction.¹

The fact that the purchaser of the good-will of a business paid as part of the consideration therefor the value of an unexpired license to conduct the business, which license was issued to his vendor and was not assignable or transferable, does not affect the recovery.² The damages resulting to a physician by the loss of the practice given up in reliance upon the contract of his vendor to sell his practice do not arise from the breach of such contract, and are not recoverable because the law does not contemplate indemnity for profits the party supposes he would have made from the business he claims he would have pursued if he had not made the contract violated. The plaintiff would have lost his practice if the defendant had not broken his contract.³ The plaintiff's damages are not measurable by the difference between the aggregate price paid and the value of the property received, other than the good-will. Such a rule would make the value of the good-will the measure of damages.⁴ Neither are they to be based upon that rule and also, in addition thereto, such other damages as the plaintiff has sustained. To permit the latter rule would authorize "the jury to make a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, when no agreement had been reached in that respect; and, having reached a conclusion thereon, it would have permitted the jury to treat the difference between such value and the consideration paid as liquidated damages, in the absence of any stipulation to that effect."⁵

¹ Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. Rep. 984.

² Howard v. Taylor, 99 Ala. 450, 8 So. Rep. 36; Taylor v. Howard, 110 Ala. 468, 18 So. Rep. 311.

³ Rigney v. Monette, 47 La. Ann.

648, 17 So. Rep. 211; Williams v. Barton, 13 La. 404, 410.

⁴ Howard v. Taylor, 90 Ala. 241, 8 So. Rep. 36. See Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. Rep. 984.

⁵ Dose v. Tooze, 37 Ore. 13, 20, 60 Pac. Rep. 380.

In an Indiana case it was claimed that fraudulent representations were made to the purchasers of a stock of merchandise and the good-will of the business, in this, that the annual sales were represented to be \$30,000, while they were in fact but one-half that sum. The purchasers obtained a lease of the building in which the vendor had carried on business. The following is substantially the instruction given on the question of damages, of which the supreme court said that it is as accurate, correct and fair a statement of the proper measure thereof as could well be given: The subject of good-will can be considered and its value determined only in connection with the leasehold or rental value of the building or rooms wherein the business was done; the question is confined to the difference between the rental value of the building if the business done there had amounted to the sums represented and the amount of business in fact done there by the vendor. "By the increased rental value on account of the good-will attached is meant, not how much more money would the occupant of the building have made if the good-will had been as represented; that could never be certainly determined; but how much was the rental value increased, or would it have been increased, if attended by such good-will; how much more rent for that place of business would men generally pay for the purpose of carrying on there the same business for the sake of getting such good-will. In short, what is the good-will worth, fixing the value beforehand, taking the chance of realizing on it."¹

§ 659. Contracts to pay in or deliver specific articles. Where the vendee has paid or furnished the consideration, whether directly as purchase-money or in an antecedent debt, and the vendor, for that consideration, undertakes to deliver a specific quantity of goods of a given description at a future [388] day, the contract is of the very nature of those considered, and the damages are calculated upon the value of the property in case of failure to deliver it.² The word "dollars"

¹ *Rawson v. Pratt*, 91 Ind. 9; *Montgomery, etc. Society v. Harwood*, 126 id. 440, 26 N. E. Rep. 182, 10 L. R. A. 532. See *Musselman's Appeal*, 62 Pa. 81, 1 Am. Rep. 382; *Mitchell v. Read*, 84 N. Y. 556.

² *Montelius v. Atherton*, 6 Colo. 224; *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58; *Barnes v. Brown*, 130 N. Y. 371, 29 N. E. Rep. 760, stated in note to § 657; *Butler v. Baker*, 5 Ohio St. 484; *Dyer v. Rich*,

is sometimes used in such contracts, not to express the value in legal currency to be paid, but the quantity of the specific thing to be delivered. It is then a measure of quantity. Thus, on the breach of an agreement to pay a given sum in a particular species of paper, as bank or other notes, or stock, recovery can be had only of the value of such paper.¹ Where one party gave another an acknowledgment of indebtedness, thus: "Due N. \$300 in W. R. R. stock," it was held to bind the party giving it to pay so many dollars in the stock of the company as, when counted at par, would amount to \$300. The court say: "If the stock is appreciated above par, the payee is to be benefited by the increased value; and if depreciated he is then [389] to be restricted to \$300, although worth less than that sum in money. The authorities abundantly show that where the instrument, like the one at bar, is to be paid in bank notes, or in stock or scrip in the similitude of bank notes, then the market value of the notes, stock or scrip is the measure of damages. And the reason given for this rule is, that where a

- 1 Met. 180; Neel v. Clay, 48 Ala. 252; Leach v. Smith, 25 Ark. 246; Doak v. Snapp, 1 Cold. 180; McGehee v. Posey, 42 Ala. 330; Brasher v. Davidson, 31 Tex. 190, 98 Am. Dec. 525; Cartwright v. McCook, 33 Tex. 612; Edgar v. Boise, 11 S. & R. 445; Safely v. Gilmore, 21 Iowa, 588, 89 Am. Dec. 592; Hixon v. Hixon, 7 Humph. 33; Williams v. Jones, 12 Ind. 561; Pierce v. Spader, 13 id. 458; Williams v. Sims, 22 Ala. 512; Moore v. Fleming, 34 id. 491; Marr v. Prather, 3 Met. (Ky.) 196; Herbert v. Easton, 43 Ala. 547; Powe v. Powe, 42 Ala. 113; Mettler v. Moore, 1 Blackf. 342, 12 Am. Dec. 248; Hedges v. Gray, 1 Blackf. 216; Clay v. Huston, 1 Bibb, 461; West v. Wentworth, 3 Cow. 82; Barrett v. Allen, 10 Ohio, 426; Smith v. Berry, 18 Me. 122; Vance v. Bloomer, 20 Wend. 196; Rockwell v. Rockwell, 4 Hill, 164; Baker v. Mair, 12 Mass. 121; Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154; Gilbert v. Danforth, 6 N. Y. 585; Newman v. McGregor, 5 Ohio, 349, 24 Am. Dec. 293; Starr v. Light, 22 Wis. 414; Jemmison v. Gray, 29 Iowa, 537.
- ¹ Hixon v. Hixon, 7 Humph. 33; Robinson v. Noble, 8 Pet. 181; Hopson v. Fountain, 5 Humph. 140; Bush v. Hibbard, 24 Barb. 292; Gordon v. Parker, 2 Sm. & M. 485; Walker v. Meek, 12 id. 495; Arnold v. Suffolk Bank, 27 Barb. 424; Bank of Montgomery v. Reese, 26 Pa. 143; Eastern R. Co. v. Benedict, 10 Gray, 212; Child v. Pierce, 37 Mich. 155; Coldren v. Miller, 1 Blackf. 296; Van Vleet v. Adair, id. 346; Cotton v. Reed, Sneed, 24; Fosdick v. Greene, 27 Ohio St. 484; Green v. Sizer, 40 Miss. 530; Kirtland v. Molton, 41 Ala. 548; Williams v. Jones, 12 Ind. 561; Anderson v. Ewing, 3 Litt. 245; Pierce v. Spader, 13 Ind. 458; Memphis, etc. R. Co. v. Walker, 2 Head, 467; Williams v. Sims, 22 Ala. 512; Hart v. Lanman, 29 Barb. 410; Marr v. Prather, 3 Met. (Ky.) 196; Clay v. Huston, 1 Bibb, 461; Doak v. Snapp, 1 Cold. 467, 78 Am. Dec. 495.

party engages to pay so many dollars in bank notes, stock or scrip, the articles are described and numerically calculated by the number they express; so that \$300 in railroad stock or bank notes is understood to mean that amount as expressed upon the face of the stock or note, and not the amount which will be equivalent in value to \$300 in money; while an instrument drawn for the payment of so many dollars in chattels — wheat, salt, cloth, wool or other like articles — is construed to mean so much of those things as will amount to the sum in money, because the things themselves cannot be counted by dollars, as the name is never applied to them.”¹

It has been already stated that if the property to be delivered has no market value its real value is to be ascertained by such elements of value as are attainable.² Of this character are promissory notes, stocks of projected corporations which fail to organize or any stocks in which there has been no traffic. Where such subjects are contracted to be sold, and there is no market value, how may their value be established? Where, for instance, a contract is made for the transfer of a third person's note of a certain amount in exchange for property, upon breach it has been held that the measure of damages is what the note purports to be worth.³ But in Alabama [390] it is held that such an undertaking is not one to pay the face of the notes;⁴ that the *onus* of proving the value is on the

¹Noonan v. Ilsley, 17 Wis. 314, 84 Am. Dec. 742; Anderson v. Ewing, 3 Litt. 245; German Union, etc. Ass'n v. Sendmeyer, 50 Pa. 67; Dillard v. Evans, 4 Ark. 175; Phelps v. Riley, 3 Conn. 266; Robinson v. Noble, 8 Pet. 181; Parks v. Marshall, 10 Ind. 20; Orange & A. R. Co. v. Fulvey, 17 Gratt. 366; Mettler v. Moore, 1 Blackf. 342, 12 Am. Dec. 248; Wyman v. American Powder Co., 8 Cush. 168; Hedges v. Gray, 1 Blackf. 216; Humaston v. Telegraph Co., 20 Wall. 20; Hussey v. Manufacturers' & M. Bank, 10 Pick. 415; Thrasher v. Pike County R. Co., 25 Ill. 393; Rutan v. Hinchman, 29 N. J. L. 11; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Eastern R. Co. v. Benedict, 10

Gray, 212; Smith v. Dunlap, 12 Ill. 184; Sirlott v. Tandy, 3 Dana, 142; Breckinridge v. Rolls, 2 T.B. Mon. 150; January v. Henry, 3 id. 8; White v. Green, id. 155; Alexander v. Macauley, 6 Md. 359. See Thorington v. Smith, 8 Wall. 1; Shelton v. French, 33 Conn. 489.

²§§ 653, 654.

³Fenton v. Perkins, 3 Mo. 23; Shelton v. French, 33 Conn. 489; Farwell v. Kennett, 7 Mo. 595; Child v. Pierce, 37 Mich. 155; Bates v. Cherry Valley R. Co., 3 Thomp. & C. 16; Thomas v. Dickinson, 12 N. Y. 364, 23 Barb. 481; Kirschmann v. Lediard, 61 Barb. 573.

⁴Williams v. Sims, 22 Ala. 512; Jolly v. Walker, 26 id. 690; Wilson v.

plaintiff; and that, in the absence of affirmative proof of value, only nominal damages can be given.¹ It is believed that the weight of authority is in favor of the rule that notes are, *prima facie*, worth their face; and that, in the absence of disparaging evidence, damages may be assessed on that basis, both in actions for failure to transfer and for conversion.² Where the contract is to pay in the notes of a third person the insolvency of such person may be shown to lessen the damages.³

§ 660. **Same subject.** Stocks, like promissory notes, have a nominal value expressed in dollars or pounds sterling; and, as we have seen, on the breach of a contract for the delivery or transfer thereof recovery is based on their market value, if [391] they have such. In the absence of that evidence of value other circumstances must be resorted to; and their nominal value will perhaps be accepted where there is no other proof. In one case the plaintiff agreed to sell a certain patent to the defendants, who, it was recited in the agreement, were about

Jones, 8 id. 536; Carter v. Penn, 4 id. 140; Moore v. Fleming, 34 id. 491.

¹Id. See also McKiel v. Porter, 4 Ark. 534; Elliott v. Chilton, 5 id. 181.

²Neff v. Clute, 12 Barb. 466; Baker v. Jordan, 5 Humph. 485; Pledger v. Wade, 1 Bay, 35; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Neiler v. Kelley, 69 Pa. 403; Work v. Bennett, 70 id. 484; Eastern R. Co. v. Benedict, 10 Gray, 212; Arnold v. Suffolk Bank, 26 Barb. 424; Thomas v. Dickinson, 23 id. 431, 12 N. Y. 364; Child v. Pierce, 37 Mich. 155; Clay v. Huston, 1 Bibb, 461; Parks v. Marshall, 10 Ind. 20; Smith v. Dunlap, 12 Ill. 184; Rutan v. Hinchman, 29 N. J. L. 112. See §§ 654, 1132.

In Bicknell v. Waterman, 5 R. I. 43, there was an agreement for the exchange of a specified lot of cotton for a specified note of a third person at an agreed price for the cotton. The agreement was made through a broker acting for the parties, and, it being agreed that the purchaser's note should be given for the difference, nothing remained to be done

but to deliver the cotton and receive the notes. It was held to be no defense to an action upon the contract for not delivering the cotton upon tender of the notes that, before the contract was entered into, the maker of the first named note had failed, both parties and the broker being at the time of contracting ignorant of the failure; the law implying, in such a contract of exchange, no warranty of the solvency of the maker. The rule of damages in such a case was held to be the value of the note in money at the time of the contract, at the stipulated price of the cotton to be received in exchange, with interest upon the value from the day the cotton was demanded; the note which had been deposited in the registry of the court to be at the disposal of the defendant.

³Derleth v. Degraaf, 51 N. Y. Super. Ct. 369; Potter v. Merchants' Bank, 28 N. Y. 655; Thayer v. Manley, 73 id. 307; Hynes v. Patterson, 95 id. 6.

to organize a company for the manufacture of the articles under the patent; the plaintiff agreed to make such conveyance as should be necessary to carry the agreement into effect immediately upon the organization of the company; and in consideration thereof the defendants agreed to transfer to the plaintiff, among other things, an amount equal to \$50,000 of the capital stock of the corporation. The court held that the plaintiff was entitled to damages for the breach of his contract; that the amount depended on the value of the stock after the corporation was formed, to be proven by showing what such value would have been if the company had been formed, taking into consideration the property that was to be transferred, and also that by the breach the plaintiff was released from the obligation to transfer it. In such a case it was held to be erroneous to give the plaintiff damages to the nominal amount of the stock. Referring to a previous case,¹ Ingraham, J., said: "In that case the rule of damages was said to be the amount of the obligation to be delivered in payment. But there the plaintiff had transferred to the defendant the property he had agreed to sell, and the court held that the plaintiff could recover the price at which the same was agreed to be sold. Here there has been no conveyance of the property, but the same is retained by the plaintiff, and he is only entitled to damages, and not to the nominal value agreed to be paid. The rule of damages is to be fixed by proof of what the value of the stock would have been if the contract had been performed, over and above the property retained by the plaintiff. Had the property been transferred by the plaintiff, then, in the absence of any proof of value, the rule adopted on the trial would have been the correct one." The trial court had directed a verdict for the nominal amount of the stock.² Contracts are not unfrequently made upon [392]

¹ Thomas v. Dickinson, 23 Barb. 431, reversed, 12 N. Y. 364.

² Kirschmann v. Lediard, 61 Barb. 573; Bates v. Cherry Valley, etc. R. Co., 3 Thomp. & C. 16, 59 N. Y. 641.

In Dyer v. Rich, 1 Met. 180, it was held that a promise that one shall receive a certificate of ten shares of the corporate stock of a certain man-

ufacturing company whose capital stock shall be \$100,000, divided into no more than two hundred shares, is not fulfilled by a tender of a certificate of ten shares of stock in that company of which only \$35,000 are paid in, divided into seventy shares. And it was also held that the rule of damages for breach of such promise

executed considerations to pay a stated sum in specific articles. Upon failure to deliver the articles at the time they are due, the contract furnishes, in the designated sum, the measure of damages. It is the sum stated and agreed to be paid, with interest.¹

Where the agreement is to pay a certain specified sum in specific articles at a stated price, there is much conflict as to the criterion of damages. Thus, a contract to pay \$250 at a future day, in brown cotton shirting at thirty cents per yard, was held to be an agreement to pay \$250, with an option to the maker to pay at maturity in brown shirting at the stipulated price per yard. The court say that the promise to pay \$250 necessarily implies a recognition of indebtedness to that amount; that the residue of the note has no bearing on this point, and relates exclusively to the mode of payment; that the manner in which the debt is to be paid, whether in cash or in collateral articles, has no relevancy in ascertaining the sum due; it points to an object wholly separate and distinct. This is an early and leading case upon the rule of damages which it lays down. Hosmer, C. J., delivering the unanimous opinion of the court, further expounded the contract by saying: "If the defendant, when the note was given, did not owe the plaintiff \$250, and this sum is to be considered as a penalty to enforce the contract, what is the value of the stipulation? It is a promise to pay *blank* yards of cotton shirting, and void for un-

is the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready in good faith to operate upon such capital according to the charter.

¹ Haywood v. Haywood, 42 Me. 229, 66 Am. Dec. 277; Alexander v. Macauley, 6 Md. 359; Marshall v. Ferguson, 23 Cal. 65; Burr v. Brown, 5 W. Va. 241. See Currie v. White, 6 Abb. Pr. (N. S.) 352; Moore v. Hudson River R. Co., 12 Barb. 156.

In Jones v. Foster, 67 Wis. 296, 30 N. W. Rep. 697, the purchaser of mill machinery was to pay a certain price with interest, by sawing logs which the vendor was to furnish, in

yearly instalments until all the timber on certain lands was cut; this might be done in two years, and was required to be done in four. After the expiration of four years the purchaser brought an action based on the failure to furnish logs. It appeared that if the agreement had been complied with the machinery would probably have been paid for by the sawing which would have been done in two years. The plaintiff recovered as damages a sum equal to the profits he would have made if the logs had been supplied, less the price of the machinery and two years' interest thereon.

certainty. Expunge the \$250, or what is virtually the same thing, decide that it is not the real amount of debt or liquidated damages, and the note contains no criterion by which the number of yards of shirting can be estimated. Now, as the [393] quantity of shirting is not mentioned, it necessarily follows that unless the \$250 is the sum due to the plaintiff, and therefore a standard by which to establish the value of the contract, there is no certain engagement in words, or by reference, from which the debt can be ascertained. It is admitted by the defendant that if the note had been for \$250, payable in cotton shirting, and there had ceased, that the damages, in the event of non-payment, must be the sum expressed. This surrenders the question in controversy. Why should the above sum be payable in the event expressed? For this convincing reason: because the damages are *liquidated*. But if the damages had been liquidated, the subsequent agreement that the shirting should be received at thirty cents per yard can have no possible effect on the prior liquidation. It was not inserted for that purpose, but to obviate the necessity of recurring to parol proof for the ascertainment of the value of the shirting should it be delivered. For this end the parties agreed on a certain arbitrary valuation, which they anticipated would probably be the real value, but which, in all events, they, for their mutual convenience, agreed to consider as such. This is the whole scope and effect of this latter clause in the note: that the defendant might know how many yards of shirting to deliver, and the plaintiff how much he was entitled to demand, if it should be tendered. The case has been argued for the defendant as if there had been a promise to deliver a certain number of yards of shirting, and an omission to deliver them. That would present a question of unliquidated damages, in which resort must be had to parol testimony to ascertain the value of the contract, but it has no imaginable bearing on the case before the court in which the debt is ascertained. It has been contended that in no case can the plaintiff recover a sum greater in amount than the value of the article, which, had it been tendered, would have satisfied the contract. This principle is manifestly incorrect, and is not always true, even when applied to a case where the damages have not been liquidated. In a contract for the transfer of stock on a certain day, the party

promising may be relieved by a strict performance of his engagement; but, if he omit to do it, the court will award in [394] damages against him the price of the stock, although it has risen at the moment when the judgment is rendered. The construction which I have given to the note in question is according to the obvious intention of the parties, and perfectly equitable in its result. The sum expressed is to ascertain the indebtedness, that is \$250; and the residue to give an option to the defendant to pay the debt in collateral articles at a stipulated price. If the payment were not made, what must be the expected consequence? That this part of the agreement should be as if it had never existed; and then the whole contract should be comprised in the expression, 'I promise to pay \$250.' Nothing can be more conformable to natural justice. The plaintiff will receive the precise sum admitted to be his due, and no more. And if the defendant is in a condition less eligible than he would have been if he had availed himself of the option allowed him it was his voluntary choice. After he had renounced the privilege accorded to him, to limit the recovery of the plaintiff by the value of the cotton shirting, would be to give the defendant the abnegated option in another shape, in defiance of equity, and in opposition to the agreement of the parties."¹

In a case in which there was a contract for the sale and purchase of cattle at an agreed price, to be paid for in land, also at an agreed price, the vendor was entitled to recover that price in money. It may be, said the court, that he had the choice of several remedies, and that he doubtless could recover the value of the land; but he was not confined to that measure of damages. "We think the case presented by the pleadings and evidence is analogous to that of a note payable in property. If the maker of such a note fails to deliver the specific property on or before the maturity of the note, it becomes a money demand."²

§ 661. Same subject; author's opinion. The view of the law laid down in the Connecticut case, quoted from in the

¹ Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154. Baker v. Todd, 6 Tex. 273, 55 Am. Dec. 775; Short v. Abernathy, 42

² Corbett v. Sayers, 69 S. W. Rep. Tex. 94; Bummel v. Houston, 68 Tex. 108 (Tex. Ct. of Civ. App.), citing 10, 2 S. W. Rep. 740.

preceding section, was adopted afterwards in New York. There were earlier decisions there to the same effect, but they received less consideration. The clause of the contract providing for payment in specific articles and fixing the value was deemed to be inserted for the benefit of the debtor; it offers him a mode of payment which he can adopt or not at his pleasure. The contract thus construed is an alternative one, authorizing the debtor to pay the sum stated therein in specific articles when due, or in money.¹ The chancellor remarked in the course of his opinion that "the language is certainly not the best which could be used to express such an intent, and probably if the contract was drawn by a lawyer he would put it in the alternative, giving the debtor the option in express terms to pay the debt in money or in wheat at the fixed rate per bushel. But certainly if the intention of the parties was that a certain number of bushels of wheat should be absolutely delivered in payment, a lawyer would [395] draw the note for so many bushels of wheat in direct terms."² In some other states such a contract is construed as an agreement for the delivery of the specific articles, and in case of breach by non-delivery the rule of damages is the value of the articles, and not the sum stated therein.³

Uninfluenced by any traditional use or extraneous practical construction of such contracts in states or localities where they are common, giving them, or tending to give them, by custom, a special meaning which the language does not sug-

¹ The option does not survive the time fixed for performance; after that the contract is an absolute one for the payment of money. *New York News Pub. Co. v. National Steamship Co.*, 148 N. Y. 39, 42 N. E. Rep. 514; *Pinney v. Gleason*, 5 Wend. 393, 21 Am. Dec. 223; *Choice v. Moseley*, 1 Bailey, 136, 19 Am. Dec. 661; *Perry v. Smith*, 22 Vt. 301; *Smith v. Coolidge*, 68 Vt. 516, 35 Atl. Rep. 432; *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236.

² *Pinney v. Gleason*, 5 Wend. 393, 21 Am. Dec. 223; *Harrington v. Wells*, 12 Vt. 505; *Perry v. Smith*, 22 Vt. 301; *West v. Wentworth*, 3

Cow. 82; *Smith v. Smith*, 2 Johns. 243. See *Haywood v. Haywood*, 42 Me. 229, 66 Am. Dec. 277; *Trowbridge v. Holcomb*, 4 Ohio St. 38.

³ *Meason v. Phillips*, Addison, 346; *Edgar v. Boise*, 11 S. & R. 445; *McDonald v. Hodge*, 5 Hayw. 86; *Gregg v. Fitzhugh*, 36 Tex. 127; *Price v. Justrobe*, Harp. 111; *Wilson v. George*, 10 N. H. 445; *Mattox v. Craig*, 2 Bibb, 584; *Cole v. Ross*, 9 B. Mon. 393, 50 Am. Dec. 517; *Starr v. Light*, 22 Wis. 414; *Pierson v. Spaulding*, 61 Mich. 90, 27 N. W. Rep. 865; *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. Rep. 1032, 40 L. R. A. 74.

gest, they appear to the writer to be contracts, not simply to pay the sum mentioned, but mutually binding to make and receive payment as the instrument specifies, and that upon default of the debtor the general principle in respect to the *quantum* of damages which applies generally will govern; that is, that the creditor shall receive such sum in damages as will place him in as good condition as though the goods or property had been paid according to the contract. The divergence of the decisions is wholly attributable to the singularity of holding the promise to pay in property at a specified price as not absolutely obligatory; that it imposes no absolute obligation on the debtor, nor confers any right on the creditor. A valid promise, for instance, to pay \$250 in shirting at thirty cents a yard is obviously an absolute promise, in terms, to pay eight hundred and thirty-three and one-third yards; read as the law construes contracts generally, there is no room for interpretation. The creditor is not only entitled to be paid \$250, but he is entitled to receive it in shirting at that price, and the debtor binds himself to make payment accordingly. If there is a want of directness in the agreement, and it would be more natural to express the intention and legal effect by a direct promise of the number of yards, it may be answered that it is not a legitimate deduction from this slight circuitry that the [396] parties do not mean what they say; it is more objectionable to infer that they mean something which they have not said, either directly or by some circumlocution. The interpretation which allows the promisor an option to pay the \$250 in money in satisfaction of his promise ignores a part of the contract and treats it as expunged. The promise as made is not an absolute promise to pay \$250, either in money or in value. If the shirting should be worth just thirty cents a yard when the pay day comes the nominal would be the real value, not otherwise. If the shirting should be worth more than thirty cents per yard when due, the promise to the extent of that excess would be for more than \$250. Hence by making this contract there is no precise liquidation of indebtedness. Nor is there any implication from the contract that the indebtedness ever existed in any other form. If it in fact did previously exist as an absolute debt for that amount, the action for breach of this contract would not be affected by that circum-

stance. Doubtless, after a default an action might be sustained on the indebtedness in its prior form, as though the promise to pay it in specific articles had never been made; because the making of the contract in such case, without performance, would not satisfy the debt; receiving it would be only a conditional payment, and after default no payment at all.

In a case in Ohio where a contract was entered into for work at a certain price, with a stipulation that the same was to be paid for in specific articles at an agreed rate and price, the debtor was held to have an election to deliver the articles or pay the money if such right is expressed or fairly to be implied. If not expressed, and the subject-matter or *res gestæ* indicates that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and imperative promise to deliver the specific articles. If the right of election to pay money or the articles at the option of the debtor exists, and the latter are not delivered, the plaintiff should recover the amount of the debt and interest; but if no such election is expressed or implied the plaintiff is entitled to the market value of the articles with interest.¹

§ 662. Consequential damages on contracts of sale. [397]

The damages which a purchaser is generally entitled to for failure of the vendor to deliver the property contracted are measured by the rules which have been discussed in the preceding pages.² Under special circumstances, known to the parties at the time of contracting, the damages may be enhanced beyond the real or market value of the property. This is the case when it is sold for some special purpose of the purchaser, and where, in consequence of the non-delivery, he, in respect to that intended purpose, sustains damages beyond its value, or the difference between the contract and market price of the property. If a person contracts with another for the sale of personal property and breaks his contract, the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract, or such as may reasonably be supposed to have been in the contempla-

¹ Cleveland & P. R. Co. v. Kelley, 5 Ohio St. 180.

² See, also, § 45.

tion of the parties at the time they made it as the probable result of its breach.¹ It is but the general rule of damages for breach of contract applied to contracts of sale. If the contract be simply one for merchandise at a certain price, to be delivered at a designated time and place, the rule of the difference between the contract and market price and interest affords full compensation; for the vendee may go into the market and purchase like goods at the current price, and thus save himself from loss. Where, however, particular goods, or those of a designated description, are bargained for for a special purpose, or for delivery at a particular time and place in view of ulterior contracts or preparations, a failure of the vendor to perform may cause injury which would not be compensated by that rule; but unless, according to the great preponderance of authority, that purpose, or the special circumstances from which, in case of default, such consequential damages would proceed, were communicated to the seller when the bargain was made, such damages, though they may arise naturally and proximately from the breach of the contract, are yet exceptional, and cannot be said to have entered [398] into the contemplation of the parties.²

¹ *Hadley v. Baxendale*, 9 Ex. 341; *Griffin v. Colver*, 16 N. Y. 489; *Smeed v. Foord*, 1 Ellis & E. 602.

The holder of an insurance policy upon a house he has sold is not liable because of his failure to assign it as agreed for the loss resulting from the destruction of the house. The cost of insuring it for the remainder of the term measures his responsibility. *Dodd v. Jones*, 137 Mass. 322.

The damages recoverable on the breach of a vendor's contract not to sell goods like those purchased by the vendee to other parties in his locality cannot exceed the loss of profits on goods purchased by him at the time the contract was made. *Saddlery Hardware Manuf. Co. v. Hillsborough Mills*, 68 N. H. 216, 44 Atl. Rep. 300, 73 Am. St. 569.

² *Penn v. Smith*, 104 Ala. 445, 18 So. Rep. 38; *Sanderlin v. Willis*, 94

Ga. 171, 21 S. E. Rep. 291; *Orr v. Farmers' Alliance Warehouse & Commission Co.*, 97 Ga. 241, 22 S. E. Rep. 937 (the last two cases add the qualification to the rule stated in the text — unless notice of the contract of resale was brought home to the vendor before he breached his contract); *Rhea Thielens Implement Co. v. Racine Malleable & Wrought Iron Co.*, 89 Ill. App. 463; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. Rep. 49; *Gill v. Johnson-Brinkman Commission Co.*, 84 Mo. App. 456; *Denver, etc. R. Co. v. Hutchins*, 31 Neb. 572, 48 N. W. Rep. 398; *Moffitt-West Drug Co. v. Byrd*, 92 Fed. Rep. 290, 34 C. C. A. 351; *Watson v. Gray*, 16 L. T. Rep. 308; *Guetzkow v. Andrews*, 92 Wis. 214, 66 N. W. Rep. 119, 53 Am. St. 909; *Coffin v. State*, 144 Ind. 578, 43 N. E. Rep. 654, 55 Am. St. 188; *Reed Lum-*

A view somewhat at variance with that stated and the current of authority has recently been held in Virginia by a majority of the judges of the court of last resort. There was no market at or near the place appointed for the delivery of the property, which was paid for in advance, and which the vendor did not deliver. Subsequent to the making of the contract a resale of the property was made at an advance over the purchase price. The price upon the resale was held to afford the best and very satisfactory evidence of its value. Referring to the distinction stated between a resale made at an advance subsequent to a contract of purchase and one made before that event and of which the vendor is informed, the court observe: "This is a rather fanciful distinction. It is not in accordance with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber-getter selling seven hundred thousand feet of lumber to a dealer in lumber should know (1) that it was for a resale; (2) that this resale was to be on a profit; and (3) that he should know that his vendee would be damaged to the amount of his profit if the vendor should prove faithless."¹ But according to the accepted rule, if, at

ber Co. v. Lewis, 94 Ala. 626, 10 So. Rep. 333; Wappoo Mills v. Commercial Guano Co., 91 Ga. 396, 18 S. E. Rep. 308; Detroit White Lead Works v. Knaszak, 13 N. Y. Misc. 619, 34 N. Y. Supp. 924; Buffalo Barb Wire Co. v. Phillips, 64 Wis. 338, 25 N. W. Rep. 208; Goodkind v. Rogan, 8 Ill. App. 413 (cost of reshipment of goods not according to warranty, not recoverable); Jones v. National Printing Co., 13 Daly, 192; Liljengren Furniture Co. v. Mead, 42 Minn. 420, 44 N. W. Rep. 306; Parks v. O'Connor, 70 Tex. 377, 8 S. W. Rep. 104; Cuddy v. Major, 12 Mich. 368; Young v. Cureton, 87 Ala. 727, 6 So. Rep. 352; Mann v. Taylor, 78 Iowa, 355, 43

N. W. Rep. 220; Rahm v. Deig, 121 Ind. 283, 23 N. E. Rep. 141; Citizens' N. Gas Co. v. Shenango N. Gas Co., 138 Pa. 22, 20 Atl. Rep. 947; English v. Spokane Com. Co., 57 Fed. Rep. 451, 6 C. C. A. 416; Lonergan v. Waldo, 179 Mass. 135, 60 N. E. Rep. 479, 88 Am. St. 365; Wilson v. Russler, 91 Mo. App. 275; South Gardiner Lumber Co. v. Bradstreet, — Me. —, 53 Atl. Rep. 1110; Crug v. Gorham, 74 Conn. 541, 51 Atl. Rep. 519.

¹ Trigg v. Clay, 88 Va. 330, 13 S. E. Rep. 434. See Sterling Organ Co. v. House, 25 W. Va. 64, 90, 93; Neal v. Pender-Hyman Hardware Co., 122 N. C. 104, 29 S. E. Rep. 96, 65 Am. St. 697, stated in § 663. In opposition

the time of contracting, sufficient notice be given of the intended use or of other and dependent plans, the vendor on failure to deliver, or on delaying delivery, will be subject to proximately consequential damages. Thus, if the buyer has, in advance, made a contract for resale and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable to damages on the basis of the profits the vendee would realize upon his contract for such resale.¹ Those profits may justly be said to have entered into the contemplation of the parties in making the contract. This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of contract he shall, so far as money can do it, be placed in as good a situation, by

to the Virginia case, *Lapp v. Illinois Watch Co.*, 104 Ill. App. 255.

¹*Robinson v. Hyer*, 35 Fla. 544, 577, 17 So. Rep. 745; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. Rep. 1015; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583, 33 S. W. Rep. 835; *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205, 4 N. E. Rep. 264, 54 Am. Rep. 676, stated in § 69; *Liggett Axle Co. v. Michigan Buggy Co.*, 106 Mich. 445, 64 N. W. Rep. 466; *Shadbolt & Boyd Iron Co. v. Topliff*, 85 Wis. 513, 55 N. W. Rep. 854; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. Rep. 521; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. Rep. 1129, stated in § 50; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. Rep. 495; *Jones v. National Printing Co.*, 13 Daly, 92; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. Rep. 907, 15 Am. St. 193, 5 L. R. A. 586; *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. Rep. 644, 12 Am. St. 299; *Knowlson v. Piehl*, — Mich. —, 90 N. W. Rep. 415; *South Gardiner Lumber Co. v. Bradstreet*, — Me. —, 53 Atl. Rep. 1110;

Currie Fertilizer Co. v. Krish, 74 S. W. Rep. 268 (Ky.); *Eagle Tube Co. v. Edward Barr Co.*, 32 N. Y. St. Rep. 299, 10 N. Y. Supp. 113; *Richardson v. Chynoweth*, 26 Wis. 656; *Hamilton v. Magill*, 12 L. R. Ire. 186; *Carpenter v. First Nat. Bank*, 119 Ill. 352, 10 N. E. Rep. 18; *Ramsey v. Tully*, 12 Ill. App. 463; *Stewart v. Power*, 12 Kan. 596; *Watson v. Bates*, 5 Up. Can. C. P. 366; *Johnson v. Matthews*, 5 Kan. 122; *Morrison v. Lovejoy*, 6 Minn. 319; *Messmore v. New York Shot & L. Co.*, 40 N. Y. 422; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. 45, 20 Atl. Rep. 937; *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219, 62 S. W. Rep. 591; *Pape v. Ferguson*, 28 Ind. App. 298, 305, 62 N. E. Rep. 712, citing the text; *Gunther v. Taylor*, 23 Ky. L. Rep. 536, 63 S. W. Rep. 439; *Tradewater Coal Co. v. Lee*, 24 Ky. L. Rep. 215, 68 S. W. Rep. 400; *Lapp v. Illinois Watch Co.*, 104 Ill. App. 255; *F. W. Kavanaugh Manuf. Co. v. Rosen*, — Mich. —, 92 N. W. Rep. 788.

the recovery of damages, as if the contract had been performed.¹ A vendor who knows that goods have been ordered for the purpose of being resold at a profit is chargeable with knowledge of such profits as the market price at the time delivery was due would have brought the vendee.² A vendor who knows that his vendee has bought goods to fill an order given by a third person is liable to such vendee for the price he was to receive although no notice of it was given the vendor, if such price is not such as to yield an extraordinary and unusual profit, one which could not reasonably be presumed to have been in contemplation by the vendor at the time of contracting. The price at which the first vendee sold is not to be presumed to be unreasonable; but if it is the vendor will not be liable unless it is shown that he had knowledge of it.³ Expenses incurred in making sales in anticipation of delivery may be recovered as well as the profits which would have been made;⁴ and also the damages which a vendee has been obliged to pay his sub-vendee for failure to deliver the goods bargained for. In restoring an injured party to the same position he would have been in if the contract had not been broken, account must be taken of losses suffered as well as of profits prevented.⁵ If the vendor was told at what time the vendee desired to put his salesmen on the road he is liable for

¹Shouse v. Neiswaanger, 18 Mo. App. 236, 244, quoting the text; Messmore v. New York Shot & L. Co., 40 N. Y. 422. It was also held in this case that where the article furnished by the seller was not such as the purchaser was entitled to, and the seller was notified to that effect, the purchaser had a right to sell it at the place of delivery for the best price he could obtain, without giving notice to the defendant of the time and place of such sale; that after the sale he could recover from the vendor the difference between the sum paid and the sum realized on the resale.

²Jordan v. Patterson, 67 Conn. 473, 35 Atl. Rep. 521.

³Guetzkow v. Andrews, 92 Wis.

214, 224, 66 N. W. Rep. 119, 53 Am. St. 909.

⁴Mirandona v. Burg, 51 La. Ann. 1190, 25 So. Rep. 982; Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 51 N. W. Rep. 197.

The code of Georgia declares that any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages. This has no application where the party who seeks to recover such expense was to perform the contract at his own cost, if he also seeks to recover lost profits. Fontaine v. Baxley, 90 Ga. 416, 17 S. E. Rep. 1015.

⁵Jordan v. Patterson, 67 Conn. 473, 35 Atl. Rep. 521.

the loss of their time, although it was not said to the vendor that the salesmen would be idle if the goods were not furnished at the time agreed upon. "In determining the question of damages in such a case, the seller ought to be held to have in contemplation the ordinary and usual methods of the business of the purchasers, or of the trade with which he transacts business."¹ Where there was a failure to deliver drain pipe to a contractor for use in a ditch already dug the vendor, being notified that delay in delivery might result in the washing in of the ditch in case of rain, must answer for the expense incurred by the contractor in redigging the ditch, that result having been caused by reason of his delay.² In order that there may be a recovery of the loss of profits to the vendee's business because of the vendor's breach of contract, it must be shown that the business had been in successful operation for such length of time as to give it permanency and recognition, and that it was producing a profit which is approximately ascertainable.³

§ 663. Same subject; illustrations. If a vendor in guano knows that the buyer has ordered it for use as a fertilizer and fails to deliver a portion of the quantity ordered, and the latter is unable to procure it elsewhere, the seller is liable for damages equal to the difference in value between the crop raised on the land on which the guano delivered was used and that raised on the same quantity of land of like quality and subjected to the same method of cultivation on which none was used in consequence of his breach.⁴ A vendor had notice that the vendee was buying the article, caustic soda — not ordinarily procurable in the market — for the purpose of a resale at a

¹ *Blumenthal v. Stahle*, 98 Iowa, 722, 68 N. W. Rep. 447. Compare *Moffitt-West Drug Co. v. Byrd*, 92 Fed. Rep. 290, 34 C. C. A. 351. See *Farrer v. Caster*, — Colo. App. —, 67 Pac. Rep. 171.

² *Loneragan v. Waldo*, 179 Mass. 135, 60 N. E. Rep. 479, 88 Am. St. 365.

³ *States v. Durkin*, 65 Kan. 101, 68 Pac. Rep. 1091; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. Rep. 492. See § 59.

In *Doane v. Preston*, — Mass. —, 67 N. E. Rep. 867, a bill in equity was

filed against the officers of a corporation based on their neglect to enter into a contract for the exclusive right to manufacture, sell or lease patented machines, patents for which the corporation owned. It did not appear that the machines were ever used, or that a demand for them existed. The proof of damages was too indefinite to warrant a recovery.

⁴ *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52.

distance. It was to be delivered, twenty-five tons in June, twenty-five tons in July, and twenty-five tons in August. None was delivered until September, and then only twenty-six tons. If the vendee could have delivered, on his contract, the soda which the vendor failed to deliver the profit thereon would have been 52*l.* 5*s.* 4*d.* That sum was paid into the court in an action upon the contract. But the vendee had to pay additional cost of transportation on account of the late- [399] ness of the season on the part delivered, and a certain sum to his sub-vendee for damages on the subcontract for loss of profits on a resale by him. The court held the vendee was entitled to recover as damages for the defendant's breach the loss of the profit the plaintiff would have derived from the transaction if the defendant had delivered the soda pursuant to his contract. He was held liable for the increased cost of transportation, but not for the damages paid to the sub-vendee. The latter were too remote. On this point Erle, C. J., said: "The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that it is agreed that he is responsible. But he had no notice of the subsequent resale; and it is not to be presumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural or necessary consequences of a breach of the contract he was entering into."¹

Where a coal dealer who had contracted to supply coal to steamers entered into a contract with the defendant for the coal he needed, which was expressly stated to be for shipment in such steamers, and in consequence of the defendant's default in supplying the coal one of the steamers was delayed, and a claim of 150*l.* was made against the plaintiff on account thereof, which claim it was subsequently sought to enforce by action, which action the plaintiff defended so successfully as to reduce the claim to 20*l.*, he was entitled to recover from the defendant as damages the costs reasonably incurred by him in

¹ *Borries v. Hutchinson*, 18 C. B. L. R. 10 Q. B. 265; *Sawdon v. Andrew*, 30 L. T. 23; *Masterton v. Mayor*, 7 Hill, 61; *Grebert-Borgnis v. Nugent*, L. R. 9 Q. B. 473; *Hinde v. Liddell*, 15 Q. B. Div. 85.

making such defense, less the amount recovered from the plaintiff in that action, which the defendant herein declined to defend. Such damages, it was declared, are within the rule laid down in *Hadley v. Baxendale*. The Earl of Halsbury, L. C., said: Both parties carried on business at C. The defendant knew what the plaintiff's business was, and that the coals were required for the purpose of supplying coals to steamers lying at C. Under the circumstances it is idle to suggest that it was not in the contemplation of the parties that a breach of the contract to supply coals would probably lead to such a claim against the plaintiff as was set up by the ship owners in this case. It would, under the circumstances, almost necessarily follow from a breach of the contract that such a claim would be made. It is also obvious that, if such a claim were made, it would be reasonable for the plaintiff, if, as was the case, he could not show that he was not liable, to take such steps as might be necessary to ensure that, at all events, the damages recovered should not be extravagant. It would be contrary to the principles of ordinary conduct in business that he should not endeavor to do this. . . . I really cannot see any distinction in substance between these costs and the charges of a surgeon in attendance upon a plaintiff who has sustained personal injuries through a tort.¹

On failing to deliver machinery to be used in propelling a boat the vendor is liable for the rental value of the boat while it cannot be used in consequence of the breach.² A vendor contracted to supply the furniture required for rooms in a hotel; failing to do so, he was liable for the loss resulting from the vendee's inability to use the rooms.³ A vendor must respond for the damages suffered by his vendee in consequence of being delayed in commencing the ginning of cotton because of the failure to deliver machinery contracted for for that purpose, the vendee having been engaged in that business and the vendor knowing that fact.⁴ On the failure to furnish a stipulated

¹ *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413, approving *Hammond v. Bussey*, 20 Q. B. Div. 79, and doubting observations in *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35.

² *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. Rep. 249, 35 Am. St. 326.

³ *Berkey & G. Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. Rep. 336, 8 L. R. A. 65.

⁴ *Gore v. Malsby*, 110 Ga. 893, 36 S.

quantity of distillery slop, with knowledge that it was to be used for fattening cattle, the vendor is liable for the profits the vendee would have made if the contract had been performed, he being unable to get other slop or to profitably fatten the cattle on other food.¹ Where there was a breach of a contract to furnish lumber for the construction of a building and the vendee was unable to procure other lumber, compelled to keep workmen idle, delayed in the construction of the building and put to additional expense by the vendor's default, compensation for these losses was just. The vendee was not bound to discharge the men and incur the risk of getting others.² It is declared in North Carolina that if the vendor's agent knew or could by ordinary care have known the purpose for which an article sold by him was intended, his knowledge is the knowledge of his principal, and that it must be common knowledge in localities where tobacco is cultivated that, if it is not cut and cured in apt time, serious loss is the necessary consequence; that such knowledge extends to the proper season for cutting and curing, and is presumed to have been present with the agent and defendant, who was a manufacturer of flues used in curing tobacco. The failure to furnish such flues made the vendor liable for the damages to plaintiff's crop which resulted from waiting for them and the use of cast-off flues which were unfit for use.³

In assessing damages against a vendor for breach of a contract to deliver certain bridge timber to be manufactured by him, where the purchaser had procured it otherwise at an increased cost, the court held that if the course pursued by the purchaser in obtaining the timber was the only way in which it could be obtained, or was the ordinary and usual or a reasonable and prudent way of obtaining it, the difference between the contract price and the higher cost of the timber thus obtained might be recovered as damages naturally arising from

E. Rep. 315. It seems that it would be otherwise if the business was not an established one. *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519. Or if the plaintiff had not conducted it. *Mirandona v. Burg*, 51 La. Ann. 1190, 25 So. Rep. 982.

¹ *New Market Co. v. Embry*, 20 Ky. L. Rep. 1130, 48 S. W. Rep. 980.

² *Clark v. Bailey*, 22 Ky. L. Rep. 1668, 61 S. W. Rep. 30.

³ *Neal v. Pender-Hyman Hardware Co.*, 122 N. C. 104, 29 S. E. Rep. 96, 65 Am. St. 697.

the breach itself. If the course pursued by the purchaser was not the ordinary and usual way, and would not be a reasonable or prudent one, were it not for an engagement into which the purchaser had entered with a third party for the completion, within a limited time, of the bridges for which the timber was contracted to be furnished, the purchaser cannot recover the increased cost he has been obliged to incur in order to fulfill such engagement, unless its nature was known to the vendor at the time the contract was made. But if so made known, the purchaser may recover the difference between the contract price and the higher cost, at which, acting in good faith and with reasonable diligence and prudence, he has been obliged to obtain the kind and quantity of timber contracted for in order to fulfill his engagement; for these damages may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of its breach.¹ The vendor of an engine, which he knew was to be used in grinding corn to feed cattle which were being fattened for the market, because of his failure to deliver it became liable to the vendees for the necessarily increased expense of having the feed ground for the cattle; the cost of other feed than that which the vendees would have used if the engine had been delivered, the purchase of which feed was made necessary by their inability to grind, with the power they had, sufficient feed of the kind they would have used but for the default. In respect to this head of damage the court said: "If the plaintiffs were unable to grind the quantity of corn necessary for the feed of their cattle, in order to keep them in a thriving condition, they would, of course, substitute the next best and most economical feed accessible to them for the purpose. If the cost of supplying the deficiency in corn meal with cottonseed meal was greater than the cost of the equivalence thereof in corn meal ground on the plaintiffs' own mill, had the defendant furnished the engine, then no reason is seen why the difference in the cost of the two meals was not an item of damage fairly and reasonably within the contemplation of the defendant when he entered into the contract and for which he was liable. In order to render the defendant liable it was not

¹ Paine v. Sherwood, 21 Minn. 225; Feehan v. Hallinan, 13 Up. Can. Q. B. 440.

required that the plaintiffs should have notified the former at the time he entered into the contract that, in case he made default, they would be compelled to substitute cotton-seed meal for so much of the needed corn meal as they should be unable to procure, for this must be held to have then been reasonably contemplated by him." The vendor was not liable for delay in getting the cattle ready for the market; his default was not the direct and proximate cause thereof.¹

On the breach of a contract to furnish paint suitable for painting a house, the damages resulting from a change in the color of the paint after it began to dry and from the fact that the blinds to which the paint had been applied became so gummy as to be immovable, are not too remote.² But it is not the natural result of the breach of a contract to sell a business that the buyer, who gave up his employment to take possession of it, should remain unemployed for six months after the breach;³ or that he should sell out his interest in a business in order to obtain money to pay for the property for which he had contracted.⁴ The vendor of a planing machine who fails to deliver it is not liable for the loss of profits in the business of the vendee, nor for his expenses in obtaining a machine in lieu of it. Both these are too remote and speculative.⁵ The vendor of iron columns in a building which was being torn down is not liable, after default in performing his contract, for the expense incurred by the purchaser in grading for the purpose of erecting a building he did not erect, nor for the value the columns would have had for him in the building if he had erected it.⁶

If the element of wilfulness enters into the conduct of a vendor of dangerous articles liability for consequential damages may be more far-reaching than under ordinary circumstances. In a North Carolina case defendant sold to the plaintiff's wife large quantities of laudanum for use as a beverage, with knowledge that she was, by its use, injuring both mind and

¹ *Chalice v. Witte*, 81 Mo. App. 84.

² *McCaa v. Elam Drug Co.*, 114 Ala. 74, 21 So. Rep. 479, 62 Am. St. 88.

³ *O'Connor v. Nolan*, 64 Ill. App. 357.

⁴ *Webster v. Woolford*, 81 Md. 329, 32 Atl. Rep. 319.

⁵ *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203, 21 S. W. Rep. 104.

⁶ *Warren v. A. B. Mayer Manuf. Co.*, 161 Mo. 112, 61 S. W. Rep. 644.

body and causing loss to the plaintiff. Such sales were continued, notwithstanding repeated warnings and protests on the part of the plaintiff. This conduct placed liability on the defendant for the loss of the wife's services and companionship.¹

§ 664. **Damages for delay in delivering property.** Damages for delay in the delivery of property sold or contracted for may be recovered according to circumstances. Where it has been paid for the jury may allow, if there is no proof of special damage, interest on the price from the time it should have been, until it actually is, delivered.² If there has been a decline in the market value at the time of the delayed delivery, damages for the delay may be assessed at the amount of the depreciation.³ In *Merrimack Manufacturing Co. v. Quintard*⁴ it was held that, inferior coal having been delivered after the contract time, the vendee was entitled to the difference between the value at the place of delivery of the coal called for by the contract and the value of the coal delivered as damages for the inferior quality; and that the measure of damages for failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance which had to be paid by the purchaser and the average rate during the time covered by the contract for monthly deliveries. It was also held that evidence was admissible to show that freight on coal was usually higher in the autumn than in the summer, to prove what was in the contemplation of the parties, and that the loss occasioned by the increase in freight is properly to be recovered as damages. But it has been held in a comparatively recent [401] case that compensation for delay in delivering plank intended for a road does not include the increased expense of laying the plank by reason of such delay; that such damages are too indefinite.⁵ Sharswood, J., said: "To say that.

¹ *Holleman v. Harward*, 119 N. C. 150, 25 S. E. Rep. 972, 56 Am. St. 672, 34 L. R. A. 803, citing *Hoard v. Peck*, 56 Barb. 202.

² *Edwards v. Sanborn*, 6 Mich. 348.

³ *Ramish v. Kirschbraun*, 98 Cal. 676, 33 Pac. Rep. 780, 107 Cal. 659, 40 Pac. Rep. 1045; *Tyler Car & Lumber Co. v. Wettermark*, 12 Tex. Civ. App.

399, 34 S. W. Rep. 807; *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, 43 S. W. Rep. 676; *Spiers v. Halsted*, 74 N. C. 620; *Startup v. Cortazzi*, 2 Cr., M. & R. 165; *Clements v. Hawkes-Manuf. Co.*, 107 Mass. 362.

⁴ 107 Mass. 127.

⁵ *Pennsylvania R. Co. v. Titusville, etc. Co.*, 71 Pa. 350.

the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carriers seems to be entirely too indefinite. It would include a rise in wages, stormy weather, bad roads in consequence, which would be entirely beyond what would naturally have been within the view of the parties, and might well have happened even had the railroad company punctually performed their duty. The natural consequences of delay and stoppage of work, payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been, form the rule."¹

It seems but reasonable that the purchaser should so far rely upon the vendor's punctual performance of his contract as to be justified in making necessary preparations to receive the property he has agreed to deliver, and that these should be compensated for by the vendor if he does not perform;² but this is not the rule in Pennsylvania if he has no notice of the circumstances.³ Where the defendant agreed to construct a ship which he knew was intended to carry passengers to Australia, and special damages were claimed for delay in completing it, in this, that if the ship had been delivered according to the contract the plaintiffs would have made a profit of £7,000 on the voyage, but, in consequence of a fall in freight, they made only £4,280 after the vessel was delivered, the jury gave a verdict for the plaintiff for £2,750 damages, which the court refused to set aside.⁴

Where there was a delay of three weeks in delivering beans and a sub-vendee canceled his contract, and the original vendor afterwards admitted its responsibility for the delay, but declined to take the beans, take charge of their sale or advise what should be done with them, and the vendee sold them at a loss, the vendor was liable for the resulting damage, but that did not include the vendee's traveling expenses, lawyer's fees, or money paid for photographs, telegrams, exchange, etc.⁵ The vendor is not liable for the loss of his vendee's profits on

¹ *Id.*

⁴ *Fletcher v. Tayleur*, 17 C. B. 21.

² *Chatham v. Jones*, 69 Tex. 744, 7 S. W. Rep. 600.

See *Blanchard v. Ely*, 21 Wend. 342.

³ *Billmeyer v. Wagner*, 91 Pa. 92.

⁵ *Lippert v. Saginaw Milling Co.*, 108 Wis. 512, 84 N. W. Rep. 831.

a resale unless he had notice thereof at the time his contract was made.¹ A vendee cannot claim loss of profits on a resale if he could have obtained a substitute for the goods in time to have fulfilled his contracts at a price which would not have reduced his profits.² Neither can he recover special damages on other grounds if he could supply himself with an article like that ordered.³

§ 665. **Same subject.** A vendor agreed to deliver by a stipulated day a steam-engine, intended, as he knew, to drive machinery for the sawing and planing of lumber. It was not delivered until a week after the day fixed. In the assessment of damages for such breach of contract the vendee proved that the net average value of the engine at the time and place, and for the purpose intended, was \$50 a day beyond the wear and tear of the machinery and the cost of running it. This result was obtained by a calculation of such wear and tear and cost, and the amount of lumber it would saw and plane in a day, together with the prices which the vendee received for the sawing and planing. This mode of arriving at the damages [402] was rejected. It was held that the proper rule for estimating them was to ascertain what would have been a fair price to pay for the use of the engine and machinery in view of all the hazards and chances of business.⁴ Some general principles were laid down in the decision of this case which have been extensively quoted with approval. It was held that the rule which precludes the allowance of profits by way of damages is not a primary rule, but a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained; that it is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; that it is under this rule that profits are excluded from the estimate in such cases, and not because there is anything in their nature which

¹ Bunch v. Potts, 57 Ark. 257, 21 S. W. Rep. 437. See § 662.

² Id.; Watson v. Kirby, 112 Ala. 436, 20 So. Rep. 624.

³ Blakeslee Manuf. Co. v. Hilton, 5 Pa. Super. Ct. 184.

⁴ Griffin v. Colver, 16 N. Y. 489; Creamery Package Manuf. Co. v. Benton Creamery Co., — Iowa, —, 95 N. W. Rep. 188.

should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. It was remarked that nearly every element entering into the vendee's computation of damages would have been of that uncertain character which has uniformly prevented a recovery for speculative profits. Selden, J., said: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the [403] last. These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural and even necessary result of the breach; and yet, if in their nature uncertain, they must be rejected. . . . So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach but for some special circumstances, collateral to the contract itself, or foreign to its apparent object, they cannot be recovered."¹

In a suit to recover damages for the non-delivery of a planing machine it appeared that the plaintiff, a resident of Iowa, went to the defendant's warehouse in Chicago and bought the machine, which he selected with reference to its weight and finish. He paid \$100 in hand, and was to pay \$450 more on its delivery at his residence in Iowa. The contract was that he was to have the identical machine he had selected, which

¹Freeman v. Clute, 3 Barb. 424; §§ 53, 58, 59; Fraser v. Echo Mining & Smelting Co., 9 Tex. Civ. App. 210, 28 S. W. Rep. 714.

was to be shipped when ordered. The plaintiff returned home to put up his shafting and pulleys, with the understanding that he was to send for the machine as soon as he should be ready to put it up. He ordered it by letter on the 13th or 14th of March, and after a delay of fifteen or sixteen days received a letter saying that a machine had been shipped to him. He declined to receive any machine except the one bought; he demanded it, and it was refused on the 13th of April, and on the same day he bought another machine. On the trial the plaintiff offered to prove that he had erected a building, and put in a steam-engine and shafting at an expense of \$5,000, with a view to the use of this machine; that the defendant had notice of this when the contract was made; that it all lay idle for thirty-five days in consequence of the defendant's breach of his contract. It was held that such evidence was admissible; that, in arriving at the damages which the plaintiff was entitled to recover, he should be allowed to show what would have been a fair rent for the use of the building and machinery, if in running order, during the time they lay idle in consequence of the defendant's refusal to deliver the machine, though such rent should not be allowed for any longer time than was reasonably necessary for supplying himself with another machine of similar character, after being advised of the defendant's refusal to send the one purchased, and should not be allowed anything for probable profits.¹ Where there was delay in delivering logs to a saw-mill, the operations of which were thereby interrupted, these rules were announced: It was the vendee's duty to obtain logs elsewhere as expeditiously and cheaply as he reasonably could, if that was practicable; the vendor would be responsible for the excess of the cost of the logs so obtained over the price at which he contracted to furnish them, and also for such reasonable expenses as were incurred in so doing. The vendee might have kept his teams and men unemployed for a short time at the vendor's expense if there was a loss by the suspension of the operations of the mill; but this could not be done if there was no reason to expect the delivery of the logs, nor if they could be obtained

¹ *Benton v. Fay*, 64 Ill. 417. See which a recovery for the lost profits Creamery Package Manuf. Co. v. of a business it was sought to establish was denied. *Benton Creamery Co., supra*, in

elsewhere. It was further said that interest on the value of the mill for the time it remained idle would not be objectionable as a measure of damages, but that there could not be a recovery of general profits for so short a time as ten days, because of the uncertainty as to what they would be.¹ In a North Carolina case in which there was delay in delivering machinery for a cotton mill, the court refused a recovery of the estimated monthly rental value of the machinery, that value being based on an estimate of the profits which might have been made on the raw material purchased and the manufactured goods sold; but suggested that the measure of damages is a fair rental value of the mill for the loss of time caused by the vendor, as to such part of the mill as his machinery would have equipped. "If this cannot be otherwise accurately determined by certain and determinate *data*, which were contemplated by the parties on entering into their contract, then the law will allow the legal rate of interest upon the capital invested to be the measure,² not because it is an accurate criterion, but for the reason that it is approximately just." If the vendee incurred losses and expenses incidental to the delay, such as insurance, idle labor, deterioration in machinery, etc., these were elements of damage.³ Profits are recoverable if the vendor was informed of a contract entered into by the vendee at the time the agreement for the delivery of the property sold was made, provided they are reasonably certain.⁴ In a Texas case a vendor who failed to deliver machinery for a cotton gin, he knowing the purpose for which it was ordered and the period covered by the season, was adjudged to be liable for the value of the use of the gin while it was idle, such value being ascertained by the net profits which would have been made if the gin had been in operation.⁵

§ 666. **Same subject.** An English case illustrates the extent of the vendor's liability for consequential losses in a strik-

¹ *Watson v. Kirby*, 112 Ala. 436, 20 So. Rep. 624.

² Citing *Rocky Mount Mills v. Wilmington & W. R. Co.*, 119 N. C. 693, 5 Am. St. 682, 25 S. E. Rep. 854.

³ *Tompkins v. Dallas Cotton Mill*, 130 N. C. 347, 14 S. E. Rep. 938. See *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 21 S. E. Rep.

917, in which the cost of insurance was ruled not to be a ground for recovery in an action for the breach of a warranty.

⁴ *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 584, 41 S. E. Rep. 797.

⁵ *Dilley v. Ratcliff*, 69 S. W. Rep. 237 (Tex. Ct. of Civ. App.).

ing manner. The defendant had contracted to furnish a steam threshing-machine on a fixed day, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the machine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by a thunder-storm, and it was necessary to kiln-dry a part of it; its market value was thereby diminished, and before it could be sold the market price had fallen. It was held that plaintiff was entitled to recover damages for the expense of carting and stacking the wheat, for the loss by reason of the exposure to the weather, including the expense of kiln-drying. In respect to these items Lord Campbell, C. J., said: "The plaintiff, who was a large farmer, was known by the defendant to be accustomed to thresh out his wheat in the field; he gave the order for the threshing-machine, which, it was agreed, should be delivered on the 14th of August, at which time the wheat might reasonably be expected to be ripe for threshing; the defendant knew that it was wanted for that purpose. Then, was it not in the contemplation of the parties that, if it was not delivered at that time, damage by rain might ensue to the plaintiff? The thunder-storm occurred, and the plaintiff's wheat was damaged. If the engine had been delivered at the time agreed upon, the corn would have been threshed out, and would have been carried to market in good condition, instead of which it was damaged. Is not this injury a natural consequence of the breach of contract? And may it not reasonably be supposed to have been foreseen by the parties? . . . Therefore, as respects those items for which the plaintiff claims damages as resulting from the falling of the rain, I am of opinion that he is entitled to recover. But, as respects [405] the fall of the market price of wheat in respect of which he claims damages, my opinion is quite different; because it could not have been foreseen by the parties that the market would fall; it was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract."¹

¹ *Smeed v. Foord*, 1 E. & E. 602. ing that damages caused by delay
See *Friend & T. Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. Rep. 40 (hold- may be recovered, but not those
which result from a failure to per-

The discrimination between a loss from exposure to rain and loss from fall in the market price does not appear to have caused any criticism, although the case has been frequently referred to.¹ The latter, however, arose as proximately from the delay in furnishing the machine as the other loss did; neither could have been foreseen; both did occur; and the parties must have known when the bargain was made that, if the vendor delayed performance, a loss from rain or from fall in the market was equally possible. The machine was relied upon to do the threshing, and the circumstances were such that the court held that the plaintiff was entitled to rely upon it. Had the storm destroyed the entire crop, notwithstanding such exertions of the plaintiff to prevent it as the law required him to make, the defendant, on the principle of the decision, would have been liable for its value, and that value would be the market value at the time of the loss, or at the date when, by reason of the breach of contract, the plaintiff was prevented from realizing the value by sale. On the principle that the injured party is to be placed in as good a situation by damages [406] as he would have been in if the contract had been performed, the value should be assessed, in the case supposed, at the time when, but for the defendant's breach of contract, the wheat would have been taken to market. In the actual case the plaintiff was entitled to that measure of damages, less the

form); *Van Winkle v. Wilkins*, 81 Ga. 93, 7 S. E. Rep. 644, 12 Am. St. 299 (depreciation of cotton-seed while the owner was awaiting the arrival of machinery, recovered for).

¹ In *Mayne on Damages* (6th Eng. ed., p. 26) the following is said in respect to *Smeed v. Foord*, *supra*: "The concluding part of the above ruling was put upon a finding of fact, viz.: that the parties could not have contemplated a fall in the market as one of the natural consequences of a breach of contract. Upon this point, however, it is difficult to see the distinction between this case and the other cases quoted below: *Collard v. South Eastern R. Co.*, 7 H. & N. 79; *Borries v. Hutchinson*, 18 C. B.

(N. S.) 445, 34 L. J. (C. P.) 169; *Ward v. New York Central R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405. If the defendant had undertaken to thresh the plaintiff's wheat and hand it over to him, and, in consequence of his delay, the market had fallen, these cases decide that the loss so incurred would have been part of the natural loss arising from breach of contract. Here the defendant only undertook to supply him with a threshing-machine. But every consequence which legally followed from the breach of the contract to thresh followed as an equally natural consequence from a breach of contract to supply the means of threshing."

value of what he was able to save from destruction by the precautions he took and was required to take. As the plaintiff's exertions, for this purpose, were rendered necessary by the defendant's breach of contract, he was bound to make compensation for them; he was relieved thereby from paying the value of a totally lost crop.¹ The net amount saved was its value, then, after satisfying the charges for the saving; and this, taken from the total value which would otherwise have been lost, would leave, according to familiar analogies, the amount of the plaintiff's actual loss. By this method of computation the loss from a decline in the market would fall on the defendant.²

The agreement of a carrier to deliver is like a vendor's agreement to deliver, and the same rule of damages is applied. A loss from a fall in the market at the time of a delayed delivery arises directly from the breach of contract.³ Here the liability would end, if the whole property were finally delivered without diminution or deterioration, unless there are special circumstances which enter into the contract and give it more scope. A contract to deliver a threshing-machine at a given time to enable a farmer to thresh his wheat, with a view to its being taken at once to market, is not simply a contract to deliver a machine; it is a contract to do, at a specified time, one of a known series of acts for the purpose of getting the wheat immediately to market. Where there was delay in delivering machinery for a cotton-mill the vendor was liable for damages sustained by cotton seed bought by the vendee for manufacturing, and for expense incurred in saving such seed from further damage. Under the facts the vendee's re-

¹ § 88.

² See *Ward v. New York Central R. Co.*, 47 N. Y. 177, 7 Am. Rep. 405; *Collard v. South Eastern R. Co.*, 7 H. & N. 79; *The Parana*, 1 Prob. Div. 452.

³ *Ward v. New York Central R. Co.*, *supra*; *Sturgess v. Bissell*, 46 N. Y. 462; *Weston v. Grand Trunk R. Co.*, 54 Me. 376, 92 Am. Dec. 552; *Peet v. Chicago, etc. R. Co.*, 20 Wis. 594, 91 Am. Dec. 446; *Medbury v. New York & C. R. Co.*, 26 Barb. 564;

Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; *Briggs v. New York R. Co.*, 28 Barb. 515; *Colvin v. Jones*, 3 Dana, 576; *Cowley v. Davidson*, 13 Minn. 92; *Collins v. Baumgardner*, 52 Pa. 461; *Atkisson v. Steamboat C. G.*, 28 Mo. 124; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166; *Wilson v. Lancashire R. Co.*, 9 C. B. (N. S.) 632; *Ingledeu v. Northern R.*, 7 Gray, 88; *Spring v. Haskell*, 4 Allen, 112; *Cutting v. Grand Trunk R. Co.*, 13 id. 381.

covery was not restricted to such damage and expenses prior to his knowledge of the breach.¹ In a case in which the vendor knew that property was to be delivered on board a boat, he was liable for demurrage charges paid by the vendee while the boat was held for the purpose of receiving it, in consequence of delay in delivering the property.²

The general damages arising from delay in delivering property or the failure to deliver it in proper condition may be mitigated by proof of subsequent delivery or of repairs made by the vendor.³ In the absence of other circumstances than the acceptance of property after the time specified for its delivery there is no waiver of the right to recover damages because of the delay.⁴

§ 667. **Warranties of quality and title.** To determine [407] whether a warranty exists is often a difficult question. On an executory contract for the sale and delivery of goods of a particular description, the vendee is not obliged to receive and pay for those offered unless they correspond therewith. The contract to furnish such goods is strictly a precedent condition. When the vendor offers goods the maxim *caveat emptor* warns the vendee to make due examination, and reject them if they do not conform to the requirements of the contract. If they are apparently goods of the kind so required, are tendered on the contract, and unconditionally received without objection, the right to object is waived in respect to any want of conformity which could have been ascertained by a careful examination. The tender and acceptance make the contract an executed one for the sale and purchase of specific articles.⁵

¹ Colvin v. McCormick Cotton Oil Co., — S. C. —, 44 S. E. Rep. 380. 444; Strain v. Pauley, 80 Ky. 622. *Contra*, Fraser v. Ross, 1 Pennewill, 348, 41 Atl. Rep. 204; Blakeslee

² Miner v. Blume, 64 App. Div. 511, 72 N. Y. Supp. 320. The case was ruled in reliance on Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487. One judge dissented. *Manuf. Co. v. Hilton*, 5 Pa. Super. Ct. 184.

³ Marsh v. McPherson, 105 U. S. 709. ⁵ Wiedeman v. Keller, 171 Ill. 93, 49 N. E. Rep. 210; Rayner v. Rees, 58

⁴ Belcher v. Sellards, 19 Ky. L. Rep. 1571, 43 S. W. Rep. 676, citing Dingman v. Spurr, 3 Wash. 309, 28 Pac. Rep. 529; Gaylord v. Karst, 17 N. Y. 720; Halsted Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. Rep. Ill. App. 292; Martin v. Roehm, 92 Ill. App. 87; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104, 39 Pac. Rep. 1035, 28 L. R. A. 53; McCaa v. Elam Drug Co., 114 Ala. 74, 21 So. Rep. 479, 62 Am. St. 88; Parks v. O'Connor, 70 Tex. 377, 8 S. W. Rep.

This rule has no application if the vendor fraudulently prevents inspection of the goods.¹

It is not always practicable or possible, by inspection at the time of delivery, to determine whether property offered upon an existing contract or for sale possesses certain qualities which the purchaser is charged for in the price. To some extent the law implies a warranty; but beyond this the purchaser must assure himself against loss from defects or want of fitness for his purpose by inspection, or by obtaining a warranty. The vendee is entitled to an opportunity to make such examination of the goods offered on an existing contract as will enable him to ascertain whether they fulfill its requirements; and if they are of such a nature that qualities or fitness stipulated for can only be ascertained by the use or consumption of the property, or for any reason are intended to be ascertained before the title passes, the contract in respect to them is a warranty. Such a case is precisely like any bargain and sale with a representation or warranty of qualities or fitness.² If the article war-

104; *Woods v. Cramer*, '34 S. C. 508, 13 S. E. Rep. 660; *Smith v. Coe*, 170 N. Y. 162, 63 N. E. Rep. 57; *Bell v. Mills*, 68 App. Div. 531, 74 N. Y. Supp. 224.

¹ *Fay Fruit Co. v. Talerico*, 69 S. W. Rep. 196 (Tex. Ct. of Civ. App.).

² *Snowden v. Waterman*, 105 Ga. 384, 31 S. E. Rep. 110; *Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. Rep. 557; *St. Louis Brewing Ass'n v. McEnroe*, 80 Mo. App. 429; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. Rep. 211; *Meagley v. Hoyt*, 88 Hun, 328, 34 N. Y. Supp. 790; *Huyett & Smith Manuf. Co. v. Gray*, 124 N. C. 322, 32 S. E. Rep. 718; *Coyle v. Baum*, 3 Okl. 695, 41 Pac. Rep. 389; *Thomas v. Marks*, 10 Vict. L. R. (law) 217; *English v. Spokane Com. Co.*, 57 Fed. Rep. 451, 6 C. C. A. 416; *Merchants' & Mechanics' Savings Bank v. Frazee*, 9 Ind. App. 161, 36 N. E. Rep. 378; *Philadelphia Whiting Co. v. Detroit White Lead Works*, 58 Mich. 29, 24 N. W. Rep. 881; *Lee v. Sickles Saddlery Co.*, 38

Mo. App. 201; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Howie v. Rea*, 70 N. C. 559; *Polhemus v. Heiman*, 45 Cal. 573; *Thomas v. Francis*, 12 Ind. 282; *Esty v. Read*, 29 Vt. 278; *Dounce v. Dow*, 57 N. Y. 16; *Hoe v. Sanborn*, 21 id. 532; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Baird v. Mathews*, 6 Dana, 130; *Lewis v. Rountree*, 78 N. C. 323; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Hoey*, 23 Wend. 350; *Murray v. Smith*, 4 Daly, 277; *Seigworth v. Leffel*, 76 Pa. 476; *Brown v. Burhans*, 4 Hun, 227; *Kimball & A. Manuf. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Dill v. O'Ferrell*, 45 Ind. 268; *Cox v. Long*, 69 N. C. 7; *Ash v. Beck*, 68 S. W. Rep. 53 (Tex. Ct. of Civ. App.).

"Whatever form a warranty assumes, if there is in fact a warranty,

ranted is wholly worthless the retention of it does not preclude a recovery for the breach.¹ But in case of a sale of specific goods, there being no undertaking to furnish [408] those of particular quality or fitness, and when goods are delivered on an existing contract requiring a particular quality, the absence or presence of which can be seen on mere view, the purchase is without warranty; or their acceptance, without objection, leaves the seller relieved of all responsibility for the goodness, quality or fitness of the property.² But if the goods delivered differ from those contracted for in kind or generic description, and there is no other acceptance than receipt and

the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of warranty, although an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach." *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 67 N. W. Rep. 298, 57 Am. St. 563, citing *Morse v. Moore*, 83 Me. 473, 22 Atl. Rep. 362, 13 L. R. A. 224; *Gould v. Stein*, 149 Mass. 570, 22 N. E. Rep. 47, 14 Am. St. 451, 5 L. R. A. 213; *Lewis v. Rountree*, 78 N. C. 323; *Best v. Flint*, 58 Vt. 543, 5 Atl. Rep. 192, 56 Am. Rep. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. Rep. 454; *Hege v. Newsom*, 96 Ind. 431; *English v. Spokane Com. Co.*, 6 C. C. A. 416, 57 Fed. Rep. 451, 48 Fed. Rep. 196; *Benj. on Sales* (6th Am. ed.), p. 856, note 29; *Dayton v. Hooglund*, 39 Ohio St. 671; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. Rep. 487, 6 Am. St. 737; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Zabrisckie v. Central Vermont R. Co.*, 131 N. Y. 72, 29 N. E.

Rep. 1006; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. Rep. 374, 16 Am. St. 753.

¹ *Ash v. Beck*, 68 S. W. Rep. 53 (Tex. Ct. of Civ. App.).

² *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. Rep. 587; *Gage v. Carpenter*, 107 Fed. Rep. 886, 47 C. C. A. 39; *Titley v. Enterprise Stone Co.*, 127 Ill. 457, 20 N. E. Rep. 71; *Howard v. Hoey*, 23 Wend. 350; *Hart v. Wright*, 17 id. 267; *Locke v. Williamson*, 40 Wis. 377; *Delafield v. De Grauw*, 3 Keyes, 467; *Muller v. Eno*, 3 Duer, 421, 14 N. Y. 597; *Wilkins v. Stevens*, 8 Vt. 214; *Houghton v. Carpenter*, 40 Vt. 588; *Reed v. Randall*, 29 N. Y. 358; *Fitch v. Carpenter*, 43 Barb. 40; *Cole v. Champlain Transportation Co.*, 26 Vt. 87; *Barnard v. Kellogg*, 10 Wall. 388; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Hargous v. Stone*, 5 N. Y. 73; *Merriam v. Field*, 39 Wis. 578; *McClung v. Kelley*, 21 Iowa, 507; *Hamilton v. Ganyard*, 34 Barb. 204; *Cleu v. McPherson*, 1 Bosw. 480; *Morehouse v. Comstock*, 42 Wis. 626; *Jones v. Murray*, 3 T. B. Mon. 83; *Emerson v. Bingham*, 10 Mass. 197; *Moses v. Mead*, 1 Denio, 378, 5 id. 617; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Ranger v. Hearne*, 37 Tex. 30.

use of those furnished, the intention to deliver or accept them on the contract will not be inferred, and the vendor will only be entitled to recover for them on a *quantum meruit*.¹

The English cases passing on the question of the existence of an implied warranty have been summed up by Mellor, J., in a way which has met the general approval of the courts of England. The law as declared by him has not in all particulars been approved by the courts in the United States; in the main, however, it has been accepted as correct. He said:² "First. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.³ The buyer in such case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the [409] goods are of any particular quality or are merchantable.⁴ So in the case of a sale in the market of meat, which the buyer had inspected, but which was in fact diseased and unfit for food, the maxim *caveat emptor* applies.⁵ Secondly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.⁶

¹ Joseph v. Richardson, 2 Pa. Super. Ct. 208; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. Rep. 391, 76 Am. St. 914; Murray v. Farthing, 6 Mo. 251; Andrews v. Eastman, 41 Vt. 134; June v. Falkinburg, 89 Mo. App. 563; Puntney-Mitchell Manuf. Co. v. T. G. Northwall Co., 91 N. W. Rep. 863 (Neb.).

² Jones v. Just, L. R. 3 Q. B. 197, 202.

³ Parkinson v. Lee, 2 East, 314.

Where goods of a specific denomination are sold, and not shown to be *in esse* or capable of inspection, there is an implied warranty that they are of a merchantable quality. Thomas v. Marks, 10 Vict. L. R. (law) 217.

⁴ In Hinckley v. Kersting, 21 Ill., 247, 74 Am. Dec. 102, it was held that the rule of *caveat emptor* applies to a banker or broker who deals in depreciated bills as an article of commerce; and if a bank bill purchased by him proves to be of less value than the price given for it, the vendor is not bound to make it good, where the transaction is in good faith.

⁵ Emerton v. Mathews, 7 H. & N. 586.

⁶ Hege v. Newsom, 96 Ind. 426; Ivans v. Laury, 67 N. J. L. 153, 50 Atl. Rep. 355; Burr v. Gibson, 3 M. & W. 390. See *ante*, p. 1950; Kohl v. Lindley, 39 Ill. 195, 89 Am. Dec. 294;

Thirdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty; there is no warranty that it shall answer the particular purpose intended by the buyer.¹ Fourthly. Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.²

Humphreys v. Comline, 8 Blackf. 516; McGuire v. Kearney, 17 La. Ann. 295; Deming v. Foster, 42 N. H. 165; Moses v. Mead, 1 Denio, 378; Mixer v. Coburn, 11 Met. 559, 45 Am. Dec. 230; Joslin v. Coughlin, 26 Miss. 134; Holden v. Dakin, 4 Johns. 421; Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 427; Bowman v. Clemmer, 50 Ind. 10; Fountleroy v. Wilcox, 80 Ill. 477; McCrea v. Longstreet, 17 Pa. 316.

¹ Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Smith v. Coe, 170 N. Y. 162, 63 N. E. Rep. 57; Dounce v. Dow, 64 N. Y. 411; Deming v. Foster, 42 N. H. 165; McGraw v. Fletcher, 35 Mich. 104; Bragg v. Morrill, 49 Vt. 45.

² Brown v. Edgington, 2 M. & G. 279; Jones v. Bright, 5 Bing. 533; Frith v. Hollan, 133 Ala. 583, 32 So. Rep. 494; Cram v. Gas Engine & Power Co., 75 Hun, 316, 26 N. Y. Supp. 1069; Coyle v. Baum, 3 Okl. 695, 41 Pac. Rep. 389; Morse v. Union Stock Yard Co., 21 Ore. 289, 28 Pac. Rep. 2, 14 L. R. A. 157; Haines v. Young, 13 Pa. Super. Ct. 303; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 603, 63 N. W. Rep. 1013; Nashua Iron & Steel Co. v. Brush, 91 Fed. Rep. 213, 33 C. C. A. 456; Chippewa Lumber & Boom Co. v. Howard, 18 Pa. Super. Ct. 423;

Alpha Checkrower Co. v. Bradley, 105 Iowa, 537, 546, 75 N. W. Rep. 369; Van Wyck v. Allen, 69 N. Y. 65, 25 Am. Rep. 136; Landreth v. Wyck-off, 67 App. Div. 145, 73 N. Y. Supp. 388.

In Drummond v. Van Ingen, L. R. 12 App. Cas. 284, cloth merchants ordered of cloth manufacturers goods which were to correspond to samples previously furnished by the latter to the former; the manufacturers knew that the goods were to be sold to clothiers. The goods supplied were equal to the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had been used in the trade. The same defect existed in the samples, but it was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of such cloth. It was held that there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used.

In Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 69 N. W. Rep. 1091, 64 Am. St. 418, this view is criticised. It is said that the cases cited in support of it do not sustain the proposition that the mere dealer

In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.¹ Fifthly.

[410] Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."²

is liable on such an implied warranty. "The case then before the court did not call for any decision on this point, as it was merely a case of a sale of goods to arrive in port, and, when they arrived they were found not to be merchantable. In *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, the cases were reviewed at length by Selden, J.; and it is held that, even where a manufacturer furnishes an article for a specific purpose, an implied warranty against latent defects can only be held to exist on the ground that it is presumed that he or his servants, for whom he is responsible, knew of the defect. In *White v. Miller*, 71 N. Y. 118, 131, 27 Am. Rep. 13, it is said: 'It was decided in *Hoe v. Sanborn* that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor, and there seems to be the same reason for implying a warranty on a sale of seeds by the grower.' In *Randall v. Newson*, 2 Q. B. Div. 102, the court held the manufacturer to be an absolute insurer against all latent defects and liable for all damages caused by such defects; and this seems to be the holding of the court in *Rodgers v. Niles*, 11 Ohio St. 48. We are of the opinion that such an extraordinary responsibility is not, by the principles of the law, imposed on the manufacturer. The correct rule was applied in *Bragg v. Morrill*, 49 Vt. 45,

and *Archdale v. Moore*, 19 Ill. 565 (approved in *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294) where it is held, that the manufacturer is only liable for failing to exercise the proper degree of care and skill in the selection of material and in the manufacture of the same, and that he impliedly warrants that he has done this."

¹ *Dayton v. Hoogland*, 39 Ohio St. 671; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Fox v. Stockton Combined Harvester, etc. Works*, 83 Cal. 333, 23 Pac. Rep. 295; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. Rep. 537; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. Rep. 696; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Brown v. Sayles*, 27 Vt. 227; *Sims v. Howell*, 49 Ga. 620; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Gammell v. Granby*, 49 Vt. 22; *Richardson v. Gundy*, 52 Ga. 504; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *French v. Vining*, 102 Mass. 135; *Mallan v. Radloff*, 17 C. B. (N. S.) 588; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Leopold v. Van Kirk*, 27 Wis. 152; *Brown v. Murphee*, 31 Miss. 91; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Brenton v. Davis*, 8 Blackf. 317, 44 Am. Dec. 769; *Orton v. Phelan*, 2 Head, 445; *Beers v. Williams*, 16 Ill. 69; *Boyd v. Crawford*, Addison, 150; *Cunningham v. Hall*, 1 Sprague, 404; *Walton v. Cody*, 1 Wis. 420.

² *Barnes v. Sisson*, 44 Ill. App. 327;

The fifth rule is limited to cases where a thing is ordered for a special purpose, and cannot be applied to those where a special thing is ordered, although this be intended for a special purpose. If the thing is itself specifically selected and ordered, the purchaser takes upon himself the risk of its effecting its purpose.¹ In some courts a manufacturer who sells a completed specific article is regarded as a dealer and his liability is limited accordingly.² The principle upon which a manufacturer is held to an implied warranty of quality is based upon the fact that he must know the "make-up" of the article sold by him. The law does not presume that a mere dealer is possessed of that knowledge and the same reason for the rule does not exist as to him.³ The American courts do not agree with Mellor, J., that no distinction is observed between articles purchased for food and other merchandise; that if a purchaser has an opportunity for inspection, there is no implied warranty that the provisions are sound and wholesome. But it is believed that in all sales of provisions for consumption there is an implied warranty in this country.⁴ If the seller of food for ani-

White v. Gresham, 52 Ill. App. 399; Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. Rep. 856, 56 Am. St. 636, 37 L. R. A. 799; Laing v. Fidgeon, 4 Camp. 169, 6 Taunt. 108; Mann v. Everston, 32 Ind. 355; Leopold v. Van Kirk, 27 Wis. 152; Walton v. Cody, 1 id. 420; Gaylord Manuf. Co. v. Allen, 53 N. Y. 515; Howard v. Hoey, 23 Wend. 350; Hamilton v. Ganyard, 34 Barb. 204; Morehouse v. Comstock, 42 Wis. 626; Ketchum v. Wells, 19 id. 25; Cleu v. McPherson, 1 Bosw. 480; McClung v. Kelley, 21 Iowa, 508; Merriam v. Field, 39 Wis. 578; Houston Cotton Oil Co. v. Trammell, 72 S. W. Rep. 244, citing the text (Tex. Ct. of Civil App.). See Holden v. Clancy, 41 How. Pr. 1.

¹Port Carbon Iron Co. v. Groves, 68 Pa. 149; J. L. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 602, 63 N. W. Rep. 1013. See Goulds v. Brophy, 42 Minn. 109, 43 N. W. Rep. 834, 6 L. R. A. 392; Seitz v. Brewers'

Refrigerating Machine Co., 141 U. S. 510, 12 Sup. Ct. Rep. 46.

²Lukens v. Freund, 27 Kan. 664, 41 Am. Rep. 429; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104, 39 Pac. Rep. 1035, 28 L. R. A. 53.

³McCaa v. Elam Drug Co., 114 Ala. 74, 85, 21 So. Rep. 479, 62 Am. St. 88.

⁴Wiedeman v. Keller, 171 Ill. 93, 49 N. E. Rep. 210; Rothmiller v. Stein, 143 N. Y. 581, 592, 38 N. E. Rep. 718, 26 L. R. A. 148; Winsor v. Lombard, 18 Pick. 57; Hoover v. Peters, 18 Mich. 51; Divine v. McCormick, 50 Barb. 116; Davis v. Murphy, 14 Ind. 158; Osgood v. Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317; Emerson v. Brigham, 10 Mass. 197; Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 339; Marshall v. Peck, 1 Dana, 612; Humphreys v. Comline, 8 Blackf. 516; Ryder v. Neitge, 21 Minn. 70; Moses v. Mead, 1 Denio, 378, 5 id. 617; Hart v. Wright, 17 Wend. 267; Hyland v. Sherman, 2 E. D. Smith, 234;

mals knows the purpose for which it is to be used he impliedly warrants that it is wholesome and fit for that purpose.¹ "There is, however, no implied warranty of soundness or wholesomeness arising from the sale of meats or provisions to a dealer or middleman who buys on the market, not for consumption, but for sale to others, nor would there be any liability in a sale for immediate domestic use where the vendor was not a regular dealer."² One who sells a domestic animal to a retail butcher engaged in slaughtering such animals and selling their flesh for food does not impliedly warrant that it is fit for food although he knows the purpose for which it was bought.³ Under the English sale of goods act, 1893, "where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of a merchantable quality; provided, that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." The defendant dealt in beer for consumption on his premises, made by a particular firm only. The plaintiff was aware of that fact, and frequented the defendant's house for the purpose of obtaining such beer. There was a sale of beer by description within the meaning of the act, and an implied warranty that it was of a merchantable quality.⁴

Goldrich v. Ryan, 3 id. 324; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440. See *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608.

In *Benj. on Sales*, § 672, it is said that the responsibility of a victualer, vintner, brewer, butcher or cook for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute that they shall make good any damage caused by their sale of unwholesome food. *Burnby v. Bollett*, 16 M. & W. 644. See *Chitty on Cont.* 420; 3 Black. Com. 166. But see *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327. In South Carolina fraud or deceit in the sale of unsound food for a sound price will not be inferred unless the

seller knew it was unsound. *Poag v. Charlotte Oil & F. Co.*, 61 S. C. 190, 39 S. E. Rep. 345. On a sale of food, sealed in cans, to a consumer by one who did not prepare it, there is no implied warranty that it is wholesome or fit for food. *Julian v. Laubenberger*, 16 N. Y. Misc. 646, 33 N. Y. Supp. 1052.

¹ *Houston Cotton Oil Co. v. Trammell*, 72 S. W. Rep. 244 (Tex. Ct. of Civ. App.).

² *Weideman v. Keller*, 171 Ill. 93, 98, 49 N. E. Rep. 210.

³ *Hanson v. Hartse*, 70 Minn. 282, 73 N. W. Rep. 163; *Cotton v. Reed*, 25 N. Y. Misc. 380, 54 N. Y. Supp. 143.

⁴ *Wren v. Holt*, [1903] 1 K. B. 610 (in the court of appeal).

In case of a sale by sample, there is an implied warranty that the bulk of the goods sold is equal in quality to the sample,¹ except in Pennsylvania, where a sale by sample is a guaranty only that the article delivered shall follow its kind and be simply merchantable.² The description or name by which goods are sold is a warranty that they are such as are [411] known or pass by that description or name.³ If goods are sold by sample and by description as well, and are expressly warranted to correspond with both, it is not enough that the bulk of them correspond with the sample, if they do not also correspond with the description. The vendee may rely upon his warranty by description.⁴

§ 668. **Same subject.** There is an implied warranty of title, but only when the vendor has possession⁵ of the prop-

¹ *Smith v. Foote*, 81 Hun, 128, 30 N. Y. Supp. 679; *Meagley v. Hoyt*, 88 Hun, 328, 34 N. Y. Supp. 790; *Leggett v. Young*, 29 N. B. 675; *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. Rep. 692; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. Rep. 345; *Oneida Manuf. Co. v. Lawrence*, 4 Cow. 440; *Andrews v. Kneeland*, 6 id. 354; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Gallagher v. Waring*, 9 Wend. 20; *Beebee v. Robert*, 12 id. 413; *Boorman v. Johnston*, id. 566; *Moses v. Mead*, 1 Denio, 386; *Brower v. Lewis*, 19 Barb. 574; *Beirne v. Dord*, 5 N. Y. 95; *Hargous v. Stone*, id. 73; *Messenger v. Pratt*, 3 Lans. 234; *Leonard v. Fowler*, 44 N. Y. 289; *Gurney v. Atlantic, etc. R. Co.*, 58 id. 358; *Williams v. Spafford*, 8 Pick. 250; *Hastings v. Lovering*, 2 id. 219; *Lothrop v. Otis*, 7 Allen, 435; *Rose v. Beattie*, 2 N. & McC. 538; *Bradford v. Manly*, 13 Mass. 139; *Henshaw v. Robins*, 9 Met. 86; *Whittaker v. Hueske*, 29 Tex. 355; *Brantley v. Thomas*, 22 id. 270, 73 Am. Dec. 264.

² *Boyd v. Wilson*, 83 Pa. 319; *West Republic Mining Co. v. Jones*, 103 id. 55, 65.

³ *Miller v. Moore*, 83 Ga. 684, 10 S. E. Rep. 360, 20 Am. St. 389, 6 L. R. A. 374; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. Rep. 345; *Bridge v. Wain*, 1 Stark. 504; *Bannerman v. White*, 10 C. B. (N. S.) 844; *Behn v. Burness*, 3 B. & S. 755; *Chanter v. Hopkins*, 4 M. & W. 404; *Allan v. Lake*, 18 Q. B. 560; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Hawkins v. Pemberton*, 51 N. Y. 204; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Henshaw v. Robins*, 9 Met. 83, 43 Am. Dec. 387; *Borrekins v. Bevan*, 3 Rawle, 23, 23 Am. Dec. 85; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Moore v. King*, 57 Hun, 224, 10 N. Y. Supp. 651; *Northwestern Cordage Co. v. Rice*, 5 N. D. 432, 67 N. W. Rep. 298, 57 Am. St. 563; *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. Rep. 886, 54 Am. Rep. 30.

⁴ *Miamisburg Twine & Cordage Co. v. Wohlbuter*, 71 Minn. 484, 74 N. W. Rep. 175.

⁵ It is said in *Shattuck v. Green*, 104 Mass. 42, 45: "If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title, and a warranty is implied.

erty sold.¹ If the parties to the sale are joint owners and in joint possession, each having equal knowledge of the condition of the title, there is no implied warranty of title.² The general rule does not apply to sales by executors, administrators and

In *Whitney v. Heywood*, 6 Cush. 82, 86, Dewey, J., says, 'Possession here must be taken in its broadest sense, and the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied. The possession of an agent or tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells goods thus held as his, a warranty of title is implied. *Hubbard v. Bliss*, 12 Allen, 590; *Cushing v. Breed*, 14 Allen, 376, 92 Am. Dec. 77.

¹ *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575, 32 L. R. A. 321; *Jeffers v. Easton*, 113 Cal. 345, 45 Pac. Rep. 680; *Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. Rep. 941, 17 L. R. A. 545; *Close v. Crossland*, 47 Minn. 500, 50 N. W. Rep. 694; *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. Rep. 1019; *Scranton v. Clark*, 39 Barb. 273, 39 N. Y. 220, 100 Am. Dec. 430; *Brown v. Smith*, 5 How. (Miss.) 387; *McCoy v. Artcher*, 3 Barb. 323; *Gross v. Kierski*, 41 Cal. 111; *Thurston v. Spratt*, 52 Me. 202; *Boyd v. Whitfield*, 19 Ark. 447; *Scott v. Hix*, 2 Sneed, 192; *Miller v. Van Tassel*, 24 Cal. 458; *Bennett v. Bartlett*, 6 Cush. 225; *Case v. Hall*, 24 Wend. 101; *Vibbard v. Johnson*, 19 Johns. 77; *Dorr v. Fisher*, 1 Cush. 271; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Williamson v. Summers*, 34 Ala. 691; *Linton v. Porter*, 31 Ill. 107; *Chancellor v. Wiggins*, 4 B. Mon. 201, 39 Am. Dec.

499; *Trigg v. Faris*, 5 Humph. 343; *Charlton v. Lay*, id. 496; *Hale v. Smith*, 6 Me. 416; *Butler v. Tufts*, 13 id. 302; *Bucknam v. Goddard*, 21 Pick. 70; *Huntington v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Davis v. Smith*, 7 Minn. 414; *Chism v. Woods*, *Hardin*, 531, 3 Am. Dec. 740; *Robinson v. Rice*, 20 Mo. 229; *Payne v. Rodden*, 4 Bibb, 304, 7 Am. Dec. 739; *Gookin v. Graham*, 5 Humph. 480; *Word v. Cavin*, 1 Head, 506; *Whitney v. Heywood*, 6 Cush. 82; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Emerson v. Brigham*, 10 Mass. 197; *Pratt v. Philbrook*, 41 Me. 132; *Darst v. Brockway*, 11 Ohio, 462; *Lines v. Smith*, 4 Fla. 47; *McCabe v. Morehead*, 1 W. & S. 513; *Scott v. Scott*, 1 A. K. Marsh. 217; *Inge v. Bond*, 3 Hawks, 101; *Colcock v. Goode*, 3 McCord, 513; *Storm v. Smith*, 43 Miss. 497; *Shattuck v. Green*, 104 Mass. 42; *Long v. Hickingbottom*, 28 Miss. 772, 64 Am. Dec. 118; *Mockbee v. Gardner*, 2 Harr. & G. 176; *Coolidge v. Brigham*, 1 Met. 551.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties, on breach of the contract, where no special damage is alleged, the measure of damages is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then, if the vendee is prepared to gather it and carry it

² *Gurley v. Dickason*, 19 Tex. Civ. App. 203, 46 S. W. Rep. 53. But compare *Shattuck v. Green*, *supra*.

other trustees; there is no warranty of title in sales by them, unless there be fraud or express warranty and eviction, [412] in which case they would undoubtedly be personally responsible.¹ In case of a failure of title while the purchase-money remains in their hands, undistributed or unadministered, it is suggested that there would exist no well founded reason why they should not refund to the purchaser.² *Caveat emptor* applies in all its rigor to judicial sales,³ and, it seems, to a note and mortgage formally transferred by an order of court for the purpose of transmitting the title, the nominal vendor having no connection therewith either as owner or investor.⁴ It is said by a learned author that the present rule in England may be stated in the following terms: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.⁵

to market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when the vendee went there to gather the fruit, and if those persons forbade him or his agents or servants from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold defendant responsible on the guaranty, as he was not bound to take the benefit of a portion of the contract. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 171.

¹ *Mockbee v. Gardner*, 2 Harr. & G. 176; *Sexton v. Sikking*, 90 Ill. App. 667; *Tilley v. Bridges*, 105 Ill. 339.

The last two cases cited hold that an administrator has no authority to warrant the title to real estate sold by him. Some courts apply the same rule to sales of chattels. *Ramsey v. Blalock*, 32 Ga. 376. But the weight of authority is the other way. *Baltwood v. Miller*, 112 Mich. 657, 71 N. W. Rep. 506 (private sale); *Buckels v. Cunningham*, 6 Sm. & M. 358, 365; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Craddock v. Stewart*, 6 Ala. 77.

² *Mockbee v. Gardner*, *supra*.

³ *Kimball v. Salisbury*, 19 Utah, 161, 56 Pac. Rep. 973; *Ranney v. Meisenheimer*, 61 Mo. App. 434; *Balte v. Bedemiller*, 37 Ore. 27, 60 Pac. Rep. 601; *Corwin v. Benham*, 2 Ohio St. 36; *Parker v. Rodman*, 84 Ind. 256. See *The Monte Alegro*, 9 Wheat. 616.

⁴ *Oldfield v. Vassar College*, 68 App. Div. 372, 73 N. Y. Supp. 1112.

⁵ *Benj. on Sales*, § 639; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Smith v. Neale*, id. 67; *Chapman v. Speller*, 14 Q. B. 621; *Sims v. Marryat*, 17 id. 281;

On the sale of a promissory note, bill of exchange, shares or other securities or choses in action there is an implied warranty of the assignor's title, of the genuineness of the evidence of debt or other instrument assigned, the capacity of the makers to contract, and that the same are unpaid.¹ The principle is that one who sells commercial paper payable to bearer, and

Eichholz v. Bannister, 17 C. B. (N. S.) 708; *Baguley v. Hawley*, L. R. 2 C. P. 625.

¹ *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39; *Palmer v. Courtney*, 32 Neb. 773, 49 N. W. Rep. 754 (indorsement "without recourse"); *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. Rep. 1024; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Ledwich v. McKim*, 53 id. 307; *Erwin v. Downs*, 15 id. 575; *Bell v. Dagg*, 60 id. 528; *Sherman v. Johnson*, 56 Barb. 59; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117; *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Lobdell v. Baker*, 1 Met. 193, 35 Am. Dec. 358, 3 Met. 469; *Terry v. Bissell*, 26 Conn. 23; *Wilder v. Cowles*, 100 Mass. 487; *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258, 80 Am. Dec. 69; *Shaver v. Ehle*, 16 Johns. 201; *Markle v. Hatfield*, 2 id. 455, 3 Am. Dec. 446; *Herrick v. Whitney*, 15 Johns. 240; *Murray v. Judah*, 6 Cow. 484; *Flynn v. Allen*, 57 Pa. 482; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Aldrich v. Jackson*, 5 R. I. 218; *Ellis v. Grooms*, 1 Stew. 47; *Bennett v. Buchan*, 61 N. Y. 222; *Furniss v. Ferguson*, 34 id. 485; *Andrews v. Kramer*, 77 Miss. 151, 25 So. Rep. 156; *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241, 90 N. W. Rep. 392; *Robinson v. McNeill*, 51 Ill. 225; *Carroll v. Nodine*, 41 Ore. 412, 69 Pac. Rep. 51.

In *Harloe v. Foster*, 53 N. Y. 385, it was held that where a creditor unites with others in the release of their debtor, and signs off for a de-

mand which he has previously transferred, he impliedly undertakes to protect the debtor from such demand; and upon payment being enforced against the debtor he can recover from the creditor, although the release was made upon only a nominal consideration.

Where J. made a contract to sell the promissory note of C. to L., when he was not its owner and it was not in his possession, it was held that the purchase was at the risk of L.; that the law implied no warranty by J. that he had title to the note; that although J. subsequently acquired the title this did not inure to the benefit of L. so as to render effectual a payment by C. to L. in extinguishment of the note. *Scranton v. Clark*, 39 Barb. 273.

An assignment of a judgment without recourse implies no warranty that the record is free from error. And on reversal there is no remedy to recover the purchase-money. *Glass v. Reed*, 2 Dana, 168.

A refusal to guaranty does not of itself exclude an implied warranty of genuineness. *Bell v. Dagg*, 60 N. Y. 528.

The seller of orders issued to him by drainage commissioners for his services impliedly warrants that the instruments are genuine and that he is the owner thereof and authorized to transfer title; but there is no implied warranty that they are issued by authority of law or that they are worth what they represent. *First Nat. Bank v. Drew*, 91 Ill. 186, 60 N. E. Rep. 856.

which he does not indorse, warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of the maker, or because it has been already paid.¹ The party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper, [413] and to bring an action for its collection,² and if defeated may recover the costs and expenses so incurred.³ In case of contest and adverse judgment, the vendor will be concluded by it if he has had notice of the action and an opportunity to be heard.⁴ Where the indorsement of a note is "without recourse" parol evidence is admissible to show that at the time of the transfer the buyer agreed to take the note at his own risk, thereby relieving the indorser from the implied warranty of genuineness.⁵

The indorsement of a promissory note imports a guaranty that the maker was competent to make the note in the character and in the terms in which it was made.⁶ The drawee in a forged check who has paid it, after indorsement by the payee named therein, may recover the money from such indorser, if he has given currency to the check by his indorsement made without due inquiry.⁷ The measure of damages for breach of this implied warranty is the difference between the value of the paper as it is and the value it would possess if the warranty had been true; or, if the instrument is void for a cause within the warranty, the assignee is entitled to recover what it would have been worth if conformable to the implied assurance; or, at least, the consideration and interest.⁸ Where a judgment against four defendants was assigned and one of them had been released, it was held that the assignee was entitled to [414] recover the difference in value between a judgment against all and its value with one released.⁹ In England the vendor's lia-

¹ *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. Rep. 718, 26 L. R. A. 148; *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. Rep. 151.

² *Delaware Bank v. Jarvis*, 20 N. Y. 226.

³ *Giffert v. West*, 33 Wis. 617.

⁴ *Bell v. Dagg*, 60 N. Y. 528.

⁵ *Carroll v. Nodine*, 41 Ore. 412, 69 Pac. Rep. 51.

⁶ *Erwin v. Downs*, 15 N. Y. 575.

⁷ *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349.

⁸ *Giffert v. West*, 33 Wis. 617; *Eaton v. Knowles*, 61 Mich. 625, 28 N. W. Rep. 740; *Adams v. Bowman*, 51 Mich. 189, 16 N. W. Rep. 373.

⁹ *Bennett v. Buchan*, 61 N. Y. 222.

In *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682, the defendant had executed an assignment in these

bility is not based on the notion of a warranty, but on the obligation in the contract of sale itself to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.¹ The vendee in such cases can only recover the price paid.² In South Carolina a contract of sale for [415] a full price paid for an article always implies a warranty of its soundness.³ But the parties may agree that the vendee shall take the property at his own risk;⁴ nor will a warranty

words: "I hereby assign to R. H. T. a note in my favor against T. W. and J. H. P., dated 13th November, 1838, for \$150, payable in one year from date, with use, for value received." It was held that the words "for value received" were not merely descriptive of the note assigned, but that *prima facie*, at least, they imported a sufficient consideration for the assignment; it was also held that such an instrument, describing the property assigned as "a note," must be construed as an express warranty on the part of the defendant that it was a valid note; and that the signers were of sufficient capacity to contract when they executed it; and *quere*, whether such a warranty would not be implied from the sale without words indicating an express warranty. And it appearing that the note was invalid as to one of the makers by reason of his insanity, and that an action upon it had been successfully defended by him on that ground, and that the other had removed from the state, it was held that the plaintiff, in an action upon the warranty contained in the assignment, was entitled to recover the difference between the actual value of the note and the amount appearing due upon it. See *Marshall v. Peck*, 1 Dana, 612.

In *Pacific Iron Works v. Newhall*, 34 Conn. 67, the plaintiff agreed to manufacture and sell to the defend-

ant, for use in his business, a steam-engine with a cut-off known as "Greene's Patent Cut-off," for which they represented that one Greene had a patent, and that they had a license from him to make and sell the same; and that it would be of great value to the defendant in connection with the engine, all which representations were untrue. The whole was to be for one agreed price, for which the defendant gave his notes when the engine was delivered. After he had used it for a few months another person claimed the cut-off to be an infringement of his own prior patent, and obtained an injunction against its use by the defendant. Held, that there was a failure of consideration to the extent of the value of the cut-off to the defendant in connection with the engine, and that that amount should be deducted from the price.

¹ *Benj. on Sales*, § 607; *Jones v. Ryde*, 5 Taunt. 488; *Young v. Cole*, 3 Bing. N. C. 724; *Gompertz v. Bartlett*, 2 El. & B. 849; *Westropp v. Solomon*, 8 C. B. 345.

² *Id.*

³ *Simons v. Walter*, 1 McCord, 70, 10 Am. Dec. 650; *Rivers v. Grugett*, 1 McCord, 71; *Thompson v. Lindsay*, 3 Brev. 403; *Wood v. Ashe*, 3 Strobb. 64; *Vaughan v. Campbell*, 1 Brev. 478; *Colcock v. Goode*, 3 McCord, 302.

⁴ *Thompson v. Lindsay*, *supra*.

be implied if the vendor be not in possession of the property which he sells;¹ nor against visible defects.²

This implied warranty of soundness will exist though there is an express warranty of title;³ and even though the contract be in writing and under seal,⁴ if it is silent on the subject of soundness. A similar rule prevails in Louisiana.⁵ The rule in those states is derived from the civil law. Implied warranties are excluded when there is an express warranty on the same subject.⁶ And it has been held in some states that where the contract of sale is in writing and contains no warranty, none can be established by parol.⁷ But in such cases the silence of the written contract of sale ought not to negative the implied warranty of title.⁸

No particular form of words is required to constitute a

¹ Galbraith v. Whyte, 1 Hayw. 535.

² Id.; Wood v. Ashe, 3 Strobh. 64; Forgetston v. Cragin, 62 App. Div. 243, 70 N. Y. Supp. 979. See Furman v. Miller, 1 Brev. 536.

³ Pender v. Fobes, 1 Dev. & Batt. 250; Houston v. Gilbert, 3 Brev. 216; Wells v. Spears, 1 McCord, 421; Merriam v. Field, 24 Wis. 640.

⁴ Wood v. Ashe, 3 Strobh. 64; Hughes v. Banks, 1 McCord, 537.

⁵ Bulkley v. Honold, 19 How. 390. Louisiana Civil Code, art. 1764: "There are things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect."

⁶ J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 603, 63 N. W. Rep. 1013; De Witt v. Berry, 134 U. S. 312, 10 Sup. Ct. Rep. 536; Wilson v. New United States Cattle Ranch Co., 73 Fed. Rep. 994, 20 C. C. A. 244;

The Electron, 56 Fed. Rep. 304; White v. Gresham, 53 Ill. App. 399; Thisler v. Hopkins, 85 Ill. App. 207; Wood Mowing & Reaping Machine Co. v. Bobbst, 56 Mo. App. 427; Canon City Electric Light & Power Co. v. Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. Rep. 1030; Nothery Manuf. Co. v. Sanders, 31 Ont. 475; Shepherd v. Gilroy, 46 Iowa, 196; Mumford v. McPherson, 1 Johns. 414, 3 Am. Dec. 339; Dickson v. Zizinia, 10 C. B. 602; Wilson v. Marsh, 1 Johns. 503; Carson v. Baillie, 19 Pa. 375, 57 Am. Dec. 659; Smith v. Cozart, 2 Head, 526; Parkinson v. Lee, 2 East, 314; Willard v. Stevens, 24 N. H. 271; Brown v. Smith, 5 How. (Miss.) 387; Deming v. Foster, 42 N. H. 165.

⁷ McMillan v. De Tamble, 93 Ill. App. 65; Kansas Refrigerator Co. v. Pert, 3 Kan. App. 364, 42 Pac. Rep. 943; Rodgers v. Perrault, 41 Kan. 385, 21 Pac. Rep. 287; Farmers' Stock Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. Rep. 978; Reed v. Wood, 9 Vt. 285; Smith v. Cozart, 2 Head, 526; Bond v. Clark, 35 Vt. 577. See Pickard v. McCormick, 11 Mich. 68.

⁸ Miller v. Van Tassel, 24 Cal. 458.

warranty; any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty, or re-[416] ceived and acted upon as such, will be enough.¹ A general warranty of soundness will only cover defects which are not visible and obvious as such, unless expressly made to do so, or they are fraudulently concealed.² It does not cover de-

¹ *Stranahan Co. v. Coit*, 55 Ohio St. 398, 45 N. E. Rep. 634; *Reese v. Bates*, 96 Va. 321, 329, 26 S. E. Rep. 865; *Accumulator Co. v. Dubuque Street R. Co.*, 64 Fed. Rep. 70, 12 C. C. A. 37, 44; *White v. Gresham*, 52 Ill. App. 399, 403; *Warren v. Philadelphia Coal Co.*, 83 Pa. 437; *Joseph v. Richardson*, 2 Pa. Super. Ct. 208; *Milburn Wagon Co. v. M. Nisewarner*, 90 Va. 714, 19 S. E. Rep. 846; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. Rep. 414; *Eagle Iron Works v. Des Moines S. R. Co.*, 101 Iowa, 289, 70 N. W. Rep. 193; *Maxted v. Fowler*, 94 Mich. 106, 53 N. W. Rep. 921; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. Rep. 372, 16 Am. St. 753; *Shippen v. Bowen*, 122 U. S. 581; *Titus v. Poole*, 145 N. Y. 426, 40 N. E. Rep. 228; *Robinson v. Harvey*, 82 Ill. 58; *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266; *Chapman v. Murch*, 19 Johns. 290, 10 Am. Dec. 227; *Carley v. Wilkins*, 6 Barb. 557; *Warren v. Van Pelt*, 4 E. D. Smith, 202; *Rogers v. Ackerman*, 22 Barb. 134; *Lawton v. Keil*, 61 id. 558; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Stroud v. Pierce*, 6 Allen, 413; *Stone v. Denny*, 4 Met. 151; *Morrill v. Wallace*, 9 N. H. 111; *Henshaw v. Robins*, 9 Met. 83, 43 Am. Dec. 367; *Hillman v. Wilcox*, 30 Me. 170; *Bryant v. Crosby*, 40 id. 18; *Randall v. Thornton*, 43 id. 226, 69 Am. Dec. 56; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Taylor v. Bullen*, 5 Ex. 779; *Shepherd v. Kain*, 5 B. & Ald. 240; *Freeman v. Baker*, 5 B. & Ad. 797; *Power v. Barham*, 4 A. & E. 473; *Hopkins v. Tanqueray*, 15

C. B. f30; *Powell v. Horton*, 2 Bing. N. C. 668; *Allan v. Lake*, 18 Q. B. 560; *Hawkins v. Berry*, 10 Ill. 36; *Towell v. Gatewood*, 5 id. 22; *Ender v. Scott*, 11 Ill. 35; *Bond v. Clark*, 35 Vt. 577; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *House v. Fort*, 4 Blackf. 293; *Humphreys v. Comline*, 8 id. 507; *Hahn v. Doolittle*, 18 Wis. 196; *McGregor v. Penn*, 9 Yerg. 74; *Henson v. King*, 3 Jones, 419; *Ricks v. Dillahunt*, 8 Port. 133; *Murphy v. Gay*, 37 Mo. 535; *Carter v. Black*, 46 id. 384; *O'Neal v. Bacon*, 1 Houst. 215; *Osgood v. Lewis*, 2 H. & G. 495, 18 Am. Dec. 317; *Ottis v. Alderson*, 10 Sm. & M. 476; *Blythe v. Speake*, 23 Tex. 429; *Weimer v. Clement*, 37 Pa. 147, 78 Am. Dec. 411; *McFarland v. Newman*, 9 Watts, 55, 34 Am. Dec. 497.

It is held in *Hoffman v. Dixon*, 105 Wis. 315, 81 N. W. Rep. 491, 76 Am. St. 914, that "if a person offer an article for sale, accompanying such offer with an affirmation of fact, or acts equivalent to such affirmation, as to the identity of such article, for the purpose of making a sale thereof to another, and such other relying upon such affirmation, purchase such article, and such affirmation be false to the injury of the purchaser, he may hold the vendor liable for damages for breach of warranty or actionable fraud, without regard to whether such vendor made the affirmation knowing it to be false or not."

² *Florida Athletic Club v. Hope Lumber Co.*, 18 Tex. Civ. App. 161, 44 S. W. Rep. 10; *Vanderwalker v. Osmer*, 65 Barb. 556; *Brown v. Bige-*

fects which are perfectly visible and obvious to the senses, and actually known to the party taking the warranty.¹ Where, however, it was conceded that the defect complained of in a horse sold with warranty, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse, nor affect him in the slightest degree, and the purchaser or his agent did not believe, and had no reason to believe, that the defect was anything but a mere blemish, which would never render the horse less useful or capable of service, and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of sale, it was held that this was one of those equivocal defects that a warranty may well be considered as taken to guard against.² A warranty may be expressly made to cover defects known to the vendee,³ and for the purpose of covering and including a prior warranty which he claimed had been broken.⁴ The implied warranty of an article does not extend beyond the article itself to other articles or appliances connected therewith, even though included in the same order and bought at the same time.⁵

The rule excluding from a warranty defects known to [417] the purchaser only applies to such as are perfectly obvious,

low, 10 Allen, 262; Chadsey v. Green, 24 Conn. 562; Dillard v. Moore, 7 Ark. 466; Fisher v. Pollard, 2 Head, 314, 75 Am. Dec. 740; Mulvany v. Rosenberger, 18 Pa. 203; Dana v. Boyd, 2 J. J. Marsh. 587; Hudgins v. Perry, 7 Ired. 105; Pinney v. Andrews, 41 Vt. 631; Benj. on Sales, § 616.

A manufacturer who makes and sells machinery for a special use warrants that it is free from latent defects which render it unfit for the use to which it is to be applied. He does not warrant (in the absence of express contract) that it is perfect, or the best for that purpose, but only that it is reasonably fit and proper for the use designed. "If one orders a casting which cannot be made without blow-holes, there is no warranty implied that he will receive

one without blow-holes; but there is a warranty that he may not expect any more or larger blow-holes than is usual in the process of manufacture designed to such articles fit and proper for use." Tennessee River, etc. Co. v. Leeds, 97 Tenn. 574, 37 S. W. Rep. 379.

¹ Byrd v. Campbell Printing Press & Manuf. Co., 90 Ga. 542, 16 S. E. Rep. 267; Hill v. North, 34 Vt. 604.

² Hill v. North, 34 Vt. 604.

³ June v. Falkinburg, 89 Mo. App. 563, 571, and cases cited in next note.

⁴ Hansen v. Gaar, 63 Minn. 94, 65 N. W. Rep. 254; Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. Rep. 143; Norris v. Parker, 15 Tex. Civ. App. 117, 38 S. W. Rep. 259; Watson v. Roode, 30 Neb. 264, 46 N. W. Rep. 491.

⁵ Troy Laundry Co. v. Henry, 23 Ore. 232, 31 Pac. Rep. 484.

and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller intended to warrant against them; but all other defects, though apparent to some extent, but still equivocal and doubtful in their character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundness, must be understood to be included in and covered by a general warranty.¹

For mere breach of warranty the sale cannot be rescinded by return of the property after it has been delivered and accepted so as to vest the title in the purchaser, unless the contract gives that option or requires it.² But in some states a warranty is considered in the nature of a condition subsequent at the election of the vendee, and upon a breach of it he may rescind the contract by returning the property.³ If, by the

¹ *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. Rep. 856, 56 Am. St. 636, 37 L. R. A. 799; *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395; *Miller v. Moore*, 83 Ga. 684, 10 S. E. Rep. 360, 20 Am. St. 329, 6 L. R. A. 374; *Hill v. North*, 34 Vt. 604. See *Callaway v. Quattlebum*, 19 Ga. 277.

² *Skinner v. Mulligan*, 56 Ill. App. 47; *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. Rep. 149; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. Rep. 3; *Street v. Blay*, 2 B. & Ad. 256; *Gompertz v. Denton*, 1 Cr. & M. 207; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 530; *Cutter v. Powell*, 2 Smith Lead. Cas. 26; *Wright v. Davenport*, 44 Tex. 164; *Thornton v. Wynn*, 12 Wheat. 183; *Withers v. Greene*, 9 How. 213; *Lyon v. Bertram*, 20 id. 149; *Voorhees v. Earl*, 2 Hill, 288; *Cary v. Gruman*, 4 id. 625; *Muller v. Eno*, 14 N. Y. 601, per Comstock, J.; *Kase v. John*, 10 Watts, 107, 36 Am. Dec. 148; *Lightburn v. Cooper*, 1 Dana, 273; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197; *Williams v. Hart*, 2 Humph. 68; *West v.*

Cutting, 19 Vt. 536; *Hoadly v. House*, 32 id. 179, 76 Am. Dec. 167; *Mayor v. Dwinell*, 29 Vt. 298; *Matteson v. Holt*, 45 id. 336; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Rust v. Eckler*, 41 N. Y. 488; *Milton v. Rowland*, 11 Ala. 732; *Freeman v. Clute*, 3 Barb. 424; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. Rep. 692; *Miller v. Moore*, 83 Ga. 684, 10 S. E. Rep. 360, 20 Am. St. 329, 37 L. R. A. 799.

³ *Hodge v. Tufts*, 115 Ala. 366, 22 So. Rep. 422; *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 26 C. C. A. 259; *Wilson v. New United States Cattle Ranch Co.*, 73 Fed. Rep. 994, 20 C. C. A. 244; *Eagle Iron Works v. Des Moines S. R. Co.*, 101 Iowa, 289, 70 N. W. Rep. 193; *Door v. Fisher*, 1 Cush. 271; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Bryant v. Isburgh*, 13 Gray, 607; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Franklin v. Long*, 7 Gill & J. 407; *Rutter v. Blake*, 2 Harr. & J. 353, 3 Am. Dec. 552; *Boothby v. Scales*, 27 Wis. 626;

terms of the contract, the purchaser is required absolutely to return the property if found defective or in any wise not conformable to the warranty, with a view to the substitution of other property, or rescission, then the vendee will have [418] no right of action on the warranty without returning or offering to return it.¹

It is nowhere obligatory to return the goods, unless it is required by the contract. The buyer may sue immediately on the breach; his action accrues at once on the completion of the sale, if the goods are not according to the warranty.² This

Wardle v. Whitney, 23 id. 55, 99 Am. Dec. 102; Merrill v. Nightingale, 39 Wis. 247.

"In cases of executory contracts for the manufacture and sale of goods of a particular description, there is an implied warranty that they are free from any latent defect growing out of the process of manufacture or the use of inferior material; this is the sole warranty that attaches to such a contract and after full opportunity for examination as to quality, or as to apparent defect, or the discovery of it, if it is latent, the vendee must rescind the contract and offer to return the property to the vendor, in which case he may recover the contract price; this is his only remedy. If the vendee neither returns nor offers to return the property, nor gives the vendor notice or opportunity to take it back, in the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced and may not thereafter complain that the article is not in accordance with the contract. Durbrow & Hearne Manuf. Co. v. Cuming, 35 App. Div. 376, 58 N. Y. Supp. 818; Reed v. Randall, 29 N. Y. 358; Coplay Iron Co. v. Pope, 108 id. 232, 15 N. E. Rep. 335. If there is an express or collateral warranty the vendee may retain the goods if they are defective, and sue for the breach of warranty,

in which case he may recover as damages the difference between the value of the goods, if they had been as represented, and their value as they actually were." Bank of North Collins v. Cary Safe Co., 42 App. Div. 233, 59 N. Y. Supp. 643.

¹ Davis v. Gosser, 41 Kan. 414, 21 Pac. Rep. 240; Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129, 30 N. W. Rep. 295; Sessions v. Hartsook, 23 Ark. 519; Mayor v. Dwinell, 29 Vt. 298.

Under a warranty that a horse is sound and kind, and if he should not suit the seller would take him back and send the purchaser another, held, that the warranty as to unsoundness was independent, and that the right to provide another horse under the contract did not extend to unsoundness; that the horse being unsound and having died, the purchaser could recover damages, and was not obliged to call upon the seller to furnish another horse. Perrine v. Serrell, 30 N. J. L. 454.

² Parry Manuf. Co. v. Tobin, 106 Wis. 286, 82 N. W. Rep. 154; Hefner v. Haynes, 89 Iowa, 616, 57 N. W. Rep. 421; Hooper v. Story, 155 N. Y. 171, 49 N. E. Rep. 773; Zimmerman v. Druecker, 15 Ind. App. 512, 44 N. E. Rep. 557; Central Trust Co. v. Arctic Ice Machine Manuf. Co., 77 Md. 202, 238, 26 Atl. Rep. 493; Joseph v. Richardson, 2 Pa. Super. Ct. 208; English v. Spokane Com. Co., 57 Fed. Rep. 451,

is so, notwithstanding any difficulty or inability of the purchaser then to ascertain the quality or condition of the property.¹ If the buyer is required to return the property on ascertaining its defect and does not do so, he cannot recover for expenses incurred after its condition is known to him.² The right to return is lost if the goods are retained for a longer time than was reasonable for a trial, or if the buyer's conduct shows that he accepted them.³

"When there is an express warranty upon an executory contract of sale, and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty, two remedies are open to him. He may return the articles and rescind the contract, or he may accept them and, affirming the contract, recover upon the warranty.⁴ The right to rescind arises, not because the contract of warranty is broken, but because the articles do not correspond with the contract of sale, and the vendee is not bound to accept that which he did not agree to buy,—a consideration which has sometimes been overlooked in the adjudged cases. A rescission contemplates that both parties shall be placed in *statu quo*, and ordinarily the vendee of goods who proposes to

6 C. C. A. 416; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. Rep. 942; *Close v. Crossland*, 47 Minn. 500, 50 N. W. Rep. 694; *Vincent v. Leland*, 100 Mass. 433; *Hammar Paint Co. v. Glover*, 47 Kan. 15, 27 Pac. Rep. 130.

¹ *Allen v. Todd*, 6 Lans. 222.

Where the use of improper stock in the manufacture of cloth only made it unserviceable in places the vendee was not concluded by his acceptance and retention of the cloth for manufacturing it into ulsters, the defects not being discoverable upon inspection. *Bierman v. City Mills Co.*, 151 N. Y. 482, 492, 45 N. E. Rep. 586, 56 Am. St. 636, 37 L. R. A. 799.

² *Newberry v. Bennett*, 38 Fed. Rep. 308; *Draper v. Sweet*, 66 Barb. 145; *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129, 33 Am. Rep. 121, 50 N. W.

Rep. 988; *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. Rep. 917.

It is competent for the jury to consider, in determining whether or not there was a breach of warranty, the fact that the buyer, after a reasonable opportunity to examine goods sold by sample, retained possession of them without complaining of their quality or offering to return them. *Moore Furniture Co. v. Sloane*, 166 Ill. 457, 47 N. E. Rep. 1128, 64 Ill. App. 581.

³ *McMillan v. De Tamble*, 93 Ill. App. 65; *Hodge v. Tufts*, 115 Ala. 366, 22 So. Rep. 422.

⁴ *Pope v. Allis*, 115 U. S. 363, 6 Sup. Ct. Rep. 69; *Bayley v. Cleveland Rolling Mill Co.*, 22 Blatch. 342, 21 Fed. Rep. 159; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. Rep. 51, 52 Am. Rep. 63.

rescind the contract for their purchase must rescind *in toto*. But, when the contract of purchase embraces a number of distinct articles at different prices, then, even if they are of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is, in effect, a separate contract for each article, and a right of rescission exists as to each.¹ But, if one consideration is to be paid for all the articles so that it is not possible to determine the amount of consideration paid for each, the contract is entire, and there cannot be a rescission without an offer to return the whole."²

§ 669. Damages on breach of warranty of title. The measure of damages for breach of the warranty of title, it might be expected, would be at least what would be recoverable for failure to deliver, that is the value of the property lost by the defect of title,³ at the time of the breach, which is, in the absence of any stipulation, when there is an absolute refusal to deliver.⁴ "A loss of property through a want of title is precisely the same to the vendee as a loss of it because the vendor fails to deliver, and the latter, by violating his contract, is the cause of the loss in either case. The value of the property at the time the vendee is dispossessed has been held to be the measure of damages.⁵ Generally, however, the measure has been stated to be the purchase-money and interest,⁶ thus adopting the same rule that is usually applied in

¹ *Young & Conant Manuf. Co. v. Wakefield*, 121 Mass. 91.

² Per Wallace, C. J., in *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 26 C. C. A. 259, citing *Miner v. Bradley*, 22 Pick. 457; *Lyon v. Bertram*, 20 How. 149.

³ *Routh v. Caron*, 64 Tex. 289.

⁴ *Lister v. Windmuller*, 52 N. Y. Super. Ct. 407.

⁵ *Close v. Crossland*, 47 Minn. 500, 50 N. W. Rep. 694; *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. Rep. 1019; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. Rep. 150, citing *Grose v. Hennessey*, 13 Allen, 389, and *Rowland v. Shelton*, 25 Ala. 217; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Duecker v. Goeres*, 104 Wis. 29, 36,

80 N. W. Rep. 91, citing the text; *Marlatt v. Clary*, 20 Ark. 251; *Dobovich v. Emeric*, 12 Cal. 171; *Boyd v. Whitfield*, 19 Ark. 447.

This is assumed to be the measure in *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482.

⁶ *Jeffers v. Easton*, 113 Cal. 345, 45 Pac. Rep. 680; *Hudson v. Norwood*, 13 Tex. Civ. App. 662, 35 S. W. Rep. 1075; *Confederation Life Ass'n v. Labatt*, 27 Ont. App. 321, quoting the text; *Brown v. Woods*, 3 Cold. 182; *Ellis v. Gosney*, 7 J. J. Marsh. 109; *Crittenden v. Posey*, 1 Head, 311; *Auding v. Perkins*, 29 Tex. 348; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Burt v. Dewey*, 31 Barb. 540; *Goss v. Dysant*, 31 Tex.

estimating the damages for breach of covenants for title to real estate.¹ There can be no recovery on warranty for more [419] than nominal damages unless the paramount title has been asserted or yielded to and the property given up to the owner.² In North Carolina there may be a recovery without

186; *Granberry v. Hawpe*, 30 id. 409; *Ware v. Weathnall*, 2 McCord, 413; *Rowland v. Shelton*, 25 Ala. 217; *Eaton v. Mellus*, 7 Gray, 566; *Arthur v. Moss*, 1 Ore. 193; *Atkins v. Hosley*, 3 Thomp. & C. 322; *Wood v. Wood*, 1 Met. (Ky.) 512.

In *Hendrickson v. Back*, 74 Minn. 90, 76 N. W. Rep. 1019, this rule of damages was declared erroneous because under it the recovery might be more or less than the damages, depending on the real value of the chattel when the paramount title was asserted against the vendee; that is, whether the real value was more or less than the price paid. "A good illustration of this is found in the present case. Defendant purchased in 1892, agreeing to pay \$75 for the harvester and binder in question. He gave his note for this sum to his vendor, plaintiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged until 1895, and it was then worth but \$25. Defendant had the possession and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for \$10 in 1892. We call attention to the fact that in a number of the text-books on the subject of damages the rule finally adopted by the trial court is laid down, and cases cited in support of it. An examination will show that, with two or three exceptions, they do not sustain the rule, and quite a

number are authority for what we believe to be the only just doctrine."

There is no connection between the failure of title and the act of the owner of the property in maliciously, wilfully and fraudulently taking possession of it; hence, if such owner is impleaded by the vendor he cannot be held for exemplary damages. *Hudson v. Norwood*, 13 Tex. Civ. App. 662, 35 S. W. Rep. 1075.

¹ If the failure of title is but partial the damages will bear the same proportion to the whole purchase-money as the value of the part to which the title fails bears to the whole property, estimated at the price paid. *Moorehead v. Davis*, 92 Ind. 303; *Brown v. Woods*, 3 Cold. 182; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, 5 Atl. Rep. 150.

In *Crittenden v. Posey*, 1 Head, 311, the vendor had a life estate in the property, which was slaves, for the life of another, and in that case the consideration paid was permitted to be recovered, but with an abatement of interest during the period of enjoyment; it was computed only from the termination of the life estate. See *Wood v. Wood*, 1 Met. (Ky.) 512.

² *Close v. Crossland*, 47 Minn. 500, 50 N. W. Rep. 694; *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. Rep. 100; *Johnson v. Oehmig*, 95 Ala. 189, 10 So. Rep. 657, 36 Am. St. 204; *O'Brien v. Jones*, 91 N. Y. 93; *Wanser v. Messler*, 29 N. J. L. 256; *Bordewell v. Colie*, 45 N. Y. 594, 1 Lans. 141; *Joslin v. Caughlin*, 27 Miss. 852; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Sweetman v. Prince*, 62 Barb. 256; *Randon v. Toby*, 11 How. 493; *Mc*

proof of dispossession by legal process;* that follows if the title is in another than the vendee and such other has acquired possession.¹ In Kentucky the same rule is recognized where the warranty is implied;² but if it is expressed no cause of action accrues until dispossession by the owner.³ The latter rule is the law of Georgia.⁴ It has been said that there is not sufficient ground for this distinction.⁵

If the vendor fraudulently represents the property to be his when he knows it is not, an action lies to recover damages although the owner has not recovered the property and the vendee has not suffered any actual damages.⁶ A recovery of the value by the owner against the vendee is equivalent to an eviction for the purpose of recovery against the vendor on the warranty of title.⁷

It is said in a Canadian case⁸ that "there is no case in the

Giffin v. Baird, 63 N. Y. 329; *Burt v. Dewey*, 40 id. 283, 100 Am. Dec. 482; *Brown v. Smith*, 5 How. (Miss.) 387; *Patrick v. Swinney*, 5 Bush, 421; *Ogburn v. Ogburn*, 3 Port. 126; *Conner v. Eddy*, 25 Mo. 72; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Richardson v. McFadden*, 13 Tex. 278; *Dent v. McGrath*, 3 Bush, 174; *Schuchardt v. Allens*, 1 Wall. 359. See *Grose v. Hennessey*, 13 Allen. 389.

If the vendor is insolvent the vendee may, upon being threatened with suit by the true owner of the property, pay the latter the price and thereby acquire a defense to an action by the vendor. *Matheny v. Mason*, 73 Mo. 677, 682, 39 Am. Rep. 541, citing *Sweetman v. Prince*, 26 N. Y. 232; *Bell's Contract of Sale*, 94, 95; *Burt v. Dewey*, 40 N. Y. 286, 100 Am. Dec. 482; *McGiffin v. Baird*, 62 N. Y. 329, 331; *Bordewell v. Colie*, 1 Lans. 141, 143, 144; *Dickinson v. Maul*, 4 B. & Ad. 638; *Allen v. Hopkins*, 13 M. & W. 93; *King v. Richards*, 6 Whart. 418, 427, 37 Am. Dec. 420; *Hayden v. Davis*, 9 Cal. 573; *Frazier v. Erie Bank*, 8 W. & S. 18, 20, and

Arnold v. Macungie Savings Bank 71 Pa. 287.

One who yields property to the owner on demand, without eviction, assumes the burden of proving that the person to whom he yielded it had a paramount title. *Jeffers v. Easton*, 113 Cal. 345, 45 Pac. Rep. 680. And so as to payment voluntarily made to the true owner. *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541.

¹*Hodges v. Wilkinson*, 111 N. C. 56, 15 S. E. Rep. 941, 17 L. R. A. 545.

²*Pusey's Trustee v. Wathen*, 90 Ky. 473, 14 S. W. Rep. 418.

³*Tipton v. Triplett*, 1 Met. 570, and cases cited.

⁴*Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. Rep. 352.

⁵*Hodges v. Wilkinson*, *supra*; *Gross v. Kierski*, 41 Cal. 111.

⁶*Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. Rep. 100.

⁷*Bordewell v. Colie*, 1 Lans. 141, 45 N. Y. 494; *Allen v. Roundtree*, 1 Spears, 80; *Hynson v. Dunn*, 5 Ark. 395, 41 Am. Dec. 100; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39.

⁸*Confederation Life Ass'n v. Labatt*, 27 Ont. App. 321 (1900).

English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration.¹ In Benjamin on Sales² it is said: *Eichholz v. Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back by the buyer on the failure of the title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract, there seems no reason to doubt that the vendor would also be liable for unliquidated damages. . . . It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work and that the vendee, going upon the breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the common law, as stated by Parke, B.,³ that 'where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'” In another Canadian case it was held that the vendee was entitled to recover the value of the article sold, — a hay press — and the sum he would have received, beyond expenses, upon contracts actually made to press hay with the press in question, and which he was in the course of executing at the time he was dispossessed, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale.⁴

¹ *Eichholz v. Bannister*, 17 C. B. (N. S.) 708; *Raphael v. Burt*, Cab. & Ell. 325; *Peuchen v. Imperial Bank*, 20 Ont. 325.

² 7th Am. ed. (1899) from the Eng. ed. of 1892, and earlier editions published in the author's life time.

³ *Robinson v. Harman*, 1 Ex. 855.

⁴ *Sheard v. Horan*, 30 Ont. 618 (1899). The plaintiff used the press nearly four years before his possession was interfered with. The opinion refers to *The Argentino*, L. R. 14 App. Cas. 519; *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181; *Mullett v. Mason*, L. R. 1 C. P. 559.

Where the vendee is dispossessed by suit and has in good faith incurred expenses in defending it, he is entitled to recover these, also, as an additional item of damages, for the same reasons and on the same conditions as when an action is brought on the covenant of warranty in a deed of land, and in other instances of recovery over.¹ By giving the [420] vendor seasonable notice to defend the suit brought by the owner of the property he is so far made a party that, whether he responds to the notice and defends or not, the judgment is conclusive against him in favor of his vendee to the extent to which his rights are tried and adjudicated.² After the [421]

¹ *Scaling v. Knollin*, 94 Ill. App. 443; *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. Rep. 100; *Balte v. Bedemiller*, 37 Ore. 27, 60 Pac. Rep. 601; *Thurston v. Spratt*, 52 Me. 202; *Armstrong v. Percy*, 5 Wend. 535; *Boyd v. Whitfield*, 19 Ark. 447.

In the last case the vendor lived in Virginia, and after his death his administrator also. The securities for the purchase-money were in the hands of an attorney in Kansas for collection. He had been attorney for the vendor, and, after his death was such for the administrator for the purpose of such collection. This attorney was notified of the suit, and the nature of it, for the assertion of the paramount title, and requested to attend to it in behalf of the vendor. The attorney, being unable to attend court, said he would request his partner to do so, and he did assist in the defense. Testimony was taken in Virginia, and it was inferred by the court that the vendor's administrator in that manner obtained notice of the suit and the object of it, as he was present at the taking of the depositions, and the record was held conclusive against him. The property was slaves, and in the action upon the warranty the court gave the plaintiff their value, and the amount of hire he had been adjudged to pay the true owner,

with interest, "etc.," which, perhaps, refers to the costs and expenses of defending the title.

² *Davis v. Wilborne*, 1 Hill (S. C.), 27, 26 Am. Dec. 154; *Pickett v. Ford*, 4 How. (Miss.) 246; *Barney v. Dewey*, 13 Johns. 225, 7 Am. Dec. 372; *Blasdale v. Babcock*, 1 Johns. 517; *Brewster v. Countryman*, 12 Wend. 450; *Minor v. Clark*, 15 id. 427; *Middleton v. Thompson*, 1 Spears, 67; *Train v. Gold*, 5 Pick. 360; *Ives v. Niles*, 5 Watts, 325; *Collingwood v. Irwin*, 3 id. 310; *Eldridge v. Wadleigh*, 12 Me. 371; *Marlatt v. Clary*, 20 Ark. 251; *Myers v. Smith*, 27 Md. 91.

It was so held in *Armstrong v. Percy*, 5 Wend. 535. In August, 1825, the defendant had sold a horse to the plaintiff for \$140. In March, 1827, the plaintiff sold the horse, together with another, to M., and took his notes for \$225. In May following the horse bought of defendant was taken from M. by G. on replevin. A claim for property was interposed — the plaintiff and defendant in this action attended on the inquiry before the sheriff, — the jury found the property to be in G., and defendant expressed his satisfaction with the finding. The replevin was prosecuted to judgment. G. recovered \$72.32 for damages, and \$33.95 costs, which sums, together with \$19.50, the costs of the defense, were paid by M. A.

failure of title has been judicially established the vendor is not liable for the expense of further litigation.¹ The vendor is bound to protect the vendee from all actions arising from circumstances anterior to the sale, of which the cause or germ

settled with M. by giving up his notes for \$225 and paying him \$20 in cash, and claimed of the referees a report in his favor for the amount of the original consideration paid P. and for the damages and costs recovered against and paid by M., which he had subsequently paid to M. in the manner above stated. Referee's report \$275. Marcy, J.: "Where the action is on the warranty of title, the damages which naturally result to the purchaser are the value of the article which he loses by the failure of the title, or the price he has paid for it. In the cases of *Curtis v. Hannay*, 3 Esp. 82, and *Caswell v. Coan*, 1 Taunt. 566, no special damages were set forth in the declaration; the measure of damages, therefore, in those cases was the price paid for the article; but in the case of *Lewis v. Peake*, 7 Taunt. 152, the declaration assigned as special damages, occasioned by the breach of the warranty, that the plaintiff, confiding in the defendant's warranty, resold the horse with warranty, and was thereby subjected to pay £88 as costs besides the price of the horse. Having given notice to the defendant that he was prosecuted on his warranty, and offered him the option to defend (which was not accepted), the plaintiff was allowed to recover, in addition to the price of the horse, the costs which he was subjected to pay. The principle of that case is probably correct; but it may well be doubted whether the plaintiff here has brought himself within it. We are not furnished with the declaration, and may, there-

fore, presume that it is so framed as to allow the plaintiff to recover such special damages as by law he could, in any form of declaring, be entitled to recover. If the plaintiff was liable for the costs incurred in testing the title to the horse, or could have been made liable, and has, in fact, paid them, he may recover them of the defendant. If he has paid them without being under a legal liability to do so, it appears to me he had no just right to have them allowed to him in this cause. The extent of the plaintiff's right to damages could not be conclusively settled by the sum which he agreed to allow, or had actually paid M., but by the amount that M. could have recovered against him. What sum could M. have recovered? Certainly not more than the price paid for the horse when purchased of the plaintiff, and the costs of the suit in which the title was tested. The fact that \$72.32 were allowed to the owners for damages proves that the horse had become deteriorated in the hands of M., and, if so, he could not have recovered of the plaintiff the damages and costs which the owners recovered against him, and the full value of the horse before the deterioration or at the time of his purchase. The damages must be allowed in part or wholly for the use of the horse, and as the plaintiff or M. must have had the benefit of that use, the defendant could not be legally charged therewith. The referees should have arrived at the amount which the plaintiff was entitled to recover by allowing him the price paid to the defend-

¹ *Lunt v. Wrenn*, 113 Ill. 168; *Scaling v. Knollin*, 94 Ill. App. 443, 453.

existed at the time thereof: the debts chargeable on the thing sold, revenue duties to which the goods are liable, or such defects in the vendor's title as form a *labes realis*. Thus, if rent be due at the time of the sale the vendor is liable on his implied warranty of title if the property sold be afterwards lawfully seized and taken by the landlord to pay such rent.¹ This warranty extends to and protects against a prior lien as well as an adverse title. So where one sold property and took a note for the price, and the purchaser, finding a lien upon it at the time of the sale, paid it, it was held that [422] the law presumed the payment to have been made at the request of the vendor and that it was valid.² Where the adverse owner has recovered the value instead of the property itself, and the vendor has had the requisite notice to defend the suit in which such recovery was had, he is liable to his vendee for the amount of that judgment, both as to damages and costs. The same rule applies to the original vendor who warrants property when his vendee has sold it with a like warranty and judgment has been recovered against him by the sub-vendee.³

Where there was a sale of a patented article and the full price was paid, less \$25, which the vendor told the vendee was owing to the owner of the patent, and which the vendee assumed to pay, on its appearing that such sum was reserved for the use of the article for one year, and that another \$25 was the price for its perpetual use, it was ruled that the sale

ant for the horse and interest thereon, together with the costs which he became liable to pay to the true owners in their suit to establish their title. . . . I presume that the referees considered the costs paid by M. to his own attorney as an item to be taken into the calculation, but I know of no authority for doing so. In the case of *Lewis v. Peake* the plaintiff was permitted to include as an item in the amount of damages the costs recovered against him on his warranty at the resale of the horse. In the case of *Blasdale v. Babcock*, 1 Johns. 517, which was an

action on an implied warranty as to the title of a horse, the amount that had been recovered against the plaintiff by the owner of the horse was allowed to be the measure of his damages against the defendant. The expenses of *Blasdale* in defending the suit against him were not allowed to him as damages against *Babcock*."

¹ *Myers v. Smith*, 37 Md. 91.

² *Crowell v. Simpson*, 7 Jones, 285; *Dresser v. Ainsworth*, 9 Barb. 619.

³ *Hammond v. Bussey*, 20 Q. B. Div. 79.

carried an implied warranty of both the article and the right to use it, and that the vendee was entitled to the additional \$25, which was the only damage sustained.¹ This view has been approved in a case somewhat similar. "The mere ownership of the title to personal property designed solely for use is of no value if the owner cannot lawfully use it at all. . . . As respects the vendor's implied warranty the right to use should stand on the same ground as the title. Unless, therefore, sufficient facts appear to warrant the inference that the vendee took the risk of any conflicting claims to the patent right, I think the vendor is bound either to secure to the vendee the right to use that which was sold for use, or else to answer in damages for the loss of the value of that use from the time any further use was prevented." The vendee's right to damages was dependent upon an eviction from the use of the article, or a final adjudication resulting in a perpetual injunction, which would be equivalent. The damages would be either the cost of procuring a license for the continued use of the article, or, if that could not be done, the amount of pecuniary loss arising from the inability to continue its use.²

§ 670. Damages for breach of warranty as to quantity or quality. The general rule of damages for breach of warranty as to quantity or quality is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty,³

¹ Carman v. Trude, 25 How. Pr. 440. 48 Am. St. 353; Love v. Ross, 89 Iowa,

² The Electron, 56 Fed. Rep. 304; 400, 56 N. W. Rep. 528; Aultman v. see S. C., 74 id. 689, 21 C. C. A. 12. Shelton, 90 Iowa, 288, 57 N. W. Rep.

³ Canon City Electric Light & Power Co. v. Medart Patent Pulley Co., 11 Colo. App. 300, 52 Pac. Rep. 1030; Wheelock v. Berkeley, 138 Ill. 153, 27 N. E. Rep. 942; Berry v. Shannon, 98 Ga. 458, 25 S. E. Rep. 514; Millirons v. Dillon, 100 Ga. 656, 28 S. E. Rep. 385; Florence v. Pattillo, 105 Ga. 577, 32 S. E. Rep. 642; Moore Furniture Co. v. Sloane, 166 Ill. 457, 46 N. E. Rep. 1128 (citing the text), 64 Ill. App. 581; Miller v. Law, 44 Ill. App. 630; Green v. Witte, 5 Ind. App. 343, 32 N. E. Rep. 214; Douglass v. Moses, 89 Iowa, 40, 56 N. W. Rep. 271, 857; Alpha Checkrower Co. v. Bradley, 105 Iowa, 537, 57 N. W. Rep. 369; Tufts v. Mabie, 7 Kan. App. 129, 53 Pac. Rep. 84; Loomis Milling Co. v. Vawter, 8 Kan. App. 437, 57 Pac. Rep. 43, citing the text; Sharpe v. Bettis, 17 Ky. L. Rep. 673, 32 S. W. Rep. 395; Central Trust Co. v. Arctic Ice Machine Co., 77 Md. 202, 238, 26 Atl. Rep. 493; Ponce v. Smith, 84 Me. 266, 24 Atl. Rep. 854; Noble v. Fagnant, 162 Mass. 275, 38 N. E. Rep. 507; Maxted v. Fowler, 94 Mich. 106, 53 N. W. Rep. 921; Hansen v. Gaar, 63 Minn. 94, 65 N. W. Rep. 254; Mia-

with interest upon such sum.¹ This rule is not affected by the fact that the vendee has sold the property at an increased price,² or paid for it in advance of its delivery,³ or thereafter.⁴ Where a partial payment has been made the vendee's recovery

misburg Twine & Cordage Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. Rep. 175; McCormick Harvesting Machine Co. v. Heath, 65 Mo. App. 461; Hogan v. Shuart, 11 Mont. 498, 28 Pac. Rep. 969; Hooper v. Story, 155 N. Y. 171, 49 N. E. Rep. 773; Bates v. Fish Brothers' Wagon Co., 50 App. Div. 38, 63 N. Y. Supp. 649; Huyett & Smith Manuf. Co. v. Gray, 124 N. C. 322, 32 S. E. Rep. 718; Aultman v. Ginn, 1 N. D. 402, 48 N. W. Rep. 336; Joseph v. Richardson, 2 Pa. Super. Ct. 208; Himes v. Kiehl, 154 Pa. 190, 25 Atl. Rep. 632; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. Rep. 942, 44 L. R. A. 438; Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. Rep. 10; Danner v. Fort Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. Rep. 856; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 606, 63 N. W. Rep. 1013, citing the text; Park v. Richardson, 91 Wis. 189, 64 N. W. Rep. 859, citing the text; Parry Manuf. Co. Tobin, 106 Wis. 286, 82 N. W. Rep. 154; English v. Spokane Com. Co., 57 Fed. Rep. 451, 6 C. C. A. 416, citing the

text; Wilson v. New United States Cattle Ranch Co., 73 Fed. Rep. 994, 20 C. C. A. 244; Crane Co. v. Columbus Const. Co., 73 Fed. Rep. 984, 20 C. C. A. 233; Spence v. Duffield, 1 Vict. (law) 49; Hege v. Newsom, 96 Ind. 426; Jackson v. Mott, 76 Iowa, 263, 41 N. W. Rep. 12; J. I. Case Threshing M. Co. v. Haven, 65 Iowa, 359, 21 N. W. Rep. 677; Weybrick v. Harris, 31 Kan. 92, 1 Pac. Rep. 271; Minneapolis Harvester Works v. Bonnellie, 29 Minn. 373, 13 N. W. Rep. 149; Wickes Brothers v. Swift Electric Light Co., 70 Mich. 322, 38 N. W. Rep. 299; Birdsall v. Carter, 11 Neb. 143, 7 N. W. Rep. 751; Willingham v. Hooven, 74 Ga. 233, 58 Am. Rep. 435; Means v. Means, 88 Ind. 196; Blacker v. Slown, 114 id. 322, 16 N. E. Rep. 621; Deutsch v. Pratt, 149 Mass. 415, 21 N. E. Rep. 1072; Merrick v. Wiltse, 37 Minn. 41, 33 N. W. Rep. 3; Young v. Filley, 19 Neb. 543, 26 N. W. Rep. 256; Bach v. Levy, 101 N. Y. 511, 5 N. E. Rep. 345; Marsh v. McPherson, 105 U. S. 709; McMullen v. Williams, 5 Ont. App. 518; Nye v. Iowa City Alcohol Works, 51 Iowa, 129, 50 N. W. Rep. 988; Snow v. Schomacker

¹ Ash v. Beck, 68 S. W. Rep. 53 (Tex. Ct. of Civ. App.). See § 671, note.

² Andrews v. Schreiber, 93 Fed. Rep. 367, affirmed, 101 id. 763, 41 C. C. A. 663; Wheelock v. Berkeley, 138 Ill. 153, 27 N. E. Rep. 942, citing the text; Berry v. Shannon, 98 Ga. 458, 25 S. E. Rep. 514; Miamisburg Twine & Cordage Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. Rep. 175; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 606, 63 N. W. Rep. 1013; Brown v. Bigelow, 10 Allen,

242; Texada v. Camp, Walk. (Miss.) 150; Hunt v. Van Deusen, 42 Hun, 392. See Eagle Iron Works v. Des Moines S. R. Co., 101 Iowa, 289, 70 N. W. Rep. 193.

³ Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. Rep. 942, 44 L. R. A. 438; Loder v. Kekule, 3 C. B. (N. S.) 128.

⁴ Elliott v. Puget Sound & Central American Steamship Co., 22 Wash. 220, 60 Pac. Rep. 410; Nauman v. Ullman, 102 Wis. 92, 78 N. W. Rep. 159.

is, if the amount paid exceeds the value of the property, the excess of the payment; if the property was worthless for the purpose intended, the whole sum paid may be recovered, and if the property was reasonably worth more than the payment the vendor may recover the excess of its value.¹ The rule of damages stated has thus been vindicated as against a contention for the doctrine that the vendor is entitled to recover all that the property was worth to him in the market at the time and place of delivery: "The law does not hold the purchaser at a fixed price of a warranted article for the market value of such article. He has a right to have just such an article as the vendor agreed to sell, and at the agreed price. A low price may be the chief inducement to purchase, and the pur-

Manuf. Co., 69 Ala. 111, 44 Am. Rep. 509; *Sinker v. Diggins*, 76 Mich. 557, 43 N. W. Rep. 674; *Birdsall Co. v. Palmer*, 74 Md. 201, 21 Atl. Rep. 705; *Houghton v. Carpenter*, 40 Vt. 588; *Perrine v. Serrell*, 30 N. J. L. 454; *Roberts v. Fleming*, 31 Ala. 683; *Burford v. Gould*, 35 id. 265; *Rutan v. Ludlam*, 29 N. J. L. 398; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197; *Scranton v. Mechanics' T. Co.*, 37 Conn. 130; *Richardson v. Mason*, 53 Barb. 601; *Tuckwell v. Lambert*, 5 Cush. 23; *Wells v. Selwood*, 61 Barb. 238; *Comstock v. Hutchinson*, 10 Barb. 211; *Voorhees v. Earl*, 2 Hill, 288; *Pritchard v. Fox*, 4 Jones, 140; *Clark v. Neufville*, 46 Ga. 261; *Morse v. Hutchins*, 102 Mass. 439; *Foster v. Rodgers*, 27 Ala. 602; *Cary v. Gruman*, 4 Hill, 625; *Tuttle v. Brown*, 4 Gray, 457, 64 Am. Dec. 80; *Reggio v. Braggiotti*, 7 Cush. 166; *Van Valkenburgh v. Evertson*, 13 Wend. 76; *Decker v. Myers*, 31 How. Pr. 372; *Marshall v. Wood*, 16 Ala. 806; *Marshall v. Gantt*, 15 id. 682; *Scranton v. Tilley*, 16 Tex. 183; *Anderson v. Duffield*, 8 id. 237; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. Rep. 483; *Williamson v. Conday*, 3 Ired. 349; *Seibles v. Blackwell*, 1 McMull. 56; *Badgett v. Broughton*, 1 Ga. 591; *Sharon v. Mosher*, 17

Barb. 518; *Prentice v. Dike*, 6 Duer, 220; *Connor v. Dempsey*, 49 N. Y. 665; *Hook v. Stovall*, 30 Ga. 418; *Lane v. Lantz*, 27 Md. 211; *Hoe v. Sanborn*, 35 How. Pr. 197; *Anding v. Perkins*, 29 Tex. 348; *Williamson v. Dillon*, 1 Harr. & G. 444; *Thornton v. Thompson*, 4 Gratt. 121; *Burton v. Young*, 5 Harr. (Del.) 233; *Brown v. Sayles*, 27 Vt. 227; *Smith v. Cozart*, 2 Head, 526; *Converse v. Burrows*, 2 Minn. 229; *Roberts v. Carter*, 28 Barb. 462; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Edwards v. Collson*, 5 Lans. 324; *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395, citing the text; *Plano Manuf. Co. v. Richards*, 86 Minn. 94, 90 N. W. Rep. 120.

A vessel was warranted to be of a certain class; the vendor promised to insure her for a designated sum. The warranty was not true and the insurance could not be obtained. After a total loss it was held that the vendee's damage was not the amount for which the vessel was to be insured, but the sum it would have cost to have made her of the warranted class. *La Roche v. O'Hagan*, 1 Ont. 300.

¹*Schumann v. Wager*, 36 Ore. 65, 58 Pac. Rep. 770; *Huyett-Smith Manuf. Co. v. Gray*, 129 N. C. 488, 57 L. R. A. 198, 40 S. E. Rep. 178.

chaser at such a price is as much entitled to the benefit of his contract of warranty as though the price agreed on was equal to or greater than the market price of goods of the kind and quality warranted. There might be a breach of a warranty and consequent damage, and the market price of the article be more than the contract price. If there was a breach of warranty, appellant had a right to compensation for the difference by which the coal fell short of what it was agreed to be, and that would not be done merely by making him pay the market value. By deducting the damages from the contract price, the result might or might not be the market value. The measure of recovery, if a breach is proven, would be the contract price less the damages, and the damages would be so much as would make up the difference between the value of the coal as it was and as it was warranted to be, together with any reasonable, necessary expenses directly resulting from a breach of warranty."¹

The difference between the value of the whole property purchased, where only a small portion of it is inferior to that required by the contract, and not merely the difference between the price paid for the defective portion as a part of the lot and its actual value, is the measure of the seller's liability.² But in Minnesota if the defect in a warranted machine is traceable to some detachable part, which may be replaced, irrespective of the whole, or which does not necessarily render the balance of the machine useless, the facts may be proven to show the value of the machine for any purpose.³ If the article purchased has been used in manufacturing, the cost of the labor and the waste of the material resulting from its defects, with interest from the commencement of the suit, are elements of damage.⁴ There

¹ *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395, 404; *Green v. Witte*, 5 Ind. App. 343, 32 N. E. Rep. 214.

² *Deutsch v. Pratt*, 149 Mass. 415, 21 N. E. Rep. 1072.

³ *Benson v. Port Huron Engine & T. Co.*, 83 Minn. 321, 86 N. W. Rep. 327.

⁴ *Bagley v. Cleveland Rolling Mill Co.*, 22 Blatch. 342, 21 Fed. Rep. 159; *Smith v. Foote*, 81 Hus. 128, 30 N. Y.

Supp. 679; *Jones v. Mayer*, 16 N. Y. Misc. 586, 38 N. Y. Supp. 801; *Dommerich v. Garfunkel*, 28 N. Y. Misc. 433, 58 N. Y. Supp. 1006.

In *Wait v. Borne*, 123 N. Y. 592, 25 N. E. Rep. 1053, it is held that if the manufactured article has been sold by the warrantee under circumstances which leave no liability upon him to his vendee, the measure of recovery against the warrantor is the difference between the price actually

is not a total failure of consideration if the property retained by the purchaser has some value for any purpose, though it is valueless for the purpose for which it was bought.¹ The price paid for an article is in many jurisdictions deemed the best evidence of its value between the parties at the time of the purchase, and is preferred to any other evidence;² but in others it is not treated as exclusive of the test of value;— only as admissible evidence tending to show value.³ In some states the damages are ascertained, where the sale is for cash, by the

received for it and its value as it would have been but for the defect in the quality of the ingredient which went into such article. This was ruled on the assumption that the price received was at least equal to the actual value of the article sold, in which case it would be conclusive evidence of value. See *Sherman v. Billings*, 90 Hun, 544, 36 N. Y. Supp. 69.

The terms of the warranty limit the liability of the vendor. Where the obligation was to deliver machinery on the cars, and that if it should fall short of the representations he would replace it, the vendee could not recover freight charges, the expense of placing the machinery or loss or damages resulting from an attempt to use it. *Canon City Electric Light & Power Co. v. Medart Patent Pulley Co.*, 11 Colo. App. 300, 52 Pac. Rep. 1030.

¹*Thumimel v. Dukes*, 82 Mo. App. 53; *Aultman v. Ginn*, 1 N. D. 402, 48 N. W. Rep. 336; *Himes v. Kiehl*, 154 Pa. 190, 25 Atl. Rep. 632; *Brown v. Weldon*, 99 Mo. 564, 13 S. W. Rep. 342, 27 Mo. App. 251.

²*South Covington, etc. R. Co. v. Gest*, 34 Fed. Rep. 628; *Clark v. Neufville*, 46 Ga. 261; *Marshall v. Wood*, 16 Ala. 806; *Scranton v. Tilley*, 16 Tex. 183; *Badget v. Broughton*, 1 Ga. 591; *Hook v. Stovall*, 30 Ga. 418; *Thornton v. Thompson*, 4 Gratt. 121; *Stout v. Jackson*, 2 Rand. 132; *Threlkeld v. Fitzhugh*, 2 Leigh, 451.

The vendor is estopped from show-

ing that goods sold and delivered under an express contract at a stated price were not worth that price. *Levi v. Dimmick*, 99 Cal. 490, 34 Pac. Rep. 79.

³*J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. Rep. 1013; *Hege v. Newsom*, 96 Ind. 426; *Houghton v. Carpenter*, 40 Vt. 588; *Cary v. Gruman*, 4 Hill, 625; *Lane v. Lantz*, 27 Md. 211; *Gilpin v. Consequa*, 3 Wash. C. C. 184; *Anding v. Perkins*, 39 Tex. 348; *Ash v. Beck*, 68 S. W. Rep. 53 (Tex. Ct. of Civ. App.).

In *Reggio v. Braggiotti*, 7 Cush. 166, Shaw, C. J., said: "*Prima facie*, the price first paid for the article is good evidence of its value in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country the established rule in relation to damages in such actions is that the plaintiff may recover what he can show that he has actually lost. A subsequent sale by the vendee of the article warranted is evidence of its value to him."

In *Morse v. Hutchins*, 102 Mass. 440, the court say: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bar-

difference between the price paid for the property and its value.¹ This rule is rested on the principle that the purchaser is entitled to the benefit of his bargain, if he has bought at a low price, which he would lose if his recovery was limited to the amount paid; the same consideration applies to the defendant if he has made a good sale. If the property was bought for the vendee's retail trade, and the seller knew that fact, the wholesale price, it is ruled in a Texas case, is not the standard by which the vendee's loss is to be measured.² But in Illinois this measure of damages does not govern when there has been an exchange of property — then the general rule as stated at the beginning of this section applies.³ The measure of damages on the breach of a warranty as to the quantity of wood lying upon the land of the vendor is not the market value of the deficiency in the wood, but a due proportion of the purchase-money with interest thereon.⁴

The rule that the vendee's damages are to be measured by

gain inure to the benefit of the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken his contract at the expense of the party who was ready to abide by the terms of the contract."

In *Rutan v. Ludlam*, 29 N. J. L. 398, R. sold to L. a horse, for which L. conveyed to him a house and lot and gave him a note for \$25. In an action against R. for a false warranty of the horse, it was held that evidence of the value of the house and lot was inadmissible; that the only question was the difference in value between a sound horse and an unsound one.

In *Comstock v. Hutchinson*, 10 Barb. 211, a charge to the jury that the measure of damages was the difference between the price paid for the horse and the amount he realized on a resale was held erroneous; and the same in *Cary v. Gruman*, 4 Hill, 625. See *Foster v. Rodgers*, 27 Ala. 602; *Tuttle v. Brown*, 4 Gray, 457, 64 Am. Dec. 80.

In an action by the vendor for the

price of goods (cigars), the defendant sought to recoup for damages done to the property after the sale and before delivery; it was held to devolve on him to prove that the injury was done during such period; and that he must prove the actual damage without reference to the price paid at auction; that it was erroneous to allow him the difference in value between the price at which he bought them at auction and the value when delivered. *Gerard v. Prouty*, 34 Barb. 454.

¹ *Levi v. Dimmick*, 99 Cal. 490, 34 Pac. Rep. 79; *West Republic Mining Co. v. Jones*, 108 Pa. 55; *Crabtree v. Kile*, 21 Ill. 180; *Callender I. & W. Co. v. Badger*, 30 Ill. App. 314; *Bump v. Cooper*, 19 Ore. 81, 23 Pac. Rep. 806. Compare *Courtney v. Boswell*, 65 Mo. 96, and *Brown v. Welden*, 99 id. 564, 13 S. W. Rep. 342.

² *Fay Fruit Co. v. Talerico*, 69 S. W. Rep. 196 (Tex. Ct. of Civ. App.).

³ *Wallace v. Wren*, 32 Ill. 146.

⁴ *Parker v. Barlow*, 93 Ga. 700, 21 S. E. Rep. 313.

the difference between the value of the property as it was at the time of its delivery and the market value of it if the warranty had been complied with, is varied when it is necessary to do justice between the parties. Where an orchid was warranted to be of a variety which would blossom white, and proved, after two years' cultivation by the vendee, to be an ordinary purple one, the warranty was not breached until the orchid blossomed, it being impossible to determine before that event whether the warranty was according to the fact or not. The vendee's damages were not measurable by the injury sustained when the orchid was delivered; he could wait and see what those damages were, and was entitled to prove special damages, which were the difference between what the value of the orchid was at the time of the sale and what its value would have been when it blossomed if it had conformed to the warranty.¹ The same principle has been applied in California, the code of which provides that the detriment caused by the breach of the warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. Where fruit trees were sold with a warranty as to their varieties, and the breach was not discovered until two years after they were planted, it was ruled that the time to which the warranty related was that when the breach was discovered, or with ordinary care might be discovered.² In ascertaining the value of property purchased with a warranty for a special purpose, there being none in the market which would produce the result the vendor stipulated for, the vendee is not entitled to speculative damages for an ideal machine which was not in existence; his damages are measurable by the difference in value between the machine delivered and the contract price.³

¹ *Ashworth v. Wells*, 14 T. L. Rep. 227 (1898).

² *Shearer v. Park Nursery Co.*, 103 Cal. 415, 37 Pac. Rep. 412. And see the cases cited *infra* to the various sections of this chapter.

It is declared in *Battley v. Faulkner*, 3 B. & Ald. 288, that the cause of action for breach of warranty on

a sale of unascertained goods arises upon their delivery though the defect was not discovered until long after, and the claim was in part for special damages subsequently incurred.

³ *Huyett-Smith Manuf. Co. v. Gray*, 129 N. C. 438, 57 L. R. A. 190, 40 S. E. Rep. 178.

§ 671. **Same subject.** The rule of damages just stated, like all general rules, is intended for ordinary cases of the class to which it applies, and where it will afford to the injured party full compensation for his actual loss. It often happens, however, that the delivery and acceptance of property which is not conformable to the contract imposes upon the vendee trouble and expense which add to the loss for which compensation may be recovered under that rule, which, if it were applied arbitrarily, excluding all other items, would in many instances fail to give adequate redress. As the paramount principle is to give compensation commensurate with the loss or injury, the rule on the subject of warranties is always stated, when the case requires it, so as to include interest¹ if the price has been paid, and any expense² or other special damages naturally and proximately resulting from the breach.³ Thus, where an article was sold as opium the court

¹ Interest runs from the date of the breach to the time of trial. It is due by way of damages implied by law, and need not be specially claimed in the pleading. *Brown v. Doyle*, 69 Minn. 543, 72 N. W. Rep. 814; *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 63 N. W. Rep. 1013. Interest is not recoverable in New York. *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Riss v. Messmore*, 58 N. Y. Super. Ct. 23, 9 N. Y. Supp. 320.

² A vendor is not liable for expenses incurred by his vendee in adjusting differences between himself and another to whom he had sold the warranted property, the original sale not having been made with reference to a resale. *Joseph v. Richardson*, 2 Pa. Super. Ct. 208.

Expenses incurred by the purchaser of a trotting-horse, sold upon representation that it was eligible to registration in a particular association, in endeavoring to have the horse registered, and for extra care and expense of it on the theory that the horse was as he represented, have been held not to be elements of dam-

age. *Sharpe v. Bettis*, 17 Ky. L. Rep. 673, 32 S. W. Rep. 395.

In *Huyett & Smith Manuf. Co. v. Gray*, 111 N. C. 87, 93, 15 S. E. Rep. 939, a recovery of the cost of a building erected for warranted machinery was denied, and it was said that special damages for breach of warranty are rarely allowable except in cases of fraud in inducing the contract. *But see notes to this section *infra*.

If the vendee may return a horse bought by him in case of a breach of the warranty, he cannot recover the cost of keeping him after knowledge of the breach. *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. Rep. 340.

³ *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395, citing the text; *Glidden v. Pooler*, 50 Ill. App. 36; *Deane v. Michigan Stove Co.*, 69 Ill. App. 106, stated in § 672; *Hodge v. Tufts*, 115 Ala. 366, 22 So. Rep. 422; *Love v. Ross*, 89 Iowa, 400, 56 N. W. Rep. 528; *Briggs v. Rumely Co.*, 96 Iowa, 202, 64 N. W. Rep. 784; *Alpha Checkrower Co. v. Bradley*, 105 Iowa, 537, 75 N. W. Rep. 369; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55

held there was an implied warranty of genuineness; and there being a breach of it, and the vendee having resold with a like warranty, and judgment recovered against him for breach of it, the sum paid on this judgment was *prima facie* the amount he was entitled to recover against his vendor; also, that if he

N. W. Rep. 211; Kester v. Miller, 119 N. C. 475, 26 S. E. Rep. 115; Coyle v. Baum, 3 Okl. 695, 41 Pac. Rep. 389; Danner v. Fort Worth Implement Co., 18 Tex. Civ. App. 621, 45 S. W. Rep. 856; Tompkins Co. v. Galveston Street R. Co., 4 Tex. Civ. App. 1, 23 S. W. Rep. 25; J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 606, 63 N. W. Rep. 1013, citing the text; Aultman v. McDonough, 110 Wis. 263, 85 N. W. Rep. 980; Accumulator Co. v. Dubuque Street R. Co., 64 Fed. Rep. 70, 12 C. C. A. 37; Burr v. Redhead, 52 Neb. 617, 72 N. W. Rep. 1058; Fisher v. Bertram, 100 Ill. App. 542; Heenan v. Redmen, 101 Ill. App. 603; Cleave v. King, 3 N. Z. L. R. 277 (court of appeal); Thoms v. Dingley, 70 Me. 100, 35 Am. Rep. 310; New York & C. Mining Co. v. Fraser, 130 U. S. 611, 622, 9 Sup. Ct. Rep. 665; Union Bank v. Blanchard, 65 N. H. 21, 18 Atl. Rep. 90; Minneapolis Harvester Works v. Bonnackie, 29 Minn. 373, 13 N. W. Rep. 149; Joplin Water Co. v. Bathe, 41 Mo. App. 285; Aultman v. Case, 68 Wis. 612, 32 N. W. Rep. 772; Hambrick v. Wilkins, 65 Miss. 631, 3 So. Rep. 67; Halstead Lumber Co. v. Sutton, 46 Kan. 192, 26 Pac. Rep. 444; Sinker v. Diggins, 76 Mich. 557, 43 N. W. Rep. 674; Swain v. Schieffelin, 134 N. Y. 471, 18 L. R. A. 385, 31 N. E. Rep. 1025; Roberts v. Fleming, 31 Ala. 683; Buford v. Gould, 35 id. 265; Perrine v. Serrell, 30 N. J. L. 454; McKay v. Lane, 5 Fla. 268; Foster v. Rodgers, 27 Ala. 602; Reggio v. Braggiotti, 7 Cush. 166; Marshall v. Wood, 16 Ala. 806; Badgett v. Broughton, 1 Ga. 591; Sharon v. Mosher, 17 Barb. 518; Prentice v. Dike, 6 Duer, 220; Seibles v.

Blackwell, 1 McMull. 56; O. H. Jewell Filter Co. v. Kirk, 103 Ill. App. 246; Dilley v. Ratcliff, 69 S. W. Rep. 237 (Tex. Ct. of Civ. App.); People's Savings Bank v. Waterloo & C. F. Rapid Transit Co., — Iowa, —, 92 N. W. Rep. 691.

Where goods were bought for resale, the vendor knowing the fact, and the vendee, before discovering the defects, sold them to his customers, who rejected the goods because of such defects, the reasonable expenses in making such sales and those incurred in returning the goods to the vendee, were proper elements of damage. Punteney-Mitchell Manuf. Co. v. T. G. Northwall Co., 91 N. W. Rep. 863 (Neb.).

In Clark v. Neufville, 46 Ga. 264, an action for breach of warranty of quality in the sale of goods, the court says the measure of damages is the difference between the price paid and the value of the goods as they actually were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule excluding indirect and speculative damages. Thompson v. Bertrand, 23 Ark. 730; Tatum v. Mohr, 21 id. 349; Murray v. Meredith, 25 id. 164.

In Short v. Matteson, 81 Iowa, 638, 47 N. W. Rep. 874, there was a breach of warranty concerning the colt-getting qualities of a stallion sold for breeding purposes. The vendee was entitled to recover the difference between the real value of the horse and what his value would have been if the warranty were not false, and also the reasonable costs and expenses incurred for advertising,

gave the latter notice of the commencement of that suit and requested him to defend it, the plaintiff might, likewise, recover his taxable costs incurred therein; but, following the Massachusetts rule, the attorney fees paid for the defense of such a suit were not allowed.¹ And where it was provided that if a warranted machine did not work properly the purchaser's negotiable note should be returned upon the delivery of the machine to the vendor, and the vendee complied with the condition, but the vendor did not return the note, but indorsed it before it was due to a third person under circumstances which gave the maker some cause to believe that the transfer was not *bona fide*, the vendor was held responsible for the attorneys' fees incurred in defense of a suit thereon.² Where there was a breach of warranty as to a machine which could not be bought in the market, and the vendor knew that the vendee bought it for use in his business, and must have anticipated that he would make contracts involving its operation, the damages were measured by what it cost the vendee to have such a contract fulfilled and what he would have received for it if he had himself fulfilled it.³ Where the delivery of an inferior grade of goods necessitated a sale of them by the vendee and a purchase of others to take their place, the expense of such a sale and purchase was held to be a necessary and natural damage.⁴ A manufacturer of cloth is not bound

keeping and standing the horse for breeding purposes prior to the time his real qualities became known.

In *National Horse Importing Co. v. Novak*, 95 Iowa, 596, 64 N. W. Rep. 616, the vendee of a warranted stallion arranged with C., the owner of another stallion, that the two should stand together, the joint earnings of both horses to pay for their keeping, and that the surplus should be divided. C.'s horse earned nearly all that was earned, and the cost of keeping the other was taken out of such earnings. Such vendee was entitled to recover expenses like those specified in the preceding paragraph.

¹ *Reggio v. Braggiotti*, 7 Cush. 166; *Randall v. Raper*, El. B. & E. 84;

Hammond v. Bussey, 20 Q. B. Div. 79; *Nashua Iron & Steel Co. v. Brush*, 91 Fed. Rep. 213, 33 C. C. A. 456; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. Rep. 1065; *Cleave v. King*, 3 N. Z. L. R. 277 (court of appeal); *Carleton v. Lombard*, 19 App. Div. 297, 46 N. Y. Supp. 120, affirmed without opinion, 162 N. Y. 628.

² *Osborne v. Ehrhard*, 37 Kan. 413, 15 Pac. Rep. 590.

³ *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 55 Fed. Rep. 451, 5 C. C. A. 190.

⁴ *Hudmon v. Cuyas*, 57 Fed. Rep. 355, 6 C. C. A. 381. One of the judges was of opinion that such damage was special and was not recoverable because not specially pleaded.

to respond to his vendee for the full selling price of suits made therefrom after he became aware of the worthlessness of the material, such suits being sold under circumstances which imposed no liability upon the vendee; and as to suits made after such knowledge came to the vendee, he could not recover increased damage because of the making of them.¹

In an action for the breach of warranty on the sale of a mare, the representation made to the plaintiff that she was perfectly gentle and kind was shown to be false. The action was for this representation, and it appeared that within two days after the sale and purchase the plaintiff attempted to drive the mare before a buggy, when she commenced running and kicking, with the result that the buggy was broken; the plaintiff to save himself sprang to the ground and thereby broke one of his legs. It was held admissible to prove the [425] nature, extent and permanent character of the injury to his leg; the length of time he was confined to his house, and the damage done to his buggy; that it should be left to the jury to say whether such injuries resulted from the viciousness of the mare and were the probable and natural consequences of the fraud practiced by the defendant.² In Alabama there may be a recovery for personal injuries caused by the running away of a vicious and unsafe horse which the vendor represented to be kind and gentle if bad faith or fraud on the part of the latter is shown; but not otherwise.³ But there cannot be a recovery for damage done to property by the horse after the purchaser has acquired knowledge of his vicious and dangerous tendencies.⁴ Where slaves were purchased as sound, and proved to be unsound or diseased, reasonable charges for care and attention and medical aid were

¹ Black v. Dudley, 75 App. Div. 72, 77 N. Y. Supp. 766.

² Sharon v. Mosher, 17 Barb. 518; Allen v. Truesdell, 135 Mass. 75; Bruce v. Fiss, 26 N. Y. Misc. 472, 56 N. Y. Supp. 234, 47 App. Div. 273, 62 N. Y. Supp. 96.

In Rich v. Smith, 34 Hun, 136, the warranty that a horse was "good, gentle and kind" to the extent of being a good family horse was con-

sidered general as to his qualities only — not as special for any particular purpose. Injuries sustained by the purchaser in consequence of the animal's running away and colliding with a vehicle were remote and accidental.

³ Jones v. Ross, 98 Ala. 448, 13 So. Rep. 319.

⁴ Bruce v. Fiss, 47 App. Div. 273, 62 N. Y. Supp. 96.

allowed as damages;¹ the same rule applies to other property.² In such cases the vendee must exert himself with diligence and good faith to effect a cure, and thus prevent further damage.³ If the defect in a warranted heating apparatus could be remedied by a slight addition, involving no impairment of the plant, the vendee cannot recover special damages unless he gives the vendor an opportunity to make reparation by remedying the defect or by a money compensation.⁴ The same rule applies to general damages, so as to prevent the recovery of the purchase price. In such a case the reasonable expense of making the change will measure the damages.⁵ Expenditures unreasonably made in order to make the articles purchased conform to the warranty are not recoverable.⁶ If the vendor has bound himself to remedy defects, it is not a defense that they might have been remedied by the vendee if he had known how.⁷ If the vendee in an executory contract rescinds it and returns the goods because of a breach of warranty, on the vendor's refusal to receive them he may sell them, and if he acts reasonably in so doing his liability will be limited to the sum received on the sale.⁸

Where a contract is made by one to furnish to another a specific article of a designated description, to be used for a particular purpose, or for use at another place, and the destination, purpose and use are known to him who agrees to furnish it, and the article furnished is defective for the purpose, and

¹ *Roberts v. Fleming*, 31 Ala. 683; *Marshall v. Wood*, 16 Ala. 806; *Kornegay v. White*, 10 id. 255; *Willis v. Dudley*, id. 933; *Stoudenmeier v. Williamson*, 29 id. 558; *Worthy v. Patterson*, 20 id. 172; *Gingles v. Caldwell*, 21 id. 444; *Buford v. Gould*, 35 id. 265; *Hogan v. Thorington*, 8 Port. 428.

² *Penny v. Andrus*, 41 Vt. 631; *Philadelphia Whiting Co. v. Detroit White Lead Works*, 58 Mich. 29, 24 N. W. Rep. 881 (expense of testing goods, insurance, freight and cartage); *Raeseide v. Hamm*, 87 Iowa, 720, 54 N. W. Rep. 1079; *Noble v. Fagnant*, 162 Mass. 275, 38 N. E. Rep. 507; *Heenan v. Redman*, 101 Ill. App. 603; *Galbreath v. Carnes*, 91 Mo. App. 512.

³ Id. See § 88.

⁴ *Bates v. Fish Brothers' Wagon Co.*, 50 App. Div. 38, 63 N. Y. Supp. 649; *Frick Co. v. Falk*, 50 Kan. 644, 32 Pac. Rep. 360.

⁵ *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. Rep. 568, citing *J. Thompson Manuf. Co. v. Gunderson*, 106 Wis. 449, 82 N. W. Rep. 299; *Birdsall v. Carter*, 11 Neb. 143, 7 N. W. Rep. 751. See § 88.

⁶ *Crane Co. v. Columbus Const. Co.*, 73 Fed. Rep. 984, 20 C. C. A. 233.

⁷ *Aultman v. Shelton*, 90 Iowa, 288, 57 N. W. Rep. 857.

⁸ *Rubin v. Sturtevant*, 80 Fed. Rep. 930, 26 C. C. A. 259.

not according to the contract, the damages occasioned by reason of such defects, with reference to the purpose and place, are direct and recoverable. The measure is the difference between the value of the article received, and of that contracted for, at the place and for the purpose contemplated.¹

¹Thorne v. McVeagh, 75 Ill. 81; Beeman v. Banta, 118 N. Y. 538, 23 N. E. Rep. 887, 16 Am. St. 779 (see § 50); Hammar Paint Co. v. Glover, 47 Kan. 15, 27 Pac. Rep. 130; Swain v. Schieffelin, 134 N. Y. 471, 18 L. R. A. 385, 31 N. E. Rep. 1025; Passinger v. Thorburn, 34 N. Y. 634; Van Wyck v. Allen, 69 id. 61, 25 Am. Rep. 136; White v. Miller, 78 N. Y. 393; Converse v. Burrows, 2 Minn. 229; Reese v. Miles, 99 Tenn. 398, 41 S. W. Rep. 1065; Burr v. Redhead, 52 Neb. 617, 73 N. W. Rep. 1058; Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co., 55 Fed. Rep. 451, 5 C. C. A. 190; Ellis v. Tips, 16 Tex. Civ. App. 82, 40 S. W. Rep. 524.

A vendor of paint, bought to paint a house, who agrees that if it does not comply with his representations he would repaint the house, is liable, on breach of his contract to repaint it, for the reasonable cost of doing it. Reeds v. Lee, 64 Mo. App. 683.

On the breach of a contract to replace a furnace with one that would meet the stipulated requirements, without extra cost, and to pay all damages caused by the insufficiency of the furnace first put in, the vendee may recover the expense of putting in a new heater of the required capacity. Williams v. Thrall, 101 Wis. 337, 76 N. W. Rep. 599.

The vendor of a warranted furnace which fails to heat a dwelling according to the terms of the contract must respond for the vendee's discomfort, and the expense incurred in the use of other means to obtain heat. Fowler v. Pauly, 67 Mo. App. 632.

The vendor of a harvesting ma-

chine warranted to supply any parts which should prove to be defectively constructed. The machine broke down during the harvesting season, when help had been collected and no other machine could be obtained. In consequence the ripened grain was injured, and there was, also, a loss of the wages of the help. It was determined that injury to the grain could not be recovered for, even if there had been an implied warranty; to permit a recovery on that account, it was said, would establish a broad rule. (Fuller v. Curtis, 100 Ind. 237.) The recovery was limited to the actual expense of getting notice to the warrantor and of repairing the machine. Smoots v. Foster, 16 Ohio Ct. Ct. 612.

In Converse v. Burrows, 2 Minn. 229, the trial court gave an instruction to the jury embodying a legal proposition substantially as stated in the text, which on appeal was approved. The case is not a novel one, but the principle discussed in the opinion is of great practical importance, and will justify a full quotation. Atwater, J., said: "Had there been nothing said between the parties to this contract as to the place where the pork contracted for was to be used, there seems to be no dispute but that the correct rule of damages would have been the difference in the value of the article contracted for and that of the article received at the place of delivery; but the case at bar forms an exception to this general rule. The plaintiff designed this pork for a particular place and purpose, of which fact he notified the defendants at the time

But the damages in excess of those recoverable under the general rule heretofore stated are not recoverable for the breach of the implied warranty of the fitness of an article made to

of the contract. The defendants therefore entered into the contract in view of these facts, and incurred the obligations imposed by the law in such cases. What were these obligations? In our view, to pay the difference between the value of the pork, as such value was actually found in its damaged state at Fort Ridgeley, and the market value of the quality of pork contracted for at the same place. The correct rule of damages in this case must be determined from the language adopted in the complaint, which purports to state the substance of the contract in reference to the place of destination and use of the pork. The only clause in the complaint referring to this point reads as follows: 'The said plaintiff further shows to the court that the said pork was to be furnished to the plaintiff for supplies for Fort Ridgeley, in the territory of Minnesota, which plaintiff had contracted to supply, which fact was well known to said defendants.' Now had the complaint simply stated that the pork was destined for use at Fort Ridgeley, or for the market at Fort Ridgeley, and that the defendant had notice thereof, we presume there would have been little question but that the instruction of the court to the jury would have been correct. The case would have fallen within the rule laid down in *Bridge v. Wain*, 1 Stark. 504, a case which seems to be quoted with approbation in *Cary v. Gruman*, 4 Hill, 625, as well as in *Hargous v. Ablon*, 5 Hill, 472. The general rule of damages for breach of warranty on a sale of personal property, as above stated, is the difference between the article sold, in its defective condi-

tion, and the market value of the article at the place where it was to be used, in the condition represented by the vendor. The reason of this rule does not seem to be based upon the fact that such measure of damages would always restore the vendee to what he had lost by the breach of warranty, for in many cases this would not be true; but rather upon grounds of public policy, it being manifestly more for the public interest that some rule should be established in such cases rather than leave each individual case to be governed by its own particular circumstances. Hence, parties entering into contracts of this kind are aware of their rights and liabilities under a breach of contract by either party; and the exception to the rule in the case above referred to is founded on the same reason and is in harmony with it, the only difference being that the rule of damages is made to depend on the market value of the article at the place where it is to be used, rather than the value at the place where it is purchased; and no good reason can be offered why the rule should be otherwise. If the general rule be not based upon the principle of restoring the party to what he has lost by the breach of contract, it is difficult to perceive why the exception should be based upon such principle. For the parties sustain the same relation to each other and the subject-matter, save that in the latter case the article is purchased for a particular market, of which the vendor is apprised, and it is manifest justice that the vendee should be made whole in that market. And in the eye of the law he is made whole by receiving the difference between

order if they were caused or contributed to by the insufficiency of the article because of instructions given by the vendee.¹

Where the contract is made to the knowledge of the vendor,²

the actual value of the article in its damaged condition, and its real value in the condition required by the contract at the place where the article was to be used. But it is claimed that the allegations of the complaint extend the contract made between the parties, so that in case of a breach on the part of the defendants they became liable for the difference, not between the market value of such pork at Fort Ridgeley, as was called for by the contract, and the inferior article furnished by them, but for the difference in value between such article and the contract price between the plaintiff and the Fort.

“Let us look at the allegation, and see if this view can be sustained. It will be observed that it does not appear from the pleadings what the contract was between the plaintiff and the party with whom he contracted at Fort Ridgeley; nor that there was any stipulated price for the pork. Much less does it appear that the plaintiff, at the time he contracted with the defendants for the purchase of the pork, informed them that he had contracted with the Fort at any particular price, nor, if so, at what price. In the absence of any agreement, therefore, on the subject, the presumption would be that the plaintiff had agreed to furnish the pork at current rates at the place of delivery (the Fort). But whatever his agreement may have been, it does not appear that the defendants had any reference to it, or were influenced by it, in entering into their contract. They did not agree to fill the contract

of the plaintiff, nor does it appear that they knew what his contract was. They knew only that he had a contract to fill at that place; and the fact that they were aware that the pork was to be used by the plaintiff at Fort Ridgeley makes the case an exception to the general rule which would govern damages on breach of warranty. And to bring the defendants within the exception, it was important that they should know in reference to the plaintiff's contract, so far as the place was concerned. For the degree of care and diligence which they might exercise to fill their contract might be influenced by such knowledge. The fact that the pork was to be transported to a considerable distance during the summer season might lead them to exercise more care in its selection and preparation than they otherwise would have done. It therefore becomes important to the plaintiff, if he would bring the defendants within the exception to the general rule of damages, that he should bring home to them the knowledge that the pork was to be used at a certain place; and if he would go further than this, and make the defendants responsible for the loss he has sustained on the particular contract, he must at least show that the defendants knew that the contract was to fill his own or to make him whole for any failure to do so. The object of the court should be to apply the rule of law to the contract between the parties, if that contract can be ascertained. We are satisfied that the defendants entered into the con-

¹ *Nashua Iron & Steel Co. v. Brush*, 91 Fed. Rep. 213, 33 C. C. A. 456.

² § 662; *Spence v. Duffield*, 1 Vict. (law) 49 (1870); *Sutherland v. Round*, 57 Fed. Rep. 467, 6 C. C. A. 428.

for the purpose of shipping the article purchased to a foreign country, and he delivers one inferior in quality to that contracted for, and that fact is not ascertainable until it has reached its destination, the purchaser may sell it there for the

tract with the plaintiff with the knowledge of the place where the pork was to be used by the plaintiff. But we are not satisfied, nor is there anything in the case to show, that the defendants, in making their contract, took into account in any manner the price the plaintiff was to receive for his pork; or that they ever even knew what price he was to receive. In such case we certainly can see no good reason why either the defendants or plaintiff should now claim any benefit from a consideration which never entered into the original contract. Suppose the plaintiff contracted to sell his pork at the Fort for \$100 per barrel, should he be permitted to recover from the defendants the difference between that sum and the actual value of the pork per barrel at the Fort in its damaged condition? Manifestly, it would not be just that he should do so, unless the defendants had expressly agreed to pay such difference.

"A law which should recognize such a measure of damages in such cases would be highly inequitable and work great injustice. If such was the rule, as has been justly observed, it would open the door to unfair dealing, and a fraudulent inflation of price by the vendee, with a view to charge the vendor or guarantor: for if the vendor was to be made liable for the loss of a particular trade which the vendee might have made with reference to the subject-matter of the sale, the particulars of such trade, especially as to price, would be of the highest consequence to the vendor, and would form a principal element in, and become the very essence and

basis of, the original transaction, instead of being considered of such little moment as not even to be mentioned between the parties. Had the contract between the plaintiff and the defendants in the case at bar been in fact made with reference to the price at which the plaintiff resold the pork, as well as the place where it was to be used, that fact should have been averred by the defendants in their answer, if they would avail themselves of any advantages from it. If the rule in this case be that the plaintiff is entitled to recover from the defendants such sum as he has lost by their breach of warranty, at the place where the pork was destined to be used, then the proposition must be true that the loss of a particular bargain, on resale of the warranted article, must be the rule of damages on breach of warranty; but the authorities are directly to the contrary of this proposition. In *Clare v. Maynard*, 7 C. & P. 741, it appears that the plaintiff gave \$45 for a horse, and had sold him for \$55, with warranty, but was obliged to take him back. This, *per se*, was not allowed as a ground for recovering the \$10 difference, the court saying it was the mere loss of an accidental bargain. The same principle is recognized in *Voorhees v. Earl*, 2 Hill, 288; *Clare v. Maynard*, 6 Ad. & E. 19; *Hargous v. Ablon*, 5 Hill, 472; *Phillips' Ev.*, vol. 5, p. 105; *Greenl. on Ev.*, vol. 2, p. 273; *Sedg. on Dam.* 295."

See *Bridge v. Wain*, 1 Stark. 504. In this case scarlet cuttings were purchased for sale in China. In an action for breach of the implied warranty that the goods were such,

best price obtainable, and the difference between that and the market price of the article contracted for, with the necessary expenses incurred by him, will be the damages.¹ The loss of profits by a street railway company through its failure to carry passengers to and from a summer resort, because of the failure of an engine to furnish the required motive power, have been held too speculative to be a basis for recovery, the evidence being based largely on the earnings of the company in transporting passengers to such resort in previous years.²

[426] § 672. **Same subject.** The cases reported show a great variety of illustrations of the rule that the damages are the difference between the actual value of the property and [427] what its value would have been if conformable to the warranty. The special value to the vendee for a particular use will be taken into account, if known to the vendor at the [428] time of the sale, and he expressly or by implication undertook to furnish goods suitable for that use. The principle seems to be settled, that, when the manufacturer of an article [429] sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller impliedly warrants it fit and proper for such purpose and free from secret or latent defects.³ In *Brown v. Sayles*⁴

Lord Ellenborough instructed the jury to consider the effect of their being of no use or value in China. "I am decidedly of the opinion," said his lordship, "that by value is to be understood the value which the plaintiff would have received had the defendant faithfully performed his contract."

As to the necessity that the vendor be informed of the price in the vendee's contract for resale, see § 52; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Elbinger Actien Gesellschaft v. Armstrong*, L. R. 9 C. P. 473; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; § 662; *Guetzkow v. Andrews*, 92 Wis. 214, 53 Am. St. 909, 66 N. W. Rep. 119.

¹ *Camden Consolidated Oil Co. v. Schlens*, 59 Md. 31, 45, 43 Am. Rep. 537; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. Rep. 1065.

² *People's Savings Bank v. Waterloo & C. F. Rapid Transit Co.*, — Iowa, —, 92 N. W. Rep. 691. See § 664 *et seq.*

³ *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Edwards v. Collson*, 5 Lans. 324; *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Merrill v. Nightingale*, 29 Wis. 247; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Walton v. Cody*, 1 Wis. 420; *McCaa v. Elam Drug Co.*, 114 Ala. 74, 21 So. Rep. 479, 62 Am. St. 88.

The implied warranty of a manufacturer who makes an article for a particular purpose or use does not cover the reasonable safety of the article for the purpose or use for which it was made. *Cram v. Gas Engine & Power Co.*, 75 Hun. 316, 26 N. Y. Supp. 1069.

⁴ 27 Vt. 227.

it was held that when an article is to be manufactured to order and nothing is said as to the quality of the material to be used, it is implied that it shall at least be of an ordinary quality. The acceptance of an article so manufactured is not binding and conclusive upon the purchaser, if the material was defective and the defect was not known nor observable on careful inspection. After such an acceptance of a defective article the purchaser will only be liable for its value, not for the contract price. Dealers who do not make or grow what they sell may, by the circumstances of the sale, incur a like obligation. They must agree that what they sell is suitable for the intended use; and the purchaser must trust to the judgment and skill of the vendor.¹ In such cases, and also where there is an express warranty, the value of the property purchased to the vendee includes those gains which would, with the requisite certainty, have accrued to him if the vendor had faithfully performed his contract, and exemption from those expenses and losses which naturally and proximately result from his failure to do so. Thus a warranty of a steam-engine, as having a certain capacity for work, and as sound and in good order, if untrue, will entitle the vendee to recover the difference between the actual value and what its value [430] would have been had the engine been conformable to the warranty.² And the vendee may show this difference of value by proof of what it would cost to replace the machinery furnished with such as was demanded by the contract.³ Where a boiler, warranted to be suitable for a particular purpose, proved to be unsound, and in consequence the purchaser was damaged because of the destruction of property situated near where the boiler was used, such damage was a natural and legitimate result of the breach of the warranty.⁴ In a recent Massachusetts case a boiler maker of good reputation under-

¹ *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Mason v. Chappell*, 15 Gratt. 572; § 667.

² *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 86 Vt. 194; *Merrill v. Nightingale*, 39 Wis. 247; *Giffert v. West*, 33 id. 617; *Park v. Morris Ax & Tool Co.*, 4 Lans. 103, 54 N. Y. 586; *Accumulator Co. v. Dubuque Street*

R. Co., 64 Fed. Rep. 70, 12 C. C. A. 37, citing the text.

³ *Holmes v. Boydston*, 1 Neb. 346; *Hitchcock v. Hunt*, 28 Conn. 343; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Benjamin v. Hilliard*, 23 How. 149; *Marsh v. McPherson*, 105 U. S. 709.

⁴ *Page v. Ford*, 12 Ind. 46.

took to make for the plaintiff a boiler to be used for a specified purpose, of which the defendant was informed. The boiler proved insufficient, and caused injury to an employee of the plaintiff, for which the latter paid. The court said, Holmes, C. J., writing the opinion, that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it, and probably not falling within the exceptional rule as to well known articles made by reputable makers and sold in the market ready for use. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendant. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendant was an expert and the plaintiff presumably was not. Whether the false warranty be called a tort or breach of contract, the consequence which ensued must be taken to have been contemplated and was not too remote. The fact that the reliance was not justified as toward the men does not do away with the fact that the defendant invited it with notice of what might be the consequence if it should be misplaced, and there is no policy of the law opposed to his being held to make his representations good.¹

¹Boston Woven Hose & R. Co. v. Kendall, 178 Mass. 232, 59 N. E. Rep. 657, 86 Am. St. 478, 51 L. R. A. 781. The opinion states that *Nashua Iron & Steel Co. v. Worcester & N. R.*, 62 N. H. 159, is not opposed, and that *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, [1895] 2 Q. B. 640, is very much in point. It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of recovery over we need not

consider. See *Holyoke v. Hadley Water Power Co.*, 174 Mass. 424, 428, 54 N. E. Rep. 889; *Consolidated Hand-Method Lasting Machine Co. v. Bradley*, 171 Mass. 127, 134, 50 N. E. Rep. 464. There are many cases in our own and other reports which offer as strong or stronger applications of the principle of liability over. *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191; *Old Colony R. v. Slavens*,

In an English case the sale of a rope for use on the vendee's crane was held to import a warranty of fitness, and the vendor was liable for a cask of wine lost by the breaking of the rope;¹ and in another case for the value of an anchor lost by the breaking of the cable sold for the purpose of holding it;² and the vendor of a warranted lintel which caused the fall of a building in which it was used was liable for the damage.³ A manufacturer of barrels is liable for the loss of their contents by reason of defects in them.⁴ The vendee of a defective threshing machine may recover for the wastage of his own time and that of his employees in an effort to use the machine, the vendor having solicited that he do so, and the value of his time in reasonable efforts to remedy its defects, and the cost of the hire of another engine for a short time to accomplish the work which the machine would have done if it met the warranty.⁵ The purchaser of a furnace which fails to heat his office so that it can be used may recover the rental value of the latter;⁶ and the owner of a dwelling which is not

148 Mass. 363, 19 N. E. Rep. 372, 12 Am. St. 558; *Holyoke v. Hadley Water Power*, *supra*; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 327, 328, 16 Sup. Ct. Rep. 564; *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. Rep. 987.

¹ *Brown v. Edgington*, 2 M. & G. 279.

² *Borradaile v. Brunton*, 8 Taunt. 535. The authority of this case was questioned in *Hadley v. Baxendale*, 9 Ex. 341. This criticism is noticed in *Mayne on Dam.* (Wood's ed.) 267, as is the remark of Alderson, B., that on the same principle the jury might have given the value of the ship, if it had been lost. This author says: "No doubt the enormity of the damages which would be recoverable in such a case is very startling. But if a chain cable is sold for the express purpose of holding a ship to its anchor, and if, through some defect of it, the ship drifts on shore, it is

difficult to see why the damages should stop at any smaller amount. When the pole of a carriage broke, in consequence of which the horses became frightened and were injured, the court held that the sale of the pole carried with it an implied warranty that it was reasonably fit for its purposes; and that, as to damages, the proper question to leave to the jury was whether the injury to the horses was or was not a natural consequence of the defect in the pole. *Randall v. Newson*, 2 Q. B. Div. 102. See criticism on this case and that cited in preceding note, in note to § 672.

³ *Riss v. Messmore*, 30 N. Y. St. Rep. 250, 9 N. Y. Supp. 320, 58 N. Y. Super. Ct. 23.

⁴ *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Tatro v. Brower*, 118 Mich. 615, 77 N. W. Rep. 274.

⁵ *Optenberg v. Skelton*, 109 Wis. 241, 85 N. W. Rep. 356.

⁶ *Russell v. Corning Manuf. Co.*, 49 App. Div. 610, 63 N. Y. Supp. 640.

heated according to the warranty of the vendor of the furnace may recover for his discomfort and the expense of efforts to heat his house.¹ The owner of a greenhouse, the stock in which is injured or destroyed because of a defect in a heating apparatus, may recover the difference between the value of the stock therein which was so affected by such reason before it was injured and the value of it thereafter.² The rental value of a mill which lies idle because of the insufficiency of warranted machinery is an element of damage,³ as is the cost of making repairs and the wages of men who are kept idle in consequence.⁴ The vendor of hay or grain which is to be fed to animals, or which is ordinarily used for that purpose, is liable for injury done to the vendee's animals by a poisonous substance contained therein.⁵ Where the oats sold to the keeper of a livery-stable contained castor beans, and, as a result of eating them, some of his horses died and others were permanently injured, the vendor was liable for the value of those that died, the diminished value of those injured, the loss of the use of the horses while sick and the expense of medical treatment and medicines.⁶ The owner of cattle who has been damaged by feeding them unsound feed, in consequence of which they became sick, fell off in weight and deteriorated in value, may recover to the extent of their lessened market value at the time and place they were injured.⁷

A dealer in Paris green sold by mistake to a customer, knowing that he desired it to use on his crop for the purpose of destroying worms which injured it, another substance much in

¹ See § 671, note.

² *Lauffer v. Boynton Furnace Co.*, 84 Hun, 311, 32 N. Y. Supp. 362.

³ *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. Rep. 341; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508.

⁴ *Aultman v. Stout*, 15 Neb. 586, 19 N. W. Rep. 464; *Erie City Iron Works v. Barber*, *supra*; *New York & C. Mining Co. v. Fraser*, 130 U. S. 611, 622, 9 Sup. Ct. Rep. 665.

In the absence of proof of value the legal rate of interest upon the cost may be taken as the fair rental

value of a mill. *New York & C. Mining Co. v. Fraser*, *supra*.

Expenses incurred in experimenting with a machine after it has been demonstrated to be defective are not recoverable from the vendor. *Aultman v. Stout*, *supra*.

⁵ *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Wilson v. Dunville*, 4 L. R. Ire. 249, 6 id. 210.

⁶ *Coyle v. Baum*, 3 Okl. 695, 716, 41 Pac. Rep. 389.

⁷ *Houston Cotton Oil Co. v. Trammell*, 72 S. W. Rep. 244 (Tex. Ct. of Civ. App.).

appearance like that applied for. The substance delivered was used on the crop without producing the desired result. The vendor was held liable for the value of the crop as it stood just before it was destroyed, the cost of the article sold, the expense of preparing and applying it, with interest on the money expended, except in so far as the purchaser could, with ordinary care and reasonable expense, have prevented any of these elements of damage.¹ If rags sold as clean, free from infection and fit to be manufactured into paper are infected with the small-pox and cause that disease to break out in the vendee's mill, the elements of damage are the loss of his trade because of the disability of his men and the money expended to support them while they are afflicted with the disease.² The vendee may recover compensation for labor, expense or losses sustained in *bona fide* attempts to make a warranted machine produce the results which it was bought and sold for,³ so far as they were incurred prior to the time he was bound by his contract to return it if it did not fill the warranty,⁴ unless such efforts are clearly futile,⁵ or the contract limits the liability of the vendor.⁶ To make the vendor of a harvesting machine, sold with a warranty of its quality and capacity, and with knowledge that it was purchased for the purpose of harvesting the vendee's grain, liable for damage sustained by the grain on account of the failure of the machine to work, it must appear that it was impracticable to secure the grain by other means, or that the delay in experimenting with the harvester was justified, or that it was contemplated by the parties that such damage would be the re-

¹ Jones v. George, 61 Tex. 345, 48 Am. Rep. 280. See § 50; Kent v. Halliday, 23 R. I. 182, 49 Atl. Rep. 700.

² Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. Rep. 696.

³ Fox v. Stockton Combined Harvester, etc. Works, 83 Cal. 333, 23 Pac. Rep. 295; Whitehead & A. Machine Co. v. Ryder, 139 Mass. 366, 31 N. E. Rep. 736.

But in Minnesota, in the absence of fraud, expenses incurred by the purchaser for the medical examination and treatment of a warranted

horse are not recoverable. Merrick v. Wiltse, 37 Minn. 41, 33 N. W. Rep. 3.

⁴ Newberry v. Bennett, 38 Fed. Rep. 308.

⁵ Draper v. Sweet, 66 Barb. 145; Nye v. Iowa City Alcohol Works, 51 Iowa, 129, 33 Am. Rep. 121, 50 N. W. Rep. 988; Murphy v. McGraw, 74 Mich. 318, 41 N. W. Rep. 917.

⁶ Sycamore Marsh Harvester Manuf. Co. v. Sturm, 13 Neb. 210, 13 N. W. Rep. 202; McCormick v. Vanatta, 43 Iowa, 389.

sult of the breach of the warranty.¹ In the absence of fraud or bad faith the vendor of a safe which is warranted to be "burglar proof" is not liable for damages sustained by the loss of valuables taken therefrom by burglars who broke it open.² But in Illinois the vendor of a safe warranted to be burglar-proof (*i. e.*, in the commercial sense, as distinguishing it from the commercially known fire-proof safe), who fails to furnish complete directions for locking it, in consequence of which the safe was opened by burglars without the use of force, is liable for the loss of a reasonable sum of money put in the safe. "The very intervention of a burglar was the essential element that both parties contemplated as being the thing to be guarded against, and concerning which the warranty was interposed."³ If an article sold for a known use proves unfit therefor and produces injury to the customers of the vendee, the vendor is liable for the value of the article and for the injury resulting to the vendee from its defects by loss of trade.⁴ A vendor of mortar which was defective, a fact which could not be determined before using it, was liable for the cost of pulling down the building in which it was used and the cost of rebuilding it, the authorities having condemned the building because the mortar was bad; he was also liable for the vendee's loss of ground rent.⁵ Where cement warranted fit for use in plastering a dwelling was unfit for that purpose, the vendee recovered for disbursements made to have the

¹ *Wilson v. Reedy*, 32 Minn. 256, 20 N. W. Rep. 153; *Froherich v. Gammon*, 28 Minn. 476, 11 N. W. Rep. 88. Compare *Aultman v. Case*, 68 Wis. 612, 32 N. W. Rep. 772.

² *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4. It is said in this case that *Borradalle v. Brunton and Brown v. Edgington*, *supra*, carry the principle of liability on the part of a vendor to extreme results. In the latter case "nothing was said, either in the argument of counsel or in the opinions of the judges, on the question of the loss of the wine being too remote to justify a recovery therefor." Distinguishing those and other cases from the one in hand, the court say,

by *Stone, J.*, that the injuries in them resulted directly from the known use for which the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or inaptness for the service required. They were the natural consequence of the falsity of the warranty. See *Jones v. Ross*, 98 Ala. 448, 13 So. Rep. 319.

³ *Deane v. Michigan Stove Co.*, 69 Ill. App. 106.

⁴ *Swain v. Schieffelin*, 134 N. Y. 471, 18 L. R. A. 385, 31 N. E. Rep. 1025.

⁵ *Smith v. Johnson*, 15 T. L. Rep. 179 (1899).

floors marred by the falling of the plaster cleaned, the door and window casings removed preparatory to replastering, the cost of replastering and replacing casings, and the loss of the use of the house caused by having these things done. He also recovered the cost of an attempt to remedy the defect in the plastering by patching it, the necessity of replastering not being apparent when such attempt was made.¹

The uncertainty of the extent to which damages have resulted from the breach of a contract is not ground for refusing the recovery of any. As was said in a New York case: "When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach."² But a vendee cannot recover unless his evidence establishes the basis for calculating his damages. Where these are measurable by the difference between the value of the machine if it had been as warranted and its actual value, the latter must be proven. The fact that a machine warranted to varnish a designated number of labels in a day would varnish only a certain smaller number does not establish its actual value as compared with the contract price.³

§ 673. Same subject. Where coal dust was sold and warranted to contain no soft or bituminous coal, and with knowledge that it was intended by the vendee to make brick and that if there was soft coal dust in it its use would ruin the brick, on breach of the warranty it was held that the vendee was not limited in his recovery to the difference between the value of impure and pure dust, but that he might recover all the loss he had actually sustained from the use of the dust in

¹ *Nye v. Snyder*, 56 Neb. 754, 77 N. W. Rep. 118.

² *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. Rep. 264; *Eagle Iron Works v. Des Moines S. R. Co.*, 101 Iowa, 289, 70 N. W. Rep. 193.

In *Resse v. Bates*, 94 Va. 321, 26 S. E. Rep. 865, it is laid down that the breach of a warranty that a fertilizer is as good as any other article of a like character and price offered in

the same market may be shown by proof that, when applied in like quantities to the same crop, during the same season, upon the same land, receiving the same cultivation, the results obtained where such fertilizer was used were inferior to those obtained from other fertilizers sold in the same market.

³ *Hooper v. Story*, 155 N. Y. 171, 49 N. E. Rep. 773.

making brick; these damages were clearly such as were in contemplation by the parties.¹ On a sale of onion seed it was [431] warranted to be "good, fresh, and such seed as would grow." There being a breach of warranty and the seed not growing, the vendee recovered as damages the amount paid for the seed, the value of labor in preparing the ground for it (after deducting the benefit to the land) and in planting it, with interest on the several amounts.² In another case where the warranty was that the seed was "early strap-leaved, red-top turnip seed," on a breach because the seed sold was a different turnip seed, it was held that the measure of damages was the difference between the market value of the crop raised and a crop from the seed ordered.³ Depue, J., said: "Profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract by reason of which the adventure was defeated. For a similar reason the loss of the value of a crop for which the seed had not been sown, the yield of which if planted would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation, and the plaintiff's complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character. In this case the defendant had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes to a purchaser engaged in that business would of itself imply knowledge of the use which was intended

¹ *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403.

² *Ferris v. Comstock*, 33 Conn. 513; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. Rep. 886, 11 L. R. A. 681.

³ *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Crutcher v. Elliott*, 13 Ky. L. Rep. 592 (Ky. Super. Ct.); *Haycroft v. Walden*, 14 id. 892 (Ky. Super. Ct.).

sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent on the condition of the weather and season, was removed by the yield of the ground, under [432] the precise circumstances to which the seed ordered would have been exposed."

There is no inconsistency between the result here reached and that arrived at in the preceding case, but the language quoted would exclude the damages allowed if the seed did not grow when planted. According to the foregoing quotation the uncertainties of weather and season render the crop, when the seed is not sowed, incapable of estimation; but it is conceded to be otherwise if a different seed is sowed and a crop raised on the ground prepared for the seed ordered. It is to be observed that the contract of sale was not made with reference to the use of the seed on any specified ground. And hence the uncertainties of weather and season might be removed by proof of actual turnip raising in the vicinity, and the requisite proof would always exist if any turnips were produced in the neighborhood; such proof would entirely harmonize with the principle of the other illustrations of a vessel under charter or engaged in a trade. A similar case to the last arose in New York,¹ and the court held to the same rule of damages, and it has been approved in a still later case.² Andrews, J., referring to the preceding case, said: "It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principles. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence and have naturally resulted from the breach.³ But mere contingent and speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not,

¹ *Passinger v. Thorburn*, 34 N. Y. 634; *Dunn v. Bushnell*, 63 Neb. 568, 88 N. W. Rep. 693; *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. Supp. 388.

² *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (approved, *arguendo*, in

Heilman v. Pruyn, 122 Mich. 303, 81 N. W. Rep. 97; *Kent v. Halliday*, 23 R. I. 182, 49 Atl. Rep. 700).

³ *Masterton v. Mayor, etc.*, 7 Hill, 61; *Griffin v. Colver*, 16 N. Y. 489;

Messmore v. New York Shot & L. Co., 40 N. Y. 422.

are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger v. Thorburn* are incapable of being ascertained with reasonable certainty by a jury? The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the [433] results observed in the same vicinity where cabbages were planted under similar circumstances; the market value of Bristol cabbage when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind. The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values.”¹

§ 674. **Same subject.** A few months prior to the decision of *White v. Miller* the case of *Van Wyck v. Allen*² had been decided, but it is not referred to in the later case. The instruction given the jury in *Passinger v. Thorburn* was that if the warranty was untrue then “the damages would be the value of the crop of Bristol cabbages such as they should believe would ordinarily have been produced that year, deducting all expenses of raising the crop, and also deducting the product or value of the crop actually raised.” In *Van Wyck v. Allen* the question was whether this instruction was sufficiently favorable to the plaintiff. Folger, J., said: “It is urged here as error that the trial court departed from the rule in that case laid down in not directing a deduction from the value of the crop of the cost of producing it; so that we are to assume for the purpose of this case that the decision in *Passinger v. Thorburn* is not erroneous. But it will be observed of that case that it did not undertake to fix the limits of the rule on all sides. There came to this court therein for review a rule of damages laid down at the circuit, to wit: that the plaintiff was entitled to recover the value of a crop

¹ Citing *Mahon v. New York, etc. R. Co.*, 20 N. Y. 469; *Smith v. Velie*, 60 N. Y. 106.

² 69 N. Y. 61, 25 Am. Rep. 136.

which could have been raised from good seed, less the cost of producing the crop, and the value of what was in fact raised. To this holding at the circuit the defendant excepted, but the plaintiff did not; so that there was raised in this court only the question whether the rule was unjust to the defendant: not any question whether the plaintiff could have found fault with its limits. The appellate court could not review it, [434] save to say that it was or was not too large. Whether it might not have been larger was not before the court, so that case is not an authority against the holding now before us. It is a decision which we may not in this case question, that where seeds are sold as, or warranted to be, those of a certain vegetable, and to produce that vegetable, then the vendee, the warranty failing, may recover the value of the reasonably anticipated crop, less the cost of tillage and the value of what was in fact raised. But if he may recover the value of the crop which should be, why, when naught is the product, should the vendee be held to credit the vendor with the lost labor and expenses? That he has expended in this case, and should be remunerated if he is to have full compensation. He would have been repaid it out of the profits of the crop had a crop been raised. He will repay it now out of the damages, which stand in the place of the profits of the crop, if his judgment for them remains unimpaired. If he, having paid it out in futile tillage, is not to have recompense for it, he has lost it once. And if now he is to deduct it from the value of the crop which that tillage should have produced, he loses it twice. The crop, if raised, would have represented to him all that went into it, of time, labor, money, use of land and materials. The avails of the crop would have gone to reimburse each of those. He gets, in his damages, what the avails of the crop would have been, and those damages should go to reimburse each of those items. But if from the damages he deducts them, there are no damages to reimburse them, and he loses them entirely. If there had been any part of a crop raised the value of that, clearly, should have been deducted.”¹

In an English case seed potatoes sold with a warranty proved to have been mixed with another variety less valuable.

¹ See *Page v. Pavey*, 8 C. & P. 769; *Cary v. Gruman*, 4 Hill, 625.

The quantity purchased was twelve tons, from which thirty-five tons were grown. Cave, J., directed the jury that if they thought the purchaser ought to have examined the potatoes before planting them and ascertained their quality, that damages should be given on the basis of the quantity bought; if he acted reasonably in not doing so, then the quantity produced would be the basis upon which to calculate the damages.¹ The vendor of impure clover seed has been held liable for the difference between the value of pure seed and of that sold, and also for the difference between the value of the farm before and after the seed sold was sown thereon.² The damage to the farm may be shown by proof of the extent to which weeds grew upon it in consequence of the impurity of the seed, the expense, labor and difficulty of removing them and the hindrance to the growth of crops thereon.³ According to the view of the Tennessee court such damages as were recovered in the foregoing cases are too speculative for allowance;⁴ and in Georgia the extent of a recovery where seeds prove worthless is the purchase-money with interest and expenses incurred in preparing the land for, and in planting, the seed, and compensation for any other necessary labor.⁵ In North Carolina the damages for the failure of warranted seed rice to grow include the price paid for it, the amount expended in preparing the soil for the crop and for putting the seed in the ground, and, because it was too late to plant another crop of rice when the failure of the seed to grow was discovered, a reasonable rent for the land, less any sum for which it could have been rented for raising any other crop.⁶ A tenant who buys warranted seed which fails to meet the warranty may

¹ Wagstaff v. Short Horn Dairy Co., Cab. & E. 324 (1884).

² Fox v. Everson, 27 Hun, 355; Bell v. Mills, 68 App. Div. 531, 74 N. Y. Supp. 224; McMullan v. Free, 13 Ont. 57.

³ Fox v. Everson, *supra*.

⁴ Hurley v. Buchi, 10 Lea, 346.

⁵ Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508. The code provides that "remote or consequential damages are not allowed whenever they cannot be traced solely to the breach

of the contract, or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract."

⁶ Reiger v. Worth, 127 N. C. 230, 37 S. E. Rep. 217, 52 L. R. A. 362, 80 Am. St. 798. See Phelps v. Elyria Milling Co., 12 Ohio Dec. 692 (a case in the Lorain common pleas court).

recover the entire damages notwithstanding his landlord was to receive one-third of the crops. The landlord was not in privity with the vendor, and the tenant's contract insured to his benefit on the same principle that a contract of insurance by a bailee in his own name covers the full value of the property in his care, first for the satisfaction of his own claim, and then for the satisfaction of the interest of the owner.¹

In a recent case² involving the measure of damages for the breach of warranty respecting fruit trees which the vendee had set out on his land, the cases which adjudge that the measure of damages for the breach of warranty as to seeds is the difference in value between the crop raised from the defective seed and such a crop as would ordinarily have been produced in the year in which the seed was sown, were approved. The reason for a distinction as to the measure of compensation in the case of fruit trees is thus pointed out: "Where crops are raised from seeds, and mature in a few months, and the value of the land is not affected thereby, no other rule of damages can obtain. It is different, however, where fruit trees are planted, which will not mature for years, which become a part of the realty, and materially add to its value. The destruction of a crop of cabbage, corn, wheat, or other annuals does not injure the land, and consequently there can be but one rule of damages. The most of the cases cited by the defendant are cases of this character. The other cases involve the question of speculative damages, which is not involved in this case. It is a matter of common knowledge that lands are enhanced in value by orchards of fruit trees. They have a value capable of estimation, for the reason that they usually yield fruit. The case is not one of speculative damages, but of enhanced value by additions to the realty. The rule of damages ought to be, and is, the same where worthless fruit trees are furnished, contrary to the warranty, as where good fruit trees are destroyed by the negligent acts of others. The purchaser

¹ Phillips v. Vermillion, 91 Ill. App. N. W. Rep. 258; Shearer v. Park 133, citing Home Ins. Co. v. Peoria, Nursery Co., 103 Cal. 415, 37 Pac. Rep. etc. R. Co., 78 id. 137. 412, 42 Am. St. 125; Long v. Pruyn,

² Heilman v. Pruyn, 123 Mich. 301, 128 Mich. 57, 87 N. W. Rep. 88. See 81 N. W. Rep. 97, 81 Am. St. 570; § 1019. Angell v. Pruyn, 126 Mich. 16, 85

has suffered the same damages in each case. Both parties must be held to have contracted with reference to the land in future years, as it would be enhanced by the existence of trees of the kind warranted. The difference between the value of the land with and without the trees is the just measure of damages." It was not a defense to the vendor that the trees were winter-killed after the suit was begun. In determining the value of the land with trees conforming to the warranty, the cost of raising and caring for them is a proper matter of evidence.¹ In determining the extent to which land would have been enhanced in value if fruit trees of a given variety had been furnished and had grown, testimony may be received to show what such trees ordinarily produce, and the enhanced value of the land by the tree or by the acre.² Where some of the trees supplied were killed and others injured by the weather after they began to bear and before suit was begun, an instruction that these facts might be considered by the jury as bearing upon the value that the trees would have been to the premises if of the variety ordered, and as therefore affecting the damages sustained, was pronounced as sufficiently favorable to the defendant.³

§ 675. **Same subject.** Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to persons who will purchase for the purpose of sowing them, if the warranty is untrue there seems to be no difference in principle as to the subject of damages between such a sale and one with such warranty where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one [435] buying seed to sell again justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard mentioned in the first paragraphs of the preceding section, that is also the measure of his loss as against his vendor.⁴

If animals sold are warranted sound, and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being

¹ *Angell v. Pruyn, supra.*

² *Long v. Pruyn, supra.*

³ *Id.*

⁴ *Randall v. Raper, El., B. & E. 84.*

placed with other stock, the loss not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.¹ But loss occasioned by the interruption of the business of the purchaser on account of the sickness of horses he owned cannot be recovered in the absence of allegations of special damage.² If sheep are purchased and sold for the purpose of breeding, and as a result of a contagious disease affecting them there is a deterioration in the lambs dropped soon after their sale, that forms a proper element of damages in an action for the breach of the warranty.³ Knowledge of the existence of the disease in the animals sold is not necessary in order that the vendor shall be liable for the consequences of its communication to others where he expressly warrants against its existence.⁴ And according to some cases the right to recover does not depend upon knowledge in the vendor at the time of sale that the buyer designs to place the animals sold with others;⁵ the vendor is liable if he knew that this might be done.⁶ A buyer may recover damages for personal injuries which result from selling property with a false warranty. A chemist or druggist

¹ Pinney v. Andrews, 41 Vt. 631; Bradley v. Rea, 14 Allen, 20; Marsh v. Webber, 16 Minn. 418; Brown v. Wood, 3 Cold. 182; Faris v. Lewis, 2 B. Mon. 375; Rose v. Wallace, 11 Ind. 112; Sherrod v. Langdon, 21 Iowa, 518; Wintz v. Morrison, 17 Tex. 372, 67 Am. Dec. 678; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Weaver v. Penny, 17 Ill. App. 628; Joy v. Bitzer, 77 Iowa, 73, 41 N. W. Rep. 575, 3 L. R. A. 184, quoting the text; Smith v. Green, 1 C. P. Div. 92; Long v. Clapp, 15 Neb. 417, 19 N. W. Rep. 467; Routh v. Caron, 64 Tex. 289; Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. Rep. 634; McCann v. Ullman, 109 Wis. 574, 579, 85 N. W. Rep. 493; Snowden v. Waterman, 105 Ga. 384, 31 S. E. Rep. 110; Stevens v. Bradley, 89 Iowa, 174, 56 N. W. Rep. 429; Greenby v. Brooks, 13 Ky. L. Rep. 298 (Ky. Super. Ct.).

A sale of "good merchantable cattle" means such as are free from a latent disease, and the vendor of those which are not so is liable for the vendee's losses proximately resulting. Parks v. O'Connor, 70 Tex. 377, 8 S. W. Rep. 104. See Hill v. Ball, 2 H. & N. 299; Mullett v. Mason, L. R. 1 C. P. 559.

² McCann v. Ullman, *supra*.

³ Broquet v. Tripp, 36 Kan. 700, 14 Pac. Rep. 227.

⁴ McKee v. Jones, 67 Miss. 405, 7 So. Rep. 348; Joy v. Bitzer, 77 Iowa, 73, 41 N. W. Rep. 575, 3 L. R. A. 184; Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. Rep. 634.

⁵ Snowden v. Waterman, 105 Ga. 384, 31 S. E. Rep. 110; Sherrod v. Langdon, 21 Iowa, 518; Packard v. Slack, 32 Vt. 12.

⁶ Smith v. Green, 1 C. P. Div. 92. See § 672.

may be held liable for such injuries received from deleterious compounds furnished which are unfit for the purpose for which he professed to sell them.¹ A dealer will be liable for like injuries resulting from the explosion of illuminating oils sold with warranty, express or implied, which is untrue,² as will the manufacturer of a generator of acetyline gas who falsely warrants that the same will not explode.³ And so will any vendor be held answerable for such injuries from vicious animals, sold with warranty of gentle and docile nature.⁴ In such cases there is a negligence which, though free from fraud, involves a serious breach of social duty as well as contract; and when the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be co-extensive with that allowed for compensation in actions for negligence. Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to one injured thereby whether a contract between them be violated by that negligence [436] or not.⁵ If the law and a contract impose the same duty the same redress for violation is due by either, and would be accorded unless there should be practical restriction in the form of action necessarily resorted to to obtain that redress. In *McDonald v. Snelling*,⁶ Foster, J., said: "Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he shall be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well-established and ancient doctrine of the common law, and such

¹ *George v. Skivington*, L. R. 5 Ex. 1; *Thomas v. Winchester*, 6 N. Y. 397; *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280, fully stated in § 50; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L. R. A. 385, 12 N. Y. Supp. 155, 31 N. E. Rep. 1025 (loss of business resulting from poisonous substance in ice cream recovered for). See *Longmeid v. Halliday*, 6 Eng. L. & Eq. 562.

² *Miller v. Downer, etc. Co.*, 104 Mass. 64; *Davidson v. Nichols*, 11 Allen, 519.

³ *Tyler v. Moody*, 23 Ky. L. Rep. 584, 63 S. W. Rep. 433, quoting several of the preceding propositions in the text.

⁴ *Sharon v. Mosher*, 17 Barb. 518.

⁵ *Longmeid v. Halliday*, 6 Eng. L. & Eq. 562.

⁶ 14 Allen, 290. See § 672.

liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected."¹

¹In *McGavoch v. Wood*, 1 Sneed, 181, a slave was sold to be taken south or elsewhere for sale or service, and after the journey an action was brought by the vendee against the vendor upon his warranty of soundness; held, there was no rule which would authorize the plaintiff to recover the expenses of the slave on that trip.

In *Gas Light Co. v. Colliday*, 25 Md. 1, it was held that for shutting off gas, and refusing to supply it according to contract, after the pipes and fixtures for that purpose had been put in place in a building used for business purposes, the depreciation of the property for sale or lease, and the expense of restoring the premises to proper condition, divested of the gas pipes, might be taken into account as part of the damages.

In the similar case of *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 313, 82 Am. Dec. 629, which was like the common-law action on the case, the jury was instructed that "plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business arising out of the defendant's refusal to furnish gas to him." Payne, J., delivering the opinion of the court, said: "It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is

clearly not so. The 'inconvenience and annoyance' occasioned directly by the wrongful actor or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this, as a punishment for the other party. In actions for a nuisance the damages usually consist almost entirely in inconvenience and annoyance. So also in many other actions of tort. In *Ives v. Humphrey*, 1 E. D. Smith, 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injury sustained by him the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff; and in estimating the amount of such damages all the particulars wherein the plaintiff is aggrieved may be considered whether of pecuniary loss, or pain, or insult, or inconvenience.' So in an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the

Interest on the purchase price of the warranted property and the cost of insurance on the property are not recoverable.¹ The damages resulting to an electric street railway company from the necessary withdrawal of some of its cars while a defective

general allegation of damages, as going to show that 'the plaintiff had sustained inconvenience,' *Ward v. Smith*, 11 Price, 19. . . . But the appellant further objects to the admission of evidence to show that it would injure the plaintiff's business to be deprived of gas when other stores were lighted with it. It is said that the object of this was to show that the want of gas would tend to prevent customers from coming to the store, and consequently that the plaintiff lost the profits that he otherwise might have made. And the appellant then relies on a class of authorities in which, both in actions of tort and for breaches of contract, it has been held that anticipated profits could not be recovered as damages. Upon this subject the authorities are full of confusion and uncertainty, and it is very generally conceded that no definite or satisfactory rule can be extracted from them. *Sedgwick on Dam.*, p. 112; *Cincinnati v. Evans*, 5 Ohio St. 603. But I think it can by no means be said to be established that the profits of a business or of a contract may never be considered in estimating the damages, where one party has been deprived of those profits by the wrong or default of another. On the contrary, I think the opposite conclusion is sustained, and that the tendency of the recent cases is to allow such profits to be recovered as damages where their amount can be shown with reasonable certainty. The question often

arises in cases of breach of contract, and there are many authorities which hold that the profits that might have accrued to the injured party on the contract itself, which was broken, may be recovered as damages. *Philadelphia, etc. R. Co. v. Howard*, 13 How. 307, 344; *Masterton v. Mayor*, 7 Hill, 61; *Fox v. Harding*, 7 Cush. 522. These cases confine the profits to be recovered to such as might have been made on the contract the breach of which is complained of. Yet it is very evident that even such profits cannot be arrived at with any absolute certainty, as they frequently depend upon fluctuations in the market, and changes in the price of labor and materials, which may take place while the contract is being performed. Yet, inasmuch as they may be estimated with reasonable certainty, and their loss is the direct result of the wrong complained of, they are allowed to be recovered. And in the case of *Waters v. Towers*, 20 Eng. L. & Eq. 410, the rule was extended so as to include profits on a collateral contract which the plaintiff had entered into with other parties. The court said: 'If reasonable evidence is given that the amount of profit would have been made as claimed the damages may be asked accordingly. . . . *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398; *Fletcher v. Tayleur*, 33 id. 187.' I think the principle fairly to be derived from these cases is, that the profits lost as a direct result of a

¹ *Alpha Mills v. Watertown Steam-Engine Co.*, 116 N. C. 797, 21 S. E. Rep. 917. But see § 670 as to interest.

engine was being repaired have been ruled to be too remote.¹ A vendee of adulterated butter who has sold it to his customers cannot recover damages for loss of trade profits, nor the amount of the fine paid by him for selling the butter in violation of a statute imposing a penalty if the violation was not committed with intent and knowledge. It seems that it would be otherwise as to the fine if the intent was not an ingredient of the offense.² The vendor of warranted milk is not liable to his vendee who has retailed the same for a fine imposed upon the latter for selling skimmed milk without complying with a statute requiring that the can containing the milk should be marked. The court said: The damages which plaintiff seeks to recover did not arise, according to the usual course of things, from a breach of the contract of warranty; and, if defendant innocently sold skimmed milk for unskimmed milk, it is perfectly plain that it could not have contemplated, when warranting the quality of the article, that the probable result of

breach of contract may be recovered as damages, where they are not so conjectural and remote as to be incapable of ascertainment with reasonable certainty. And their reasoning seems entirely applicable to this case. The defendant here knew that if he refused gas to the plaintiff he could get it nowhere else. It stood, therefore, in the same position that the carrier would have been in, in *Hadley v. Baxendale*, if he had known the plaintiff could have no shaft to his mill until the model was delivered. The defendant, therefore, must be presumed to have contemplated whatever damage would naturally arise from its refusal to furnish the plaintiff with gas. Its obligation to furnish it was, according to the decisions of this court, as clear and imperative as though it had expressly contracted to do it. And it seems to me that the profits of an established business are quite as ca-

pable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such a business, the experience of the past to serve as a test. And the rule suggested by *Jarvis, C. J.*, in *Fletcher v. Tayleur*, that the damages should be estimated 'according to the average percentage of mercantile profits,' could readily be applied, and would seem just and reasonable. The cases already referred to seem to me, therefore, applicable here, and to sustain the conclusion that the profits of a business which are necessarily lost by the wrong or default of another may, under some circumstances and with proper restrictions, be considered in estimating the damages for the injury."

¹ *Tompkins Co. v. Galveston Street R. Co.*, 4 Tex. Civ. App. 1, 23 S. W. Rep. 25. See § 671.

² *Fitzgerald v. Leonard*, L. R. 32 Ire. 675 (1893).

a breach of contract would be the plaintiff's arrest and conviction for the statutory offense with which he was charged. Neither of the parties, the defendant corporation which sold, or plaintiff, who purchased, reasonably contemplated this special injury, and the conventional rule is applicable.¹ Expenditures made in advertising a business in which a warranted machine was bought for use and losses incurred in the general or miscellaneous business of the vendee are too remote, vague and uncertain to be recovered.² A vendor of a warranted wagon is not responsible for the death of a horse which was drawing it. "It was neither such damage as arose naturally from the breach of the warranty, nor such as could reasonably be supposed to have been contemplated by the parties as the probable result of the breach."³ The damages resulting to a vendee from the impairment of the value of patents held by him and the loss of other contracts because of the defective character of cement sold to him and used in a building, are too remote and speculative.⁴ The vendor of a stallion is not liable for the prospective profits that the vendee expected to make by the services of the horse upon mares unless there were outstanding contracts for such services at the time of the sale, and the vendee knew thereof, and the purchase and sale were made with reference thereto.⁵ If the vendee has recovered the difference between the value of a stallion as he was and as he was warranted to be, and the expense incurred by reason of the breach of warranty, he is fully compensated, and cannot recover the difference in the sum realized for the horse's services and what would have been realized if the warranty had not been breached.⁶

[437] § 676. **Defense to action for purchase-money.** The vendee cannot resist the collection of the purchase-money, where there is no fraud or warranty, merely because the [438] property is less valuable than he supposed,⁷ nor because

¹ *Sloggy v. Crescent Creamery Co.*, 72 Minn. 316, 75 N. W. Rep. 225.

² *Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co.*, 55 Fed. Rep. 451, 5 C. C. A. 190.

³ *Schurmeier v. English*, 46 Minn. 306, 48 N. W. Rep. 1112.

⁴ *Balph v. Rathburn Co.*, 75 Fed. Rep. 971, 21 C. C. A. 584.

⁵ *Glidden v. Pooler*, 50 Ill. 36.

⁶ *Love v. Ross*, 89 Iowa, 400, 56 N. W. Rep. 528.

⁷ *Woodruff v. Graddy*, 91 Ga. 333, 17 S. E. Rep. 264, 44 Am. St. 33; *At-*

of latent defects.¹ But where goods are sold with warranty, which proves untrue, the vendee, when sued for the contract price either on a general count for goods sold and delivered or bargained and sold upon the special contract of sale, or upon a note or other security for the price, may allege the breach of warranty as a defense and obtain an abatement of damages to the amount he would be entitled to recover for such breach in a cross-action. This defense is allowed under various names—reduction or mitigation of damages, partial failure of consideration, discount, or recoupment. It is [439] not universally allowed, but nearly so, not only for breach of warranty, but also for any fraud of the vendor in the sale. The cases cited below fully define and illustrate this defense; for a full exposition of the subject the reader is referred to the section on “Recoupment and Counter-claim.”²

lanta City Street R. Co. v. American Car Co., 103 Ga. 254, 29 S. E. Rep. 925; *Edison General Electric Co. v. Blount*, 96 Ga. 272, 23 S. E. Rep. 306; *Leonard v. Peebles*, 30 Ga. 61.

¹ *Drew v. Roe*, 41 Conn. 41.

² §§ 168-179; *McAllister v. Reab*, 4 Wend. 484; *Reab v. McAllister*, 8 id. 109; *Van Epps v. Harrison*, 5 Hill, 63; *Ward v. Reynolds*, 32 Ala. 384; *Hoe v. Sanborn*, 3 Abb. Pr. (N. S.) 189; *Caldwell v. Sawyer*, 30 Ala. 283; *Jemison v. Woodruff*, 34 id. 143; *Davis v. Dickey*, 23 id. 848; *Rotan v. Nichols*, 22 Ark. 244; *Desha v. Robinson*, 17 id. 228; *Plant v. Condit*, 22 id. 454; *Peck v. Farrington*, 9 Wend. 44; *Parker v. Pringle*, 2 Strobh. 249; *Young v. Plumeau*, Harp. 349; *Harmon v. Sanderson*, 6 Sm. & M. 41, 45 Am. Dec. 272; *Wheelock v. Pacific Pneumatic Gas Co.*, 51 Cal. 223; *Polhemus v. Heiman*, 45 Cal. 573; *Huckaber v. Albritton*, 10 Ala. 651; *Simmons v. Cutreer*, 12 Sm. & M. 584; *Otis v. Alderson*, 10 id. 476; *Allaire v. Whitney*, 1 Hill, 484, 1 N. Y. 305; *Luffburrow v. Henderson*, 30 Ga. 482; *Perley v. Balch*, 23 Pick. 282; *Ault-*

man v. Mason, 83 Ga. 212, 9 S. E. Rep. 536; *Dayton v. Hooglund*, 39 Ohio St. 671; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. Rep. 886, 11 L. R. A. 681; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309, 53 N. W. Rep. 501; *Newton Rubber Works v. Home Rattan Co.*, 100 Ill. App. 421; *June v. Falkenburg*, 89 Mo. App. 563; *Florence v. Patillo*, 105 Ga. 577, 32 S. E. Rep. 642; *Foxton v. Hamilton Steel & Iron Co.*, 1 Ont. L. R. 393; *Stillwell v. Biloxi Canning Co.*, 78 Miss. 779, 29 So. Rep. 513; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. Rep. 942; *Huntington v. Lombard*, 22 Wash. 202, 65 Pac. Rep. 414; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 51 N. W. Rep. 197, 30 Am. St. 421; *Hodge v. Tufts*, 115 Ala. 366, 22 So. Rep. 422; *Parry Manuf. Co. v. Tobin*, 106 Wis. 286, 82 N. W. Rep. 154; *Springfield Milling Co. v. Barnard*, 81 Fed. Rep. 261, 26 C. C. A. 389. See *McDugald v. McFadgin*, 6 Jones. 89; *Henning v. Vanhook*, 8 Humph. 678; *McEntyre v. McEntyre*, 12 Ired. 299.

Where the title to the warranted horse was not to pass to the vendee.

until payment of a note given for a portion of the purchase price, and the horse was delivered to, and used by, him for a time, but died before the maturity of the note from a cause not connected with the unsoundness, the consideration for the note was in part the bailment, and in part the promise of the vendor to sell, and the vendee could counterclaim for the damages arising out of the breach of the warranty for the period of the bailment and for the proposed sale the same amount as if

the sale had been absolute. *Copeland v. Hamilton*, 9 Manitoba, 143. Compare *Frye v. Milligan*, 10 Ont. 509; *Tomlinson v. Morris*, 12 id. 311, ruled under contracts differing somewhat from that in the Manitoba case, and holding that the purchaser could not maintain an action for general damages for the breach of a warranty until the property warranted had become his; it was suggested that it might be otherwise as to special damages.

CHAPTER XV.

CONTRACTS FOR SERVICES.

§ 677. Scope of chapter.

678. Recovery where wages fixed, and under statute.

679. Recovery on *quantum meruit*.

680. Proof of the value of services.

681. A statutory day's work.

682. Recovery for attorney's services.

683. Recovery for broker's services.

684. Various modes of compensating for services.

685. Continuation of original contract.

686. Necessity of full performance of entire contract.

687-690. Same subject; dispensation in case of inability.

691. Entire and apportionable contracts.

692-694. Liability for wrongful dismissal of employee.

695. Liability of employee for violation of contract; recoupment of damages.

§ 677. **Scope of chapter.**—This subject properly in- [440] cludes the contracts, not only of servants and laborers, of mechanics and builders, for professional and skilled labor, but also salvage service, agency and many kinds of bailment.

§ 678. **Recovery where wages fixed, and under statute.**—Where the contract is express and fixes the amount of compensation due on performance, that stipulated compensation is the measure of damages whether the action is brought on the contract or in general *assumpsit*.¹ If the contract clearly pro-

¹Sands v. Potter, 165 Ill. 397, 46 N. E. Rep. 282, 56 Am. St. 253; McDonald v. Liggett, 146 Pa. 460, 23 Atl. Rep. 338; Gambrill v. Schooley, 89 Md. 546, 43 Atl. Rep. 918; Gillies v. Manhattan Beach Imp. Co., 73 Hun, 507, 26 N. Y. Supp. 381 (see s. c., 147 N. Y. 420, 42 N. E. Rep. 196); Robinson v. Hunt, 88 Hun, 285, 34 N. Y. Supp. 794; Marsh v. Holbrook, 3 Abb. Ct. of App. Dec. 176; Barney v. Fuller, 133 N. Y. 608, 30 N. E. Rep. 1007; Schwartzel v. Karnes, 2 Kan. App. 782, 44 Pac. Rep. 41; Turnbull v. Banks, 22 App. Div. 508, 48 N. Y. Supp. 40; Sanborn v. Plowman, 13 Tex. Civ. App. 95, 35 S. W. Rep. 193; Fells v. Vestvali, 2 Keyes, 152; McKinney v. School District, 20 Minn. 72; Edwards v. Goldsmith, 16 Pa. 43; Dermott v. Jones, 2 Wall. 1; Chesapeake & O. Canal v. Knapp, 9 Pet. 541; Perkins v. Hart, 11 Wheat. 237; Stadermann v. Heins, 78 App. Div. 563, 79 N. Y. Supp. 674. See Gay v. Botts, 13 Bush, 299; Sprague v. Morgan, 7 Ala. 952; Evans v. Bennett, 7 Wis. 404; State v. Hawkins, 28 Mo. 306; Kirk v. Hartman, 63 Pa. 97; Balsbaugh v. Frazer, 19 id. 95; Lud-

vides that the compensation shall be determined by the employer, after the work is performed, his decision is binding in the absence of fraud or bad faith, which will not be inferred from the fact that the value of the services was considerably more than the sum named by him.¹ The right so given must be exercised either when the services are rendered or when demand is made for compensation. It cannot be availed of for the first time on the witness stand so as to prevent the recovery of such sum as the services were reasonably worth.² In an action to recover wages from the estate of a decedent if it appears that there was a special contract between the plaintiff and the decedent fixing the wages for the last year, the same rate will measure the value of the services rendered in preceding years.³

low v. Dale, 63 N. Y. 617; Steinburg v. Gebhardt, 41 Mo. 519.

A superintendent employed by a corporation at a monthly salary cannot recover for services rendered outside of the usual working hours. Steam Dredge No. 1, 87 Fed. Rep. 760.

As to an accord and satisfaction resulting from the receipt of monthly payments not including compensation for services for extra time, see Jordan v. Great Northern R. Co., 80 Minn. 405, 83 N. W. Rep. 391.

Under a contract to pay an annual salary and an allowance for expenses, not to exceed an average of \$5 per day, the employee cannot recover the sum expended for his daily board or living expenses. Dowd v. Krall, 32 N. Y. Misc. 252, 65 N. Y. Supp. 797.

Under a contract to board an infant, no stipulation being made as to the duration of the service or time of payment, recovery may be had for board furnished after the infant became of age as well as before, also of interest computed from the end of each year. Yearteau v. Bacon's Estate, 65 Vt. 516, 27 Atl. Rep. 198. See Andrews v. Keith, 168 Mass. 558, 47 N. E. Rep. 423.

A suit on *quantum meruit* does not defeat the action though the existence of a contract is proved, but it controls the amount of the recovery. Henderson v. Mace, 64 Mo. App. 393.

¹ Butler v. Winona Mill Co., 28 Minn. 205, 41 Am. Rep. 277, 9 N. W. Rep. 697.

But in Illinois a contract to pay whatever the party performing may charge does not preclude the person served from disputing the reasonableness of the charge. The plaintiff may only recover what his services are worth. Van Arman v. Byington, 38 Ill. 433.

Where a claim for services rendered to a county is presented to the board of supervisors for audit, and that body may exercise its judgment concerning the amount to be allowed, the courts will not compel it to allow the claim at the sum sworn to by the claimant, though there is no opposing testimony as to the value of the services. Matter of Lanehart, 32 App. Div. 4, 52 N. Y. Supp. 671.

² Toledo, etc. R. Co. v. Lott, 10 Ohio Ct. Ct. 249.

³ Tippin v. Brockwell, 89 Ga. 467, 15 S. E. Rep. 539.

"One who is employed to render services of a particular kind cannot, in the course of such employment, be required to render services of a different character and distinct from those which he was engaged to perform, and if he is commanded by his employer to perform services requiring special qualification, skill and capacity, unconnected with his regular employment, an implied promise arises to pay him, by way of additional compensation, what those services are reasonably worth."¹ But a contract to furnish board, washing and mending does not come within the rule stated. Such a contract, *prima facie*, covers all such household attendance and attention as are usual in families of the same situation and circumstances of life, including services incident to the illness of the person who was the other party to the agreement.² A contract of hiring and service is distinguishable from a contract constituting the relation of principal and agent, and is not ended by the insanity of the employer and his consequent inability to exercise an option which the contract gives him, nor by the subsequent incorporation of the employer's business if he retains exclusive control of the corporation.³

A statute fixing the compensation of laborers employed by or for the state is binding upon all public officers, and the rate of compensation cannot be varied by any of them; the receipt of a reduced sum for a time does not estop a laborer from claiming the full amount.⁴ An act declaring that the employees of a municipality shall receive not less than the prevailing rate of wages in the trades, etc., in which they are employed in said locality, contemplates the prevailing rate of wages in the market generally, and is not limited to the particular department of the municipality in which the complaining em-

¹ Merzbach v. Mayor, 10 N. Y. Misc. 213, 40 N. E. Rep. 33, is in accord with 131, 30 N. Y. Supp. 908, citing Wood on Mast. & Serv. § 86; 1 Lawson on Rights, Remedies, etc., §§ 254, 257; 19 Am. & Eng. Ency. of Law, 500 and cases cited in note 4; Mayor v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670; United States v. Brindle, 110 U. S. 688, 4 Sup. Ct. Rep. 180; Converse v. United States, 21 How. 463. See Brauns v. Green Bay, 78 Wis. 81, 46 N. W. Rep. 889. Martin v. Prince, 12 Ind. App.

213, 40 N. E. Rep. 33, is in accord with the text.

² Rosencrance v. Johnson, 191 Pa. 520, 43 Atl. Rep. 360; Houghton v. Kittleman, 7 Kan. App. 207, 52 Pac. Rep. 898.

³ Sands v. Potter, 165 Ill. 397, 46 N. E. Rep. 282, 56 Am. St. 253.

⁴ Clark v. State, 142 N. Y. 101, 36 N. E. Rep. 817; Gilligan v. Waterford, 91 Hun, 21, 36 N. Y. Supp. 88.

employee was engaged.¹ An employee who has received the prevailing rate of wages cannot, at least if he has made no protest, recover an additional sum because he has worked extra hours, no constraint to do so having been employed.² Where a statute gives the owner of logs compensation for driving those owned by another person which are intermingled with his, the right to recover is not affected by a custom which regards such services as gratuitous, nor defeated by the fact that the owner did not know that they were driven. The recovery is to be measured by the value of the labor regardless of the resulting benefit.³

§ 679. **Recovery on quantum meruit.** If the compensation has not been fixed by agreement he who has done work on a hiring for wages may recover so much as the services are reasonably worth, or so much as he deserves.⁴ Recovery may be had according to the value of the services, not the benefit the employer derives therefrom.⁵ Such value may be ascertained by the usual price paid for like services at the time and place of the plaintiff's performance.⁶ In Louisiana a physician's charges for services are not determinable solely by the measure of his skill; the value of the patient's estate influences the amount of the recovery.⁷ One of the Ohio circuit courts, regarding the question as an interesting one, and not free from

¹ *McMahon v. Mayor*, 22 App. Div. 113, 47 N. Y. Supp. 1018.

² *McGraw v. Gloversville*, 32 App. Div. 176, 52 N. Y. Supp. 916.

³ *Osborne v. C. N. Nelson Lumber Co.*, 33 Minn. 285, 22 N. W. Rep. 540. See *Bearce v. Dudley*, 88 Me. 410, 34 Atl. Rep. 260.

⁴ *Russell v. Young*, 94 Fed. Rep. 45, 36 C. C. A. 71; *Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. Rep. 883, 22 L. R. A. 855; *Pickett v. School District*, 25 Wis. 558; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. Rep. 583; *Howard v. Gobel*, 62 Ill. App. 497; *Sprague v. Lea*, 152 Mo. 327, 53 S. W. Rep. 1074; *Levitt v. Miller*, 64 Mo. App. 147; *Hamilton v. Estate of Hamilton*, 29 Ind. App. 114, 59 N. E. Rep. 344; *Coleman v. Simpson*, 2

Dana, 166; *Downing v. Major*, id. 288; *Weston v. Davis*, 24 Me. 374; *Smith v. Davis*, 45 N. H. 566; *Updike v. Tenbroeck*, 32 N. J. L. 105; *Lewis v. Trickey*, 20 Barb. 387; *Bergin v. Wemple*, 30 N. Y. 319; *Ricketts v. Sisson*, 9 Dana, 358, 35 Am. Dec. 141; *Erben v. Lorrillard*, 2 Keyes, 567; *Spencer v. Storrs*, 38 Vt. 156.

⁵ *Stowe v. Buttrick*, 125 Mass. 449; *Gambrill v. Schooley*, 89 Md. 546, 43 Atl. Rep. 918; *Osborne Co. v. Franklin Mills Co.*, 45 App. Div. 325, 60 N. Y. Supp. 1013.

⁶ *Saffin v. Thomas*, 8 Ohio Ct. Ct. 253; *Bagley v. Bates*, *Wright*, 705. See § 682.

⁷ *Czarnowski v. Zeyer*, 35 La. Ann. 796; *Succession of Haley*, 50 La. Ann. 840, 24 So. Rep. 285. See § 682.

doubt, held that such value was not a subject of proof in an action to recover for professional services.¹ A contract to pay may be inferred from circumstances, without any express agreement,² and the price may be tacitly fixed by their [441] indicating a concurrence of the minds of the parties.³ The duty to pay may be imposed by law under the fiction of an implied promise, where there was neither promise nor intention to pay, as where the performance of service has been pro-

¹ Saffin v. Thomas, *supra*.

² McFarland v. Dawson, 125 Ala. 428, 29 So. Rep. 327; Lang v. Dietz, 93 Ill. App. 148; Palmer v. Miller, 19 Ind. App. 624, 49 N. E. Rep. 975; Saunders v. Saunders, 90 Me. 284, 38 Atl. Rep. 172; Buelterman v. Meyer, 132 Mo. 474, 34 S. W. Rep. 67; McQueen v. Wilson, 51 Mo. App. 138; Kerr v. Cusenbary, 60 Mo. App. 558; Guadelupo Y Calvo Mining Co. v. Beatty, 3 Tenn. Cas. 271; Coleman v. Simpson, 2 Dana, 166; Gill v. Staylor, 93 Md. 453, 49 Atl. Rep. 650; Van Slambrook v. Little's Estate, 127 Mich. 61, 86 N. W. Rep. 402; Ryáns v. Hospes, 167 Mo. 342, 67 S. W. Rep. 285; Leahy v. Campbell, 70 App. Div. 127, 75 N. Y. Supp. 72; Smith v. Long Island R. Co., 102 N. Y. 190, 6 N. E. Rep. 397. For cases where the implied obligation to pay has been held not to exist, see Porter v. Elizalde, 125 Cal. 204, 57 Pac. Rep. 899; Price v. Hay, 132 Ill. 543, 24 N. E. Rep. 620; Holmes v. Board of Trade, 81 Mo. 137; Young v. Crawford, 23 Mo. App. 432; Savings Bank v. Benton, 2 Met. (Ky.) 240; Evans v. Mohr, 153 Ill. 561, 39 N. E. Rep. 1083; Ennis v. Hultz, 46 Iowa, 76. Distinguishable from the above are Briggs v. Georgia, 10 Vt. 68; King v. Pope, 28 Ala. 602; Jackson v. Clopton, 66 Ala. 29; Howgate v. Edwards, 65 Ind. 373. Compare with the cases first cited in this paragraph, Moore v. Orr, 10 Ind. App. 89, 37 N. E. Rep. 554.

The implied contract is extin-

guished by an express contract concerning compensation for services rendered, and is not revived by a breach of the latter. Pim v. Greer, 64 Mo. App. 175.

There may be a recovery on a *quantum meruit* if the failure to make an express contract was the fault of the employer, but not if it was the fault of the employee. Wright v. Broome, 67 Mo. App. 32.

An exception to the general rule is to the effect "that when one summons a physician to care for another, rendered by sudden injury unable to act for himself, as to whom he stands in no relationship which creates any obligation to furnish necessary medical care and no express undertaking is entered into, then from the mere summoning of the physician and requesting him to care for the injured person the law does not presume any implied promise by the one so acting to pay for services of the physician summoned." Starrett v. Miley, 79 Ill. App. 658, citing Boyd v. Sappington, 4 Watts, 247; Clark v. Waterman, 7 Vt. 76, 29 Am. Dec. 150; Smith v. Watson, 14 Vt. 337; Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232. In Jessorich v. Walruff, 51 Mo. App. 270, the exception was applied where an employer called a physician for an employee.

³ Wilder v. Stanley, 49 Vt. 105; Buck v. Worcester, 48 id. 2; Curley v. Jenkins, 46 id. 721.

cured by fraud,¹ duress or compulsion;² or the service was rendered pursuant to a contract which was void because made on Sunday³ (but in Massachusetts the law will not imply a valid contract to pay for services rendered under an illegal contract);⁴ or because the contract was not executed with the formality required by statute.⁵ The implied promise to pay arises only under circumstances which justified the person who performed services in entertaining a reasonable expectation that he would receive payment.⁶

¹ Rumsey v. Northeastern R. Co., 14 C. B. (N. S.) 641; Morrison v. Bradley, 5 Cal. 503; Hickam v. Hickam, 46 Mo. App. 496; Higgins v. Breen, 9 Mo. 497; Boardman v. Ward, 40 Minn. 399, 42 N. W. Rep. 202, 12 Am. St. 749.

² Hickam v. Hickam, *supra*.

³ Spahn v. Willman, 1 Pennewill, 125, 39 Atl. Rep. 787.

⁴ Stewart v. Thayer, 170 Mass. 560, 49 N. E. Rep. 1020.

⁵ Bucki v. McKinnon, 37 Fla. 391, 20 So. Rep. 540; Dix v. Marcy, 116 Mass. 416; McPhail v. Commissioners, 119 N. C. 330, 25 S. E. Rep. 958; Thomas v. McManus, 23 Ky. L. Rep. 837, 64 S. W. Rep. 446; Hamilton v. Thirston, 93 Md. 213, 48 Atl. Rep. 709.

⁶ Davidson v. Westchester Gas Light Co., 99 N. Y. 559, 2 N. E. Rep. 892.

In Hay v. Walker, 65 Mo. 17, it was held that in order to raise an implied contract to pay for labor it was not necessary there should have been an intention on the part of the laborer during his service to charge therefor; it is sufficient that the person for whom the labor was done expected to pay for it.

Where there was neither expectation to charge nor to pay an allowance for services was refused, but the party who performed them was entitled to be reimbursed his necessary expenses, they having been incurred at the solicitation of the

other party. Riley v. Riley, 14 Ky. L. Rep. 895 (Ky. Super. Ct.).

Services rendered merely in expectation of marriage with the party served will not sustain *assumpsit* even after such party has married another than the person who performed the service. Lafontain v. Hayhurst, 89 Me. 388, 36 Atl. Rep. 623, 56 Am. St. 430.

If services are performed without expecting payment in money, but with the expectation that they would offset services rendered by the other party at the same time, and the latter obtains a judgment for his services, the other party may recover on an implied promise for the services rendered. Cook v. Bates, 88 Me. 455, 34 Atl. Rep. 266.

It is said in Taussig v. St. Louis & K. R. Co., 166 Mo. 28, 65 S. W. Rep. 969, 89 Am. St. 674, that it is well settled that "the directors of a corporation cannot recover compensation for their services when rendered in the line of their duty as such, whether *eo nomine* as directors, officers, members of committees, or otherwise, unless compensation for such services is provided for in its charter or authorized by a by-law or resolution of the board of directors before the services are rendered. 17 Am. & Eng. Enc. Law (1st ed.), p. 119, § 6, and cases cited in note 3; Martindale v. Wilson-Cass Co., 134 Pa. 348, 19 Atl. Rep. 680, 19 Am. St. 706; Loan Association v. Stonemetz,

If a father repudiates a contract for service made by his minor son he may claim the value of the services rendered; if the employer has permitted the son to use part of his time for his own purposes its value may be deducted.¹ A promise by the employer is generally implied to make reasonable compensation for services rendered, unless there are circumstances which negative that implication.² Where a person renders

29 Pa. 534; *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220; *Rockford, etc. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Taylor, Priv. Corp.* (4th ed.), § 646; 1 *Morawetz, Priv. Corp.* (2d ed.), § 508; *Beach v. Stouffer*, 84 Mo. App. 395; *Remmer v. Leky*, 70 Mo. App. 364; *Rose v. Eclipse Carbonating Co.*, 60 Mo. App. 28; *Pfeiffer v. Lansberg Brake Co.*, 44 Mo. App. 59; *Besch v. Western Carriage Manuf. Co.*, 36 Mo. App. 333; *Bennet v. St. Louis Roofing Co.*, 19 Mo. App. 349. Generally in these cases, the director was seeking to recover salary or compensation for services as a director, manager, officer, committeeman, or for other like services nearly or remotely incident to his duties as director, when no compensation had been provided therefor by formal action of the board, and under this rule a recovery was denied. . . . Here the plaintiff, an attorney at law, who is a director of the defendant corporation, as also its secretary and treasurer, is suing for the value of services, not within the scope of or incident to the duties of any of those official positions or relations, but for special personal services, strictly in the line of his profession and entirely outside of the line or scope of any of his official duties. And the question is, what is the rule in such case? The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered

to a corporation entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood. *Fitzgerald & M. Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36; *Pew v. First Nat. Bank*, 130 Mass. 391; *Bassett v. Fairchild*, 132 Cal. 637, 64 Pac. Rep. 1082, 52 L. R. A. 611; *National Loan & Investment Co. v. Rockland Co.*, 36 C. C. A. 370, 94 Fed. Rep. 335; *Brown v. Republican Mountain Silver Mines*, 17 Colo. 421, 30 Pac. Rep. 66, 16 L. R. A. 426; *Greensboro, etc. Turnpike Co. v. Stratton*, 120 Ind. 294, 22 N. E. Rep. 247; *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25; *Shackleford v. New Orleans, etc. R. Co.* 37 Miss. 202; *Chandler v. Monmouth Bank*, 13 N. J. L. 255; *Cheeney v. Lafayette, etc. R. Co.*, 68 Ill. 570, 18 Am. Rep. 584; *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104, 7 N. W. Rep. 470, 39 Am. Rep. 167." See *Jones v. Vance Shoe Co.*, 92 Ill. App. 158; and as to municipal officers, *Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. Rep. 883, 22 L. R. A. 855, and cases cited.

¹ *Sherlock v. Kimmell*, 75 Mo. 77.

² *Alexander v. Worman*, 6 H. & N. 100; *Higgins v. Hopkins*, 3 Ex. 166;

service for another, relying solely upon his generosity, and expecting to be compensated by a legacy, he cannot, when disappointed in such expectation, maintain an action at law for the value of such service;¹ that which was originally intended as a gratuity cannot be turned into a charge.² It is, however, settled that a contract to pay for services by will is valid;³ and where the promise is of a specific sum by bequest, it may be recovered, but no more;⁴ or, if the promise is of a specific portion of the estate, its value will be the measure of recovery.⁵ So a general promise to make compensation in the promisor's will entitles the promisee to maintain an action against the personal representative for reasonable compensation, if the promise be not fulfilled.⁶ If the promise is to leave a particular property to the person performing the service and the promisor becomes mentally incapacitated so that there is no performance on his part, there may be a recovery upon a *quantum meruit* of the value of the services rendered; the *quantum meruit* will not be the basis of the right to recover, but the measure of the amount the servant is entitled to receive, not to exceed the value of the property which was the consideration for his contract. That, however, would be diminished by the value of what the servant actually received

Poucher v. Norman, 3 B. & C. 744; Kingston v. Kelly, 18 L. J. (Ex.) 360; Lewis v. Trickey, 20 Barb. 387; Boylan v. Holt, 45 Miss. 277.

¹ Granding v. Reading, 10 N. J. Eq. 370; Osborn v. Guy's Hospital, 2 Str. 728; Le Sage v. Coussmaker, 1 Esp. 189; Little v. Dawson, 4 Dall. 111.

² Kerr v. Cusenbary, 60 Mo. App. 558, 563.

³ Redfield on Wills, pt. 2, pp. 281, 282; Graham v. Graham's Ex'r, 34 Pa. 475; Myles v. Myles, 6 Bush, 237; Lee v. Carter, 52 Ind. 342; Porter v. Dunn, 61 Hun, 310, 16 N. Y. Supp. 77; Leahy v. Campbell, 70 App. Div. 127, 75 N. Y. Supp. 72.

⁴ Porter v. Dunn, *supra*; Bell v. Hewitt, 24 Ind. 280.

⁵ Frost v. Farr, 53 Ind. 390; Matter of Mallory, 13 N. Y. Misc. 595, 35 N. Y. Supp. 155.

⁶ Succession of McNamara, 48 La. Ann. 45, 18 So. Rep. 908 (an implied promise case); Saunders v. Saunders 90 Me. 284, 38 Atl. Rep. 172 (mutual understanding); Collier v. Rutledge, 136 N. Y. 621, 32 N. E. Rep. 626 (the amount of the recovery is not affected because of the insolvency of the promisor at the time of his death); Stokes v. Pease, 79 Hun, 304, 29 N. Y. Supp. 430; Miller v. Richardson, 83 Hun, 49, 34 N. Y. Supp. 506; Hopkins v. Clark, 90 Hun, 4, 34 N. Y. Supp. 506 (interest is recoverable from the commencement of the action); Gall v. Gall, 27 App. Div. 173, 50 N. Y. Supp. 563; Reynolds v. Robinson, 64 N. Y. 589; Nelson v. Masterton, 2 Ind. App. 524, 28 N. E. Rep. 731; Purves' Estate, 9 Pa. Dist. Rep. 5; Kauss v. Rohner, 172 Pa. 481, 33 Atl. Rep. 1016.

from his employer in excess of what was necessary to support and maintain the latter during his lifetime.¹

Any circumstances will suffice to give a right of action to recover for the value of services rendered if they negative any inference that the services were gratuitous, or that the matter of paying for them was left to the will and pleasure of the employer.² On the other hand, if the services appear to [442] have been rendered as a gratuitous kindness, or the facts are insufficient to show an intention to pay for them, no action will lie.³ Thus, where a slave servant accompanied his master from the West Indies to England, and there continued in his service without any agreement, he was held not entitled to wages.⁴ So guardians, executors, administrators, or other trustees are not entitled to claim compensation for their services except by virtue of a statute or contract.⁵ The general rule in equity in this country is that trustees are entitled to reasonable and just compensation. But that will not be allowed if fraud, wilful default or gross negligence in the management of the trust estate is shown.⁶ The compensation of receivers, trustees, and other like officers of courts should be

¹ *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. Rep. 349.

² *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. Rep. 349; *Murrell v. Studstill*, 104 Ga. 604, 30 S. E. Rep. 750; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. Rep. 583; *Ridler v. Ridler*, 103 Iowa, 470, 72 N. W. Rep. 671; *Matter of Strickland*, 10 N. Y. Misc. 486, 32 N. Y. Supp. 171; *Maitland v. Greer*, 8 Pa. Super. Ct. 461; *Knauss's Estate*, 148 Pa. 265, 23 Atl. Rep. 894; *Plate v. Durst*, 42 W. Va. 63, 24 S. E. Rep. 580, 32 L. R. A. 404; *Sherman v. Whiteside*, 190 Ill. 576, 60 N. E. Rep. 838; *Martin v. Estate of Martin*, 108 Wis. 284, 84 N. W. Rep. 439; *Koch v. Williams*, 82 Wis. 186, 52 N. W. Rep. 257; *Jacobson v. La Grange*, 3 Johns. 199; *Patterson v. Patterson*, 13 id. 379; *Martin v. Wright*, 13 Wend. 460, 28 Am. Dec. 468; *Eaton v. Benton*, 2 Hill, 576; *Robinson v. Raynor*, 28 N. Y. 494.

³ 2 Add. on Cont., § 851; *Walton v. Clark*, 54 Minn. 341, 56 N. W. Rep. 40; *Kahn v. Lichtenstein*, 28 App. Div. 211, 50 N. Y. Supp. 900; *Brown v. Scott*, 91 Wis. 674, 65 N. W. Rep. 499. See *Swanzey v. Moore*, 22 Ill. 63, 74 Am. Dec. 134.

⁴ *Alfred v. Fitzjames*, 3 Esp. 3.

⁵ *Huggins v. Rider*, 77 Ill. 360; *Bartlett v. Hartley*, L. R. 2 Eq. 789; *Christophers v. White*, 10 Beav. 523; *Moore v. Frowd*, 3 Myl. & Cr. 45; *Manson v. Baillie*, 2 Macq. H. of L. Cas. 80; *Collins v. Carey*, 2 Beav. 128; *Morgan v. Hannas*, 13 Abb. Pr. (N. S.) 361; *Lansing v. Lansing*, 1 id. 280; *Hopper v. Adee*, 3 Duer, 235.

⁶ *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 80 N. W. Rep. 953, 81 id. 210; *Speiser v. Merchants' Exchange Bank*, 110 Wis. 506, 86 N. W. Rep. 243.

measured, not by the highest salaries which large establishments may pay, but by analogy to such as the law fixes for public officers having similar duties.¹ Interest cannot be recovered on the amount due an executor for services if the delay in payment is attributable to his conduct.²

Where the family relation exists the law presumes that what one member of the family does for another is done gratuitously and because of that relation. In such a case an agreement to pay for services must be established either by proof of an express contract or of facts from which an inference of such agreement will arise.³ The strength of the presumption varies according to the circumstances of each case — the closeness of the relationship, the financial or physical situation of one or both of the parties, and many other incidents. It has been said that "as between parents and an adult child whenever compensation is claimed in any case by either against the other for services rendered, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of an express contract the question always is, can it be reasonably inferred that

¹ *Speiser v. Bank, supra.*

² *McClelland v. Bristow*, 9 Ind. App. 543, 35 N. E. Rep. 197.

³ *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. Rep. 349; *O'Kelly v. Faulkner*, 92 Ga. 521, 17 S. E. Rep. 847; *Walker v. Brown*, 104 Ga. 357, 361, 30 S. E. Rep. 867; *Ridler v. Ridler*, 103 Iowa, 470, 72 N. W. Rep. 671; *Reynolds v. Reynolds*, 92 Ky. 556, 18 S. W. Rep. 517; *Zimmerman v. Zimmerman*, 129 Pa. 229, 18 Atl. Rep. 129, 15 Am. St. 720; *Ulrich v. Ulrich*, 60 N. Y. Super. Ct. 237, 17 N. Y. Supp. 721; *Matter of Dusenbury*, 10 N. Y. Misc. 633, 32 N. Y. Supp. 820; *Newell v. Lawton*, 20 R. I. 307, 38 Atl. Rep. 946; *Sherman v. Whiteside*, 190 Ill. 576, 60 N. E. Rep. 838; *Sloan v. Dale*, 90 Mo. App. 87; *Hall v. Finch*, 29 Wis. 278, 9 Am. Dec. 559; *Pellage v. Pellage*, 32 Wis. 136; *Tyler v. Burrington*, 39 Wis. 376; *Wells v. Perkins*, 43 Wis. 160; *Ayres*

v. Hull, 5 Kan. 419; *Mills v. Joiner*, 20 Fla. 479; *Scully v. Scully*, 28 Iowa, 548; *Smith v. Johnson*, 45 Iowa, 348; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. Rep. 583, 54 Ill. App. 377; *Lang v. Dietz*, 93 Ill. App. 148 (services of foster child after majority); *Dolbeare v. Coultas*, 94 Ill. App. 55; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. Rep. 808; *Dodson v. McAdams*, 96 N. C. 149, 60 Am. Rep. 408; *Price v. Price*, 101 Ky. 28, 39 S. W. Rep. 429; *Reed's Estate*, 8 Montgomery Co. L. Rep. 98; *Maitland v. Greer*, 8 Pa. Super. Ct. 461; *Jackson v. Jackson*, 96 Va. 165, 31 S. E. Rep. 85; *Leitgabel v. Belt*, 108 Wis. 107, 83 N. W. Rep. 111; *Martin v. Estate of Martin*, 103 Wis. 284, 84 N. W. Rep. 439. See *Galloway's Adm'r v. Galloway*, 24 Ky. L. Rep. 857, 70 S. W. Rep. 48.

pecuniary compensation was in the view of the parties at the time when the services were rendered; and that depends upon the circumstances of the case, the relation of the parties being one of the circumstances."¹ In a late case the court laid down the rule that where a minor enters a family, receiving those attentions and care, and the ordinary necessities which would be furnished a member by nature, he cannot recover for services rendered the head of the family during that period unless an agreement be shown to that effect. In such circumstances the presumption of law is that his support compensates for the services he may perform. To overcome such presumption an agreement for compensation must be established by evidence which is clear, positive and direct.²

In actions for compensation on a *quantum meruit*, the inquiry being what amount the party who has done the work deserves, every fact which will tend to enhance the merit and value of his services is admissible in evidence for his benefit; and every fact which will detract from their merit and value is admissible against him in behalf of the employer.³ It is a good defense to show that the work was so unskilfully, carelessly or wrongly done that the employer thereby suffered injury, or that it was for such cause useless and had to be done

¹ Broderick v. Broderick, 28 W. Va. 378; Murrell v. Studstill, 104 Ga. 604, 30 S. E. Rep. 750.

² Walker v. Taylor, 28 Colo. 233, 64 Pac. Rep. 192, citing Windland v. Deeds, 44 Iowa, 98; Thorp v. Bateman, 37 Mich. 68; McGarvey v. Roods, 73 Iowa, 363, 35 N. W. Rep. 488; Smith v. Johnson, 45 Iowa, 308; Candor's Appeal, 5 W. & S. 513; Wyley v. Bull, 41 Kan. 306, 20 Pac. Rep. 855; Tyler v. Burrington, 39 Wis. 376; Hall v. Finch, 29 Wis. 278, 9 Am. Rep. 559.

³ Berry v. Collins, 9 Ohio Ct. Ct. 656; Gausman v. Paff, 10 Ky. L. Rep. 240 (Ky. Super. Ct.); McDonough's Estate, 19 Phila. 157; Morrow v. Board of Education, 7 S. D. 553, 64 N. W. Rep. 1126; Schopen v. Baldwin, 83 Hun, 234, 31 N. Y. Supp. 581;

Reynolds v. Robinson, 64 N. Y. 589; Cadman v. Markle, 76 Mich. 448, 43 N. W. Rep. 315, 5 L. R. A. 707; Morris v. Redfield, 23 Vt. 295; Moline Water Power & Manuf. Co. v. Nichols, 26 Ill. 90; Robinson v. Mace, 16 Ark. 97; Duncan v. Blundell, 3 Stark. 6; Hayselden v. Staff, 5 A. & E. 153; Gleason v. Clark, 9 Cow. 57; Miller v. Haskell, 179 Mass. 312, 60 N. E. Rep. 982. See Clark v. Fensky, 3 Kan. 389.

It may be shown in enhancement of the claim of a nurse that disagreeable odors were emitted from the body of the patient by reason of his disease; but not that the residence of the nurse, in which the patient was kept, was damaged by such odors. Crowe v. Gallenkamp, 58 Mo. App. 396, quoting the text.

over again.¹ An employee engaged to perform particular services is entitled to recover therefor what they are reasonably worth, if faithfully and properly performed, notwithstanding the employer will derive no advantage from them. Thus, where an agent was employed to sell an estate, and the owner, without sufficient reason, refused to fulfill an agreement which the agent had made, a right to demand compensation accrued to him, and the amount was held to be ascertainable by the established usage.² A mechanic who skilfully works out the plan given him, and in a workmanlike manner follows his employer's directions, has no concern with the success and profit [443] of his work, or with the question whether it answers the purpose intended.³ It is enough that an attorney is employed to carry a case on appeal to a higher court. He is not responsible for its merits or demerits, but is entitled to payment for his services, and as against this claim the inquiry whether there was anything in the appeal to argue is irrelevant.⁴ A failure to win a case is no defense unless it is lost through the attorney's mismanagement.⁵ The undertaking of an architect does not imply or warrant a satisfactory result; but only that he possesses skill and ability, including taste, sufficient to enable him to perform the required services ordinarily and reasonably well. His compensation is earned if any failure to satisfy the employer is not the fault of the employee.⁶ But an architect employed to prepare plans and specifications for a building and furnish an estimate of its probable cost is not entitled to his fees unless the building can be erected at a cost reasonably approximating the estimate.⁷

In *Brown v. Post*⁸ it was held that commissions for procuring the charter of a vessel in the port of New York are payable as soon as the charter is effected, and do not depend upon freight being taken or upon the voyage being completed. The

¹ *Ervin v. Epps*, 15 Rich. 223; *Farnsworth v. Garrard*, 1 Camp. 38.

² *Kock v. Emmerling*, 23 How. 69; *McEwen v. Kerfoot*, 37 Ill. 530. See *Walker v. Rogers*, 24 Md. 237.

³ *Ricketts v. Sisson*, 9 Dana, 358, 35 Am. Dec. 141.

⁴ *Case v. Hotchkiss*, 3 Keyes, 334.

⁵ *Brckett v. Sears*, 15 Mich. 244;

French v. Cunningham, 149 Ind. 632, 49 N. E. Rep. 797; *Isham v. Parker*, 3 Wash. 755, 29 Pac. Rep. 835.

⁶ *Coombs v. Beede*, 89 Me. 187, 86 Atl. Rep. 104, 56 Am. St. 406.

⁷ *Feltham v. Sharp*, 99 Ga. 260, 25 S. E. Rep. 619.

⁸ 6 Robert. 111. "

plaintiffs, being ship-brokers, procured for the defendants a charter of a vessel for a voyage from New York to Cape Town, and thence to Mauritius or Batavia, the freight to be a certain sum (one dollar) and five per cent. primage in gold per barrel. The charter-party provided that the charter-money should be settled, if at Cape Town or Mauritius, at a certain rate of exchange in sterling (four shillings and two pence), for the price so fixed per barrel; if at Batavia at a certain other rate of exchange in the currency of the country (two and a half guilders), for the price so fixed. No cargo ever being shipped by the vessel, the charter was not performed. It was held that the plaintiffs were entitled to recover on their commissions five per cent. on the value in New York of the amount of sterling currency susceptible of being earned at Mauritius under the instrument; that the percentage to be allowed the ship-brokers is to be estimated, not by the ultimate profits actually derived from the adventure, but by what they would be if it were successful.

If a physician has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure then being attributable to some peculiarity in the constitution of the patient for which the medical man is not responsible.¹ A physician is the proper judge of the necessity of the number of visits necessary to make to his patient, and it will be assumed that he made no unnecessary ones.² At least one court looks with distrust upon a bill including very many charges for physicians' consultations. "As to the pretension that, from the moment more than one physician is called in, and attends regularly upon a case, every visit made by every physician employed takes rank as a consultation, it cannot be listened to, even supposing that the visits are made at the same hour, so that the physicians actually meet at the patient's bedside. The difference of the charge for what is technically styled a consultation and for a simple visit would make it ruinous to most patients and onerous to all to avail

¹ 2 Add. on Cont., § 876; *Kannen v. McMullen*, Peake, 59; *Hupe v. Phelps*, 2 Stark. 480.

² *Todd v. Myers*, 40 Cal. 357; *Ebner v. Mackey*, 186 Ill. 297, 57 N. E. Rep. 834, 87 Ill. App. 306.

themselves of the lights of more than one of the faculty in time of need.”¹

If service is performed under a contract which specifies the price to be paid for doing all the work to be done and full performance is prevented by the employer, his liability in an action upon a *quantum meruit* is such proportion of the contract price as the work done bears to the whole work agreed to be done.²

[444] § 680. **Proof of the value of services.** The value of services may be determined by customary rates where such exist; they are then market values.³ And upon the value of services, as upon the value of property, the opinions of witnesses properly informed on the subject may be taken.⁴ Such opinions may be based upon the testimony of another witness who has described the services rendered. “The opinion in such a case is deemed based only upon the character and ex-

¹ Succession of Duclos, 11 La. Ann. 406; Succession of Haley, 50 La. Ann. 840, 24 So. Rep. 285.

² French v. Cunningham, 149 Ind. 632, 49 N. E. Rep. 797, citing Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. Rep. 1060; Kersey v. Garton, 77 Mo. 645; Quint v. Ophir Silver Mining Co., 4 Nev. 304.

“If the compensation agreed upon is contingent on the successful result of a suit the measure of damages is not the contingent fee, but the reasonable value of the services rendered.” French v. Cunningham, *supra*, citing Western U. Tel. Co. v. Semmes, 73 Md. 9, 20 Atl. Rep. 127; Durkee v. Gunn, 41 Kan. 496, 21 Pac. Rep. 673, 13 Am. St. 300; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613; Ankeny v. Clark, 148 U. S. 345, 353, 13 Sup. Ct. Rep. 617; Noyes v. Pugin, 2 Wash. 653, 27 Pac. Rep. 548; Doolittle v. McCullough, 12 Ohio St. 360.

³ Clark v. Ellsworth, 104 Iowa, 442, 73 N. W. Rep. 1023; Allis v. Day, 14 Minn. 518; Thompson v. Boyle, 85

Pa. 477; Williams v. Brown, 28 Ohio St. 551; Stanton v. Embrey, 93 U. S. 557; Pfeil v. Kemper, 3 Wis. 315.

⁴ Ward v. Kohn, 58 Fed. Rep. 462, 7 C. C. A. 314; Keenan v. Getsinger, 1 App. Div. 172, 37 N. Y. Supp. 826; Levitt v. Miller, 64 Mo. App. 147; Lewis v. Trickey, 20 Barb. 387; Ottawa University v. Parkinson, 14 Kan. 159, 164; Reynolds v. Robinson, 64 N. Y. 589; Elting v. Sturtevant, 41 Conn. 176; Byrne v. Byrne, 47 Ill. 507; Mercur v. Vose, 67 N. Y. 56; McCollum v. Seward, 62 id. 316; Shepard v. Ashley, 10 Allen, 542; Madden v. Porterfield, 8 Jones, 166; Ryans v. Hospes, 107 Mich. 342, 67 N. W. Rep. 285.

In Craig v. Derrett, 1 J. J. Marsh. 365, it was said the jury have a right to base a verdict upon their knowledge of value.

In Madden v. Porterfield, *supra*, it was held that it is the province of the jury to affix a value to services according to their nature and extent as proved; and that it is not necessary for witnesses to estimate their value in money. See § 446.

tent of the services as they had been so described, the same as if the statement furnished by such description had been embraced in a hypothetical question.”¹ But this rule does not prevail where the opinion as to value is based on the testimony of several witnesses.² If the services rendered are of such a nature that no person can be found who had rendered or employed a person to render precisely the same services as those for which a recovery is sought, hypothetical questions, covering all the features of such services, may be answered by witnesses acquainted with the value of somewhat similar services.³ In fixing the value of an attorney’s services the court need not be governed by the opinions of witnesses, but may rely upon its own knowledge and experience.⁴ It may, after testimony has been taken as to the value of such services, bring to bear its knowledge thereof based on an examination of the record in the case in which the services were rendered; but it should not, no evidence having been taken, attempt to fix their value even though the parties request it to do so.⁵ This may be the rule when a court is called upon to fix the compensation of attorneys for services performed as its officers. Then the opinions of other attorneys, although unanimous, are not controlling. “Judges are as well able to form correct opinions as are other lawyers.”⁶ Though it seems contrary to the fundamental idea that juries are to decide questions submitted to them according to the evidence, it is established that they are not bound, in estimating the value of professional services, by the testimony of experts as to the reasonable value thereof, but may find from their own judgment, considering the nature and character of said services and the time occupied in their

¹ *Miller v. Richardson*, 88 Hun, 49, 34 N. Y. Supp. 506, citing *McCullum v. Seward*, 62 N. Y. 316; *Seymour v. Fellows*, 77 id. 178. To the same effect, *Hopkins v. Clark*, 90 Hun, 4, 35 N. Y. Supp. 360.

² *Reynolds v. Robinson*, 64 N. Y. 589, said to be distinguishable from the cases cited in the preceding note.

³ *Gall v. Gall*, 27 App. Div. 173, 50 N. Y. Supp. 563.

⁴ *Louisville Gas Co. v. Hargis*, 17 Ky. L. Rep. 1190, 33 S. W. Rep. 946;

Olson v. State Bank, 72 Minn. 320, 75 N. W. Rep. 378; *Beall v. Robinson*, 91 Ill. App. 247; *Matheny v. Bohn*, 164 Ill. 495, 45 N. E. Rep. 1011; *McMannomy v. Chicago, etc. R. Co.*, 167 Ill. 495, 47 N. E. Rep. 712.

⁵ *Gathe v. Broussard*, 49 La. Ann. 312, 21 So. Rep. 839.

⁶ *Richardson v. Tyson*, 110 Wis. 572, 588, 86 N. W. Rep. 250; *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. Rep. 670.

performance, the value thereof.¹ On the question of the value of such services a fee bill agreed upon by a local bar represents the combined judgment and experience of those best able to pass upon the various items embraced within its provisions at the time it was adopted, and it is, therefore, entitled to more weight than the opinion of one member of the bar.² In an action upon a *quantum meruit* for services of a domestic character, if the nature and extent of the services rendered are testified to, the case is for the jury although no opinions as to the value of the services have been offered.³ In an action by an agent upon a *quantum meruit* there may be received in evidence as tending to prove the value of his services the terms of a proposed contract between him and his principal specifying the commission to be paid for such services as were rendered; but it was otherwise as to a contract afterwards made between them and which was not in contemplation when the services were rendered.⁴ On the question of the reasonableness of the amount of compensation alleged to have been orally promised, for services performed in the care of persons, the plaintiff may show his qualifications for other employments and the value of his services therein for the purpose of establishing the reasonableness of the alleged contract.⁵ If there is a conflict in the evidence respecting the amount to be paid for services it may be shown what the services rendered were worth when the contract was made.⁶ The amount paid men for doing work for their employer may be shown to prove the value of the work done,⁷ as may declarations of an employer as to the wages to be paid his employees.⁸ If a bill is presented

¹ *Head v. Hargrave*, 105 U. S. 45; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. Rep. 39; *Bentley v. Brown*, 37 Kan. 14, 14 Pac. Rep. 434; *Willard v. Williams*, 10 Colo. App. 140, 50 Pac. Rep. 208; *Arndt v. Hosford*, 82 Iowa, 503, 48 N. W. Rep. 981; *In re Dorland's Estate*, 63 Cal. 282; *Whitney v. New Orleans*, 54 Fed. Rep. 617, 4 C. C. A. 521; *Sanders v. Graves*, 105 Fed. Rep. 894. Compare *Wood v. Barker*, 49 Mich. 295, 13 N. W. Rep. 597; *Kingsbury v. Joseph*, 94 Mo. App. 298.

² *Taylor's Estate*, 3 Pa. Dist. Rep. 691.

³ *Hossler v. Trump*, 62 Ohio St. 139, 56 N. E. Rep. 656.

⁴ *Thomson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. Rep. 454.

⁵ *Waldron v. Alexander*, 136 Ill. 550, 27 N. E. Rep. 41.

⁶ *Spurck v. Dean*, 49 Neb. 66, 68 N. W. Rep. 375; *Allison v. Horning*, 22 Ohio St. 138; *Swain v. Cheney*, 41 N. H. 232.

⁷ *Cullen v. Gallagher*, 15 N. Y. Misc. 146, 36 N. Y. Supp. 468.

⁸ *Berry v. Collins*, 9 Ohio Ct. Ct. 656.

for services the estimate so placed upon their value is an admission of the strongest character that it is all they were reasonably worth. In some cases the strength given the admission is such that it restricts the recovery.¹ But generally, if the bill has not been procured through fraud or mistake, the admission, though regarded as very strong, is not conclusive as matter of law, it is to be weighed with all the other evidence.²

§ 681. A statutory day's work. A New Hampshire statute provided: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work unless otherwise agreed by the parties; and no person shall be required or holden to perform any more than ten hours' labor in any one day except in pursuance of an express contract requiring a greater time." In *Brooks v. Cotton*³ it was held that if work is done through a season at a certain agreed price per day, and the work done from time to time in a day is done and accepted without objection as a day's work, an agreement may be implied that the work done in a day, whether on an average more or less than ten hours, shall be reckoned and paid for as a day's work. Perley, C. J., said: "The employer cannot *require* the laborer to work more than ten hours in a day without express agreement; that is to say, if the laborer is called on at any time to work more than ten hours in a day he cannot be required to do it unless he is bound to do it by an express agreement. But we do not understand that this provision reaches to the case where a laborer hired by the month or the year has voluntarily worked more than ten hours a day. If he is to be paid at a certain

¹ *Daniels v. Wilber*, 60 Ill. 526.

² *Williams v. Glenny*, 16 N. Y. 389; *Stryker v. Cassidy*, 76 N. Y. 50; *Sherwood v. Hauser*, 94 N. Y. 626; *Miller v. Beal*, 26 Ind. 234; *Nauman v. Zoehrlaut*, 21 Wis. 466; *Brauns v. Green Bay*, 78 Wis. 81, 46 N. W. Rep. 889; *Patterson v. Houston*, 92 Ill. App. 624; *Newcombe v. Hyman*, 16 N. Y. Misc. 25, 37 N. Y. Supp. 649.

³ 48 N. H. 50, 2 Am. Rep. 172.

Under sec. 3738, R. S. of the U. S., which provides that eight hours

shall constitute a day's work for all laborers, workmen and mechanics employed by or on behalf of the government, it has been held that its purpose was not to increase wages, and that an employee who works twelve hours a day and is paid by the day, and accepts the payment, cannot be heard to maintain that every eight hours constituted a day's work. *Averill v. United States*, 14 Ct. of Cls. 200.

rate per day, it may in such case be implied, from the nature of the employment and the conduct of the parties, that what [445] he did in a day was to be reckoned as a day's work." In *Luske v. Hotchkiss*¹ it was held that a week's work under a contract for a fixed price per week was work for the period of a week, and not for six periods of eight hours each; and that, consequently, a party who, under such a contract, had worked sixteen hours a day could not recover for two weeks' work. It was considered that the only effect of the statute, where a case falls within it, is to release the laborer from work, and entitle him to compensation for a day's labor at the end of eight hours. If he works more than eight hours in a day, unless by special request or agreement, he cannot claim additional compensation for such extra work.²

§ 682. **Recovery for attorney's services.** If an attorney brings suit for professional services anything which shows that they were not of the value claimed is competent; the nature of the suit conducted, the difficulties of it, the skill required and exercised may be shown. A trial may result successfully, and yet the attorney have been guilty of negligence. To obviate the effect of his negligence and want of skill the client may have been put to expense; if so, the fact will reduce the value of the services.³ In an action to recover counsel fees for services in a chancery suit the papers and records therein are com-

¹ 37 Conn. 219, 9 Am. Rep. 314.

² *McCarthy v. Mayor*, 96 N. Y. 1, 48 Am. Rep. 601; *United States v. Martin*, 94 U. S. 400; *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. Rep. 547; *Grisell v. Noel Brothers Flour-Feed Co.*, 9 Ind. App. 251, 36 N. E. Rep. 452; *Coleman v. United States*, 81 Fed. Rep. 824 (ruled under sec. 3738, R. S. of U. S.); *Christian County v. Merrigan*, 191 Ill. 484, 61 N. E. Rep. 479; *Sanitary District v. Burke*, 88 Ill. App. 196.

³ *Lindsay v. Carpenter*, 90 Iowa, 529, 58 N. W. Rep. 900; *Richards v. Washburn*, 14 App. Div. 237, 43 N. Y. Supp. 615, 28 App. Div. 109, 50 N. Y. Supp. 885, affirmed without opinion, 163 N. Y. 585; *Armin v. Loomis*, 82

Wis. 86, 51 N. W. Rep. 1097; *Nixon v. Phelps*, 29 Vt. 198; *Brackett v. Sears*, 15 Mich. 244; *Bridges v. Hall*, 13 Cal. 630, 73 Am. Dec. 605; *Cox v. Livingston*, 2 W. & S. 103, 37 Am. Dec. 486; *Hopping v. Quinn*, 12 Wend. 517; *Runyon v. Nichols*, 11 Johns. 547; *Stow v. Hamlin*, 16 How. Pr. 452; *Webb v. Browning*, 14 Mo. 354; *Smith v. Davis*, 45 N. H. 566; *Garr v. Mairret*, 1 Hilt. 498. See *Templar v. McLachlan*, 2 B. & P. N. R. 136.

It was held in *Keenan v. Dorflinger*, 19 How. Pr. 153, that the taxable costs are, *prima facie*, the measure of an attorney's compensation for services in an action carried to judgment.

petent evidence to show the character of the suit, the amount involved and what has been done in it.¹ A client who has notice of the terms fixed by a bar fee-bill and employs [446] counsel at that bar will be bound by the rates so fixed, on the ground that he has impliedly consented to them.² The value of services rendered in a certain county is to be determined with reference to the practice there, so far as that has established their value,³ and at their worth to the client in the particular matter in which they were rendered.⁴ Attorneys at law are professional laborers who assume, by accepting a retainer, peculiar responsibilities; they are entitled to remuneration proportioned to the importance of their undertakings, and the diligence, skill and knowledge required for the proper performance of their duties.⁵ Formerly the higher grade of

¹ *Boylan v. Holt*, 45 Miss. 277. See § 680.

² *Id.* See § 680.

³ *Clark v. Ellsworth*, 104 Iowa, 442, 73 N. W. Rep. 1023; *Ward v. Kohn*, 58 Fed. Rep. 462, 7 C. C. A. 314.

⁴ *Ward v. Kohn*, *supra*.

⁵ *Selover v. Bryant*, 54 Minn. 434, 56 N. W. Rep. 58, 40 Am. St. 349, 21 L. R. A. 418.

In *Stevens v. Ellsworth*, 95 Iowa, 231, 63 N. W. Rep. 683, an action to recover fees from a husband for setting aside a divorce obtained by him, it was ruled that neither his wealth, the poverty of his wife, nor the fact that the attorney relied on getting his pay from the husband, should be regarded in fixing the amount of the attorney's fee. On a second appeal several witnesses for the plaintiff testified that in answering a hypothetical question as to the value of his services they considered to some extent the wealth of the defendant, and some of them stated that the benefit to the wife which resulted from the litigation was considered. The court thus discussed the exceptions to such testimony: It is a well-settled rule that the importance of the litigation, the

success attained, and the benefit which it secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. The responsibility of an attorney may be, and usually is, much greater where large interests are involved than it is where the interests are of but little importance. *Smith v. C. & N. W. R. Co.*, 60 Iowa, 522, 15 N. W. Rep. 291; *Berry v. Davis*, 34 Iowa, 594. And where the subject-matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of the party, and his consequent ability to make a severe contest, may be considered, in connection with his disposition to do so, as tending to show the importance and value of the services which the attorney, for whose compensation he was responsible, was required to render. The hypothetical question asked on the second trial differed from that asked on the first, in that it did not require the witness to consider the wealth of the defendant in estimating the compensation in question. The district court, by its

practitioners were presumed not to perform professional services with any mercenary view, and were unable to make any binding contract for advocacy in litigation or to maintain any action for their services, even upon an express contract to pay a stipulated sum, and this is now the law in England;¹ but

charge, required the jury not to take into consideration the wealth of the defendant, nor his ability to pay for the services rendered by Clark to enhance the value of the services, but permitted the jury to consider it as an incident in ascertaining the importance and gravity of the interests involved in the litigation in which the services were rendered. We think this was correct, and not in conflict with what we decided on the former appeal. The jury was also instructed that it should not take into consideration the ultimate benefits to Mrs. E. of the litigation as a distinct element to enhance the value of the services in question, but the success or non-success of the litigation. That portion of the charge was in the interest of the defendant, and we are of the opinion that the effect of the evidence admitted which may be regarded as objectionable was so far modified by the charge as to prevent prejudice to the defendant. See *Shepard v. Chicago, etc. R. Co.*, 77 Iowa, 56, 41 N.W. Rep. 564, and cases therein cited. Not only the amount and character of the services and the results attained, but also the professional ability and standing of the attorney, his learning, skill and proficiency in his profession and his experience, may be considered in estimating the reasonable value of his services. *Clark v. Ellsworth*, 104 Iowa, 442, 449, 73 N.W. Rep. 1023, citing *Stanton v. Embrey*, 93 U.S. 548; *Randall v. Packard*, 142 N.Y. 56, 36 N.E. Rep. 823; *Allis v. Day*, 14 Minn. 516; *Vilas v. Downer*, 21 Vt.

419; *Eggleston v. Boardman*, 37 Mich. 16.

¹ *Kennedy v. Brown*, 13 C.B. (N.S.) 611. This case presents a masterly and exhaustive review of the authorities and traditions upon this subject. The following are extracts from the opinion of Erle, C. J.: "The material facts upon the first question (*i. e.*, whether there was 'no evidence of debt') are that in the course of the suit between Swifen and Swifen, the plaintiff, a barrister, became the advocate of Mrs. Swifen, who, with her husband, are now defendants; that during the continuance of that litigation she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same; and that after the end of the litigation she spoke of the amount of his remuneration; and for the purpose of the present judgment we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it. These facts are no evidence to support the verdict if the promise of the defendant did not constitute any obligation; and we are of opinion that it did not. We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before or after the litigation, has no binding effect; and furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

"For authority in support of these propositions we place reliance on the

this scruple and the disability based thereon do not ex- [448]
tensively prevail in this country. All grades of practitioners
may contract their services and recover for them,¹ and in many
states statutes have been enacted authorizing attorneys [449]

fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate; and as the number of precedents has been immense, the force of the negative fact is proportionately great. To this we add the tradition and understanding of the profession, both as known to living memory and as expressed in former times. Sir John Davys (Davys' Report, preface, page 23) declares that understanding at the beginning of the seventeenth century, when he says that 'the fees of the professors of the law are not duties certain growing due by contract for labor or service, but gifts; [447] not *merces*, but *honorarium*.'

Sir John Davys would have ample experience of the rules of the profession from his eminence in the law; and his opinion is entitled to much weight. Lord Stowell, as appears in a work remarkable for learned research—Wallace's Reporters, p. 27—speaks of him as 'a poet, a lawyer and a statesman, and highly distinguished in each of these characters.' Lord Nottingham declares the same understanding of the profession in the note to Co. Littleton, 295, a, saying: 'A counselor cannot bring any action (*i. e.*, for his fees), for he is not compellable to be a counselor; his fee is *honorarium*, and not a debt.' The same note contains the opinion of Mr. Butler to the same effect, saying that in England the fees of counsel are honorary in the strict acceptance of the word. Blackstone also

¹ Ames v. Gilman, 10 Met. 239; Thurston v. Percival, 1 Pick. 415; Stevens v. Adams, 23 Wend. 57; Adams v. Stevens, 26 id. 451; Wilson v. Burr, 25 id. 386; Merritt v. Lambert, 10 Paige, 352; Wallis v. Loubat, 2 Denio, 607; Case v. Hotchkiss, 3 Keyes, 334; Smith v. Hill, 13 Ark. 173; Smith v. Davis, 45 N. H. 565; Creiger v. Cheesbrough, 25 How. Pr. 200; Brackett v. Sears, 15 Mich. 244; Stevens v. Monges, 1 Harr. 127; Duncan v. Breithaupt, 1 McCord, 149; Clendinen v. Black, 2 Bailey, 488, 23 Am. Dec. 149; Christy v. Douglass, Wright, 485; Baird v. Ratcliffe, 10 Tex. 81; Webb v. Browning, 14 Mo. 354; Newman v. Washington, Mart. & Yerg. 79; Rust v. Larue, 4 Litt. 411, 14 Am. Dec. 172; Caldwell v. Shepherd, 6 T. B. Mon. 389; Foster v. Jack, 4 Watts, 334; Balspaugh v.

Frazer, 19 Pa. 95; Dubois' Appeal, 38 id. 231, 80 Am. Dec. 478; Lichty v. Hayne, 38 Pa. 434; Maynard v. Briggs, 26 Vt. 94; French v. Cunningham, 149 Ind. 632, 49 N. E. Rep. 797.

In New Jersey an action will not lie to recover counsel fees unless, perhaps, there is an express contract. Seely v. Cram, 5 N. J. L. 35; Van Atta v. McKinney, 16 id. 235. See Hyer v. Little, 20 N. J. Eq. 443.

A contract for a fee contingent on procuring a divorce and defeating a claim for alimony is not void because contrary to public policy. Ward v. Jones, 11 Ky. L. Rep. 273 (Ky. Super. Ct.).

As to the *status* of barristers and solicitors regarding their clients in Ontario, see Armour v. Kilmer, 28 Ont. 618, and cases cited.

to fix the measure and mode of their compensation by agreement with their clients. But on account of their confidential relations their contracts are subject to careful scrutiny for the protection of the client.¹ This doctrine has much more forcible

(vol. 3, p. 28) declares the same understanding: 'A counsel can maintain no action for his fees, which are given, not as *locatio* and *conductio*, but as *quiddam honorarium*, not as salary or hire, but as mere gratuity.' As we know of no authorities that conflict with these, we only add the names of the judges who have had occasion to declare an opinion to the same effect; and they are Lord Hardwicke (*Thornhill v. Evans*, 2 Atk. 330), Lord Kenyon (*Turner v. Phillips*, Peake's N. P. Cas. 166), Kendersley, V. C. (*Re May*, 4 Jurist (N. S.), 1169), Pigot, C. B. (*Hobart v. Butler*, 9 Ir. C. L. (N. S.) 157), and Bayley, J., and Best, J. (*Morris v. Hunt*, 1 Chit. 544). These are authority for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the services of the counsel in litigation. There is the same absence of any precedent for such an action, and the reason for the one incapacity is good for both.

"The facts of the present case forcibly show some of the evils which would attend both on the advocate

and the client if the hiring of counsel was made binding. In this case the advocate, by disclosing words of intimate confidence which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict of 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured to her by the former advocate with the perils and the miseries of wearisome litigation, derived from her later advocate, the contrast may suggest that gratuitous advocacy is preferable to contract as a mode of remunerating advocates. But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz.: the administration of justice. We are aware that, in the class of advocates, as in every other numerous class, there

¹ *French v. Cunningham*, 149 Ind. 632, 49 N. E. Rep. 797; *Dickerson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Shirk v. Neible*, 156 Ind. 66, 59 N. E. Rep. 281; *Stanton v. Haskin*, 1 MacArthur, 558; *Rose v. Mynatt*, 7 Yerg. 30.

In *Lecatt v. Sallee*, 3 Port. 115, 29 Am. Dec. 240, it was held that an agreement made by a client with his counsel, after the latter had been employed in a particular business by which the original contract was

varied, and greater compensation secured to the counsel than was at first agreed upon, is invalid and cannot be enforced; that if a bond or other security for a greater compensation be taken from a client by an attorney during their connection, it will, upon application to a court of equity, be either set aside or enforced only as security for the sum to which the attorney would have been entitled if no such bond had been given.

ble application to contracts made during the existence of those relations than to those previously or subsequently entered into; as to these the parties deal with each other at arm's length.¹ Attorneys and solicitors are entitled to have allowed them for

will be bad men, taking the wages of evil, and therewith also for the most part the early blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition proportioned to the prize to be gained, that is, wealth, and power and honor without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at all times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and

this power, again, is in practice only controlled by his own view of the interests of the truth. It is of the last importance that the sense of duty should be in active energy, proportioned to the magnitude of those interests. If the law is that the advocate is incapable of contracting for hire to serve when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty, that is to say, duty to his client, binding him to exert every faculty and privilege and power in order that he may maintain that client's rights, together with duty to the court and himself, binding him to guard against abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right.

"If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamor and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client; and such men are the guaranties for the maintenance of

¹ *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. Rep. 413, 21 L. R. A. 366.

Such contracts will be interpreted without straining them in favor of the client; but they will be scrutinized when the attorney seeks to enforce them. *Willoughby v. Mackall*, 1 D. C. App. Cas. 411. See *Isham v. Parker*, 3 Wash. 755, 29 Pac. Rep. 835, for facts which sustained a recovery for extraordinary services outside the written contract, such services consisting of a petition for a

rehearing and an application to the supreme court of the United States for a *mandamus* to compel the supreme court of the territory to decide the merits of the case. See, also, *Niagara F. Ins. Co. v. Hart*, 13 Wash. 651, 43 Pac. Rep. 937, holding that a contract covered services rendered on appeal as well as in the trial court. *Richardson v. Tyson*, 110 Wis. 572, 86 N. W. Rep. 250, is an interesting and instructive case.

their professional services what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning and skill; and for the purpose of aiding the jury to determine that matter it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court.¹

his dearest rights; and the words of such men carry a wholesome spirit to all who are influenced by them.

"Such is the system of advocacy intended by the law requiring the remuneration to be by gratuity. But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded. It may also be, that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive." See *Brown v. Kennedy*, 33 L. J. (Ch.) 71, 842; *Veitch v. Russell*, 3 Q. B. 928; *Mostyn v. Mostyn*, L. R. 5 Ch. 457.

¹ *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. Rep. 413, 21 L. R. A. 366; *McMannomy v. Chicago, etc. R. Co.*, 167 Ill. 497, 47 N. E. Rep. 712; *Nathan v. Brand*, 167 Ill. 607, 47 N. E. Rep. 771;

Ward v. Kohn, 58 Fed. Rep. 462, 7 C. C. A. 314; *Bingham v. Spruill*, 97 Ill. App. 374; *Stanton v. Embry*, 93 U. S. 557; *Vilas v. Downer*, 21 Vt. 419; *Eggleston v. Boardman*, 37 Mich. 14; *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. Rep. 417, 16 Am. St. 585; *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. Rep. 514.

It is ruled in *Vilas v. Bundy*, 106 Wis. 168, 81 N. W. Rep. 812, that "if one of two joint plaintiffs employ two attorneys to act jointly in his behalf in the prosecution of the case, and the other employ one of such attorneys to act for him, an agreement between the attorneys to put their earnings in a common fund for equal distribution does not militate against the right of either to charge and collect of his client the full reasonable compensation for the professional labor undertaken by him for such client and performed personally and by the aid of his assistant and subordinate."

If the value of services is admitted or proven it is an abuse of the court's discretion to order that the claim be reduced on the grounds that the corporation for whose benefit they were performed is insolvent and unable to pay its debts in full, and that the attorney had received a large amount of business from one client. *Stone v. Omaha F. Ins. Co.*, 61 Neb. 834, 86 N. W. Rep. 468.

"The general rule is that an attorney, in the absence of an agreement, deserves compensation according to the reasonable worth of his

The amount of the recovery is not to be affected by what the attorney has paid another party, employed with the client's consent, for doing part of the work, the former taking the responsibility to his client.¹ Neither can official salaries paid by the state be taken as a standard or limit of compensation in an action by an attorney to recover for services.² The value of services cannot be proven by showing that after the plaintiff was retained by the defendant an effort was made to secure his services in behalf of the other party to the litigation, nor by showing what a reasonable fee would have been if he had conducted the case for such party.³ Where the client, in violation of his contract, settled a suit brought for him by his attorney and refused to pay the sum which became due because of such act, it was not a defense to an action to recover on a *quantum meruit* that the original contract was champertous. "If the plaintiff can show a complete cause of action, resting upon *quantum meruit*, without being obliged to prove an illegal act, although such illegal act may incidentally appear, he may recover."⁴ But it is otherwise where the relation of attorney and client exists merely as the result of a systematic scheme of working up and instigating vexatious litigation in which the attorney was not interested, and to which and the parties

services. Of that the jury are the sole judges and, to arrive at their value, they may consider the nature of the services rendered, the standing of the attorney in his profession for learning, skill and proficiency, the amount involved and the importance to his client of the result. The reason why the result is one of the most important factors in the consideration must be obvious. It is not only in some degree evidence of the usefulness of the services; but, for its effects upon the situation of the client, relatively to what it had been, it must be conceded a degree of influence, in fixing the amount of the attorney's compensation, proportioned to the nature and incidents of the result, in connection with the other considerations adverted to."

Randall v. Packard, 142 N. Y. 47, 56, 36 N. E. Rep. 823; Gross v. Moore, 14 App. Div. 353, 43 N. Y. Supp. 945.

¹ An attorney cannot engage another as associate without the client's consent, but he may recover the value of all services performed by himself or by his assistant under his own employment. Kingsbury v. Joseph, 94 Mo. App. 298.

² Hyde v. Moxie Nerve Food Co., 160 Mass. 559, 36 N. E. Rep. 585.

³ Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. Rep. 1146.

⁴ Gammons v. Johnson, 69 Minn. 488, 72 N. W. Rep. 563, citing Frost v. Plumb, 40 Conn. 111, 16 Am. Rep. 18; Woodman v. Hubbard, 25 N. H. 67; Morton v. Gloster, 46 Me. 520; Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30.

he was an entire stranger.¹ Compensation will be denied the attorney of a receiver if he has been guilty of fraud or bad faith toward his client in the matter of his employment.² The right to recover compensation is lost by acting for adverse parties to the same suit.³ A contract which provides for a contingent fee or compensation for services as a lobbyist is void, although it provides for the drafting of a bill and the making of arguments favorable to its enactment before legislative committees. A recovery on a *quantum meruit* cannot be allowed.⁴ The financial ability of the client may be considered by the jury, not to enhance the fees above a reasonable compensation, but to determine whether or not he is able to pay a fair and just compensation for the services rendered.⁵ The fair and reasonable value of services cannot be increased by the fact that they were to be performed gratuitously in the event that the action was not successful.⁶

If the contract provides for compensation based upon a proportion of the property which may be recovered, and the client compromises the litigation for a sum which does not bear a fair ratio to such proportion, the attorney is not limited in his recovery to the same proportion of the money received by way of compromise as he would have been entitled to receive of the property if there had not been a compromise.⁷

¹ Gammons v. Johnson, 76 Minn. 76, 78 N. W. Rep. 1035; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. Rep. 779; Gammons v. Honerud, 82 Minn. 264, 84 N. W. Rep. 911.

² Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 418, 80 N. W. Rep. 953.

³ Strong v. International Building Loan & Invest. Union, 183 Ill. 97, 55 N. E. Rep. 675, 82 Ill. App. 426.

⁴ Richardson v. Scott's Bluff County, 59 Neb. 400, 81 N. W. Rep. 309, citing Wood v. McCann, 6 Dana, 366; Marshall v. Baltimore & O. R. Co., 16 How. 314; Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Harris v. Roof, 10 Barb. 489; Weed v. Black, 2 MacArthur, 268; Chipewa, etc. R. Co. v. Chicago, etc. R.

Co., 75 Wis. 224, 44 N. W. Rep. 17, 6 L. R. A. 601.

⁵ Ward v. Kohn, 54 Fed. Rep. 462, 7 C. C. A. 314. See § 679 for Louisiana cases applying a broader rule to the fees of physicians.

⁶ O'Neill v. Crane, 65 App. Div. 358, 72 N. Y. Supp. 812, citing Randall v. Packard, 142 N. Y. 47, 56, 36 N. E. Rep. 823; Harland v. Lilienthal, 53 N. Y. 438; Walbridge v. Barrett, 118 Mich. 433, 76 N. W. Rep. 973; Robbins v. Harvey, 5 Conn. 335; Middletown v. Bankers' & M. Tel. Co., 32 Fed. Rep. 254.

⁷ Duke v. Harper, 8 Mo. App. 296; Larned v. Dubuque, 86 Iowa, 166, 53 N. W. Rep. 105.

Under a contract to collect bonds for twenty-five per cent. of the

But if the compensation agreed upon is contingent upon success, the attorney, though his employment is wrongfully terminated, is not entitled to recover if the litigation could not have been brought to a termination in favor of his client.¹ If the result is favorable to the client the attorney is entitled to the share agreed upon, without deduction.² If the agreement is to perform service for a specified sum and depend therefor upon the excess which pledged property should bring over and above the amount due the client, on the revocation of the attorney's authority after the recovery of judgment, but before sale of the property, the client is liable for the stipulated sum.³ Where the full conditional fee is not due because the condition upon which it was to be paid has not been performed, the amount of it may be considered, in connection with the character of the litigation and the purpose for which the attorney was employed, in determining the value of the services rendered, because the contract shows what value the parties put upon the services.⁴ A contract giving an attorney a per centum of all the rentals which may be received from a lessee covers the amount received upon two renewals of the lease made pursuant to an option given in the original lease. The renewals were not an independent leasing, but a mere continuation of the preceding term.⁵ If the right to any compensation is conditioned upon a recovery and the attorney dies before it has been had, his personal representative cannot recover the value of the services rendered; there may be a re-

"amount made," an attorney is entitled to that proportion of the amount collected by suit or otherwise. *Larned v. Dubuque, supra.*

¹ *Swinnerton v. Monterey County*, 76 Cal. 113, 18 Pac. Rep. 135.

² *Bartlett v. Odd Fellows Savings Bank*, 79 Cal. 218, 21 Pac. Rep. 743, 12 Am. St. 139.

A percentage of the damages which may be recovered in an action means, not a percentage of the sum for which judgment was rendered, but of the damages received. *Fisher v. Mylius*, 42 W. Va. 638, 26 S. E. Rep. 309.

Under a contract giving the attor-

ney thirty per cent. of the "amount recovered" and nothing if he fails "to collect damages," the costs and an extra allowance are a part of the "amount recovered," but the attorney is entitled to the stipulated portion of these only; they are the property of the client. *Taylor v. Long Island R. Co.*, 25 N. Y. Misc. 11, 53 N. Y. Supp. 830.

³ *Strong v. West*, 110 Ga. 382, 35 S. E. Rep. 693.

⁴ *Louisville Gas Co. v. Hargis*, 17 Ky. L. Rep. 1190, 33 S. W. Rep. 946.

⁵ *Bogan v. Wright*, 22 N. Y. Misc. 94, 48 N. Y. Supp. 546.

covery of the disbursements made on account of the client.¹ In Indiana it is declared that the attorney's personal representative may recover upon a *quantum meruit* the amount which the services were worth, based on the contract rate for such part of the stipulated service as had been performed.² This view has been approved by one of the Ohio circuit courts.³

On the client's breach of a special contract for legal services he is liable for the amount he has agreed to pay, subject to such abatement as would, in the natural course of things, have been incurred in the way of expense by the attorney if he had been permitted to perform his agreement.⁴ The value of his services will not be apportioned; and while the attorney will not be put upon the *quantum meruit*, he will not be allowed to recover more than he would if he had gone on with the case. His time does not belong wholly to his client, and hence no deduction can, in ordinary cases, be justly made on the presumption that it was wholly occupied in other professional business.⁵ On the dissolution by a client of his relations with his attorney, the latter is immediately entitled to be paid for services rendered, and if payment is not made is entitled to interest from that date.⁶ If attorneys and clients make contracts for the former's services to be rendered in another state

¹ *Badger v. Celler*, 41 App. Div. 599, 58 N. Y. Supp. 653.

² *Coe v. Smith*, 4 Ind. 79; *French v. Cunningham*, 149 Ind. 632, 49 N. E. Rep. 797.

³ *McCammon v. Peck*, 9 Ohio Ct. Ct. 589, citing *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Hargrave v. Conroy*, 19 N. J. Eq. 281; *Hubbard v. Belden*, 27 Vt. 645. See § 691. On the death of an attorney who has received a gross sum for conducting a case to its final determination, the case being then undetermined, the client may recover from the estate of the attorney such portion of the money paid as was not earned. *McCammon v. Peck*, 9 Ohio Ct. Ct. 589.

⁴ Where the attorney was to receive one-fourth the amount by which an assessment against his client should be diminished and was

discharged after he had taken certain steps, but before the hearing, he was entitled to one-fourth the sum saved less the fair value of the services rendered by the attorney employed to complete the proceedings and the necessary disbursements. *Bassford v. White*, 61 N. Y. Super. Ct. 457, 19 N. Y. Supp. 1020.

⁵ *Brodie v. Watkins*, 33 Ala. 545 (the deductions made in this case were the expenses which would have been incurred in attending court and incidental disbursements which could not be charged to the client); *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. Rep. 1060; *Webb v. Trescony*, 76 Cal. 621, 18 Pac. Rep. 796. See *McMannomy v. Chicago, etc. R. Co.*, 167 Ill. 497, 47 N. E. Rep. 712.

⁶ *Commonwealth v. Terry*, 11 Pa. Super. Ct. 547.

than that in which they reside, their compensation will be governed by the rate in the state of their domicile, rather than by that which prevails in the state in which the services were performed;¹ but a contract between a citizen of one of the United States and a foreign attorney will, no agreement being made respecting compensation, be governed by the rate fixed by statute in such country, the contract having been made there and that being the place for its performance.² The right to demand compensation under a statute giving the court power to award it is waived by an agreement between attorney and client fixing the compensation of the former for his services.³ An attorney who is employed as such to take charge of matters which involve the performance of services clearly professional in their nature, and also those which are not necessarily of that character, may recover therefor, it being impossible to draw the line between the two classes, on the basis that all the services rendered are professional.⁴

On grounds of public policy a trustee will not be "permitted to charge attorney's fees for legal services rendered to himself as trustee; because, to allow the trustee to charge himself with attorney's fees for services that he as attorney renders to himself as trustee, places him as trustee in a position that is inconsistent with his duties as trustee, which position he ought not to be permitted to occupy, for the same reason that he ought not to be permitted to purchase at his own sale, or do any other act that would tempt him to abuse his trust duties. To require him to employ a third person to act for him as attorney in matters appertaining to his trust duties, he would proceed, in all probability, to do so prudently and with an eye single to the best interest of the trust estate; but to allow him to employ himself as attorney, and charge fees for it, would tempt him beyond what a trustee ought to be required to bear in handling the trust estate; for, as a layman trustee, he would be ignorant of even the most

¹ *Stanberry v. Gibson*, 35 Iowa, 493.

² *Dawson v. Peterson*, 110 Mich. 431, 63 N. W. Rep. 246.

³ *Young v. Stone*, 55 Ohio St. 125,

45 N. E. Rep. 57. (Two judges dissented.)

⁴ *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. Rep. 514. See *McGillis v. Hogan*, 190 Ill. 176, 60 N. E. Rep. 91, 85 Ill. App. 194.

common duties, and would feel compelled to consult himself as attorney in regard to them, in order to increase his compensation."¹ A provision in the deed of assignment authorizing the payment of reasonable attorneys' fees did not affect the trustee's rights.² There are, however, cases which are opposed to this view.³ It is said in one of them that a receiver, if he is an attorney, is not required himself to perform any other duties than those strictly administrative or executive; or, if he does, he is entitled to additional compensation for his services.⁴

§ 683. Broker's services. Where a broker, pursuant to his employment or the instructions of his principal, sells goods to arrive he may recover his commissions though the goods do not arrive. In such a case the broker does all he undertook, [450] and should not be deprived of compensation because, without his fault, the event upon which the contingent agreement would become absolute did not take place.⁵ So where a broker, employed to obtain a loan of \$9,000, was promised one per cent. commission, found a person willing to make a loan of \$7,000, which the principal agreed to take, but afterwards declined, such broker was held entitled to his commission, and an allowance at the agreed rate was affirmed.⁶ Where no custom to the contrary is shown, a broker, like any other person who performs service for another, is entitled to compensation; and it matters not whether what he has done proves beneficial to the party who employs him or not; if he has fully performed what he undertook to do he is entitled to be remunerated.⁷ In other words, "when a broker has found a

¹ Kentucky Nat. Bank v. Stone, 93 Ky. 623, 20 S. W. Rep. 1040, citing In re Bank of Niagara, 6 Paige, 213; State v. Butler, 15 Lea, 118.

² Kentucky Nat. Bank v. Stone, *supra*.

³ Farmers' Loan & Trust Co. v. Central R. of Iowa, 8 Fed. Rep. 60.

⁴ Olson v. State Bank, 72 Minn. 320, 75 N. W. Rep. 378.

⁵ Paulsen v. Dallett, 2 Daly, 40; Hagar v. Donaldson, 154 Pa. 242, 25 Atl. Rep. 824.

⁶ Van Lien v. Byrnes, 1 Hilt. 133.

See Diltz v. Spahr, 16 Ind. App. 591, 45 N. E. Rep. 1066; Giles v. Swift, 170 Mass. 461, 49 N. E. Rep. 737.

⁷ Id.; Read v. Rann, 10 B. & C. 438; Dalton v. Irwin, 4 C. & P. 289; Broad v. Thomas, 7 Bing. 99; Neiderlander v. Starr, 50 Kan. 770, 33 Pac. Rep. 592; Buckingham v. Harris, 10 Colo. 455, 15 Pac. Rep. 817; Leech v. Clemons, 14 Colo. App. 45, 59 Pac. Rep. 230; Schlegal v. Allerton, 65 Conn. 260, 32 Atl. Rep. 363; Hoadley v. Savings Bank, 71 Conn. 599, 43 Atl. Rep. 667, 44 L. R. A. 321; Odell

customer for that for which his principal has employed him to find a customer, the broker has performed his duty and has earned his commission, or, as the proposition is usually stated, if the person produced by the broker is able, ready and willing to buy, sell, or lend, as the case may be, the broker's commission is earned."¹ If the principal makes a valid and binding agreement to sell or exchange his land to or with a customer produced by a broker, the fact that such customer is not able to pay for the land or to make a good title to that offered in exchange does not affect the broker's right to his commission. "The ground on which this is settled is that by entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready and willing to buy the land and pay for it."² But if the vendor relies wholly

v. Dozier, 104 Ga. 203, 30 S. E. Rep. 813; Stewart v. Fowler, 53 Kan. 537, 36 Pac. Rep. 1002; Holden v. Starks, 159 Mass. 503, 34 N. E. Rep. 1069, 38 Am. St. 451; Dowling v. Morrill, 165 Mass. 491, 43 N. E. Rep. 295; Wright v. Young, 176 Mass. 100, 57 N. E. Rep. 212.

¹ Id.; Fitzpatrick v. Gilson, 176 Mass. 477, 57 N. E. Rep. 1000, citing McGavock v. Woodlief, 20 How. 221; Green v. Lucas, 33 L. T. (N. S.) 584, 587; Middleton v. Thompson, 163 Pa. 112, 29 Atl. Rep. 796; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 383-4, 38 Am. Rep. 441; Duclos v. Cunningham, 102 N. Y. 678, 6 N. E. Rep. 790; Fischer v. Bell, 91 Ind. 243; Vinton v. Baldwin, 88 Ind. 104, 105, 45 Am. Rep. 447; Peet v. Sherwood, 43 Minn. 447-8, 45 N. W. Rep. 859; Cheatham v. Yarbrough, 90 Tenn. 77, 15 S. W. Rep. 1076; Budd v. Zoller, 52 Mo. 238, 242. To the same effect are Roche v. Smith, 176 Mass. 595, 58 N. E. Rep. 152; Keys v. Johnson, 68 Pa. 42; Veazie v. Parker, 72 Me. 443; Conkling v. Krakauer, 70 Tex. 735, 11 S. W. Rep. 117; Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. Rep. 1075; Gelatt v. Ridge, 117 Mo. 553, 23 S. W. Rep. 882, 38 Am. St.

683; Hart v. Hopson, 52 Mo. App. 177; Grether v. McCormick, 79 Mo. App. 325; Finley v. Dyer, 79 Mo. App. 604; Butts v. Ruby, 85 Mo. App. 405; Crone v. Mississippi Valley Trust Co., 85 Mo. App. 601; Jones v. Stevens, 36 Neb. 849, 55 N. W. Rep. 251; Atkinson v. Pack, 114 N. C. 597, 19 S. E. Rep. 628; Heintz v. Boehmer, 6 Ohio Dec. 362; Holmes v. Neafie, 151 Pa. 392, 24 Atl. Rep. 1096; Peckham v. Ashhurst, 18 R. I. 376, 28 Atl. Rep. 337; Crockett v. Grayson, 98 Va. 354, 36 S. E. Rep. 477; Carstens v. McReavy, 1 Wash. 359, 25 Pac. Rep. 471; Barnes v. German Savings & Loan Society, 21 Wash. 448, 58 Pac. Rep. 569; Riemer v. Rice, 88 Wis. 16, 59 N. W. Rep. 450; Bell v. Siemens & H. Electric Co., 101 Wis. 320, 77 N. W. Rep. 152; Bryan v. Abert, 3 D. C. App. Cas. 180; Platt v. Depree, 9 T. L. Rep. 194; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. Rep. 426.

² Roche v. Smith, 176 Mass. 595, 58 N. E. Rep. 142; Ward v. Cobb, 148 Mass. 518, 20 N. E. Rep. 174, 12 Am. St. 587; Coleman v. Meade, 13 Bush, 358; Donohue v. Flanagan, 9 N. Y. Supp. 273; Francis v. Baker, 45 Minn. 83, 47 N. W. Rep. 452; Wray v. Carpenter, 16 Colo. 271, 27 Pac. Rep. 248;

on the broker's statements concerning the responsibility of the purchaser, and does not exercise his own judgment on that question, the fact that he signs a contract of sale, which the purchaser is unable to carry out, does not entitle the broker to his commission.¹ The broker's right to compensation does not exist until he definitely informs his principal of the name of the proposed purchaser.² The right to commissions may exist where there has been an exchange of lands though other brokers than the plaintiff were employed, if he can show that he was the effective means of bringing about the exchange, though the contract was modified in some of its details.³

The doctrine that the agent's right to compensation is not dependent upon the benefit of his act to his principal has its limitations; or, rather, the right to compensation does not follow such benefit where the agent induces his principal to make a sale for his, the agent's, advantage. Thus, where a manufacturer of whisky employed an agent to make a sale of whisky which was ready for the market, and such agent brought an intending purchaser to the vendor, and the customer insisted upon being given an option on whisky to be made in the future and the agent urged his principal to give such option, which was finally done, nothing being said about the commission on the option sale, the agent was not entitled thereto. The court said, in substance, that if the agent was not representing the purchaser in procuring such option, he was not the agent of the vendor to induce him to assent to a contract to which he was averse. The agent's labors were confined to a persuasion of the vendor to agree to grant the option, and were not exercised in the vendor's behalf to induce the purchaser to take the option. The option was a part of the consideration and inducement to the purchase of the whisky ready for the market, and not a separate feature or independent and supplemental sale of future whiskies, nor a single contract for a larger

Lockwood v. Halsey, 41 Kan. 166, 21 Pac. Rep. 98; Springer v. Orr, 28 Ill. App. 558; Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192; Lunney v. Healey, 56 Neb. 313, 76 N. W. Rep. 558, 44 L. R. A. 593.

¹ Butler v. Baker, 17 R. I. 582, 23 Atl. Rep. 1019, 33 Am. St. 897; Burn-

ham v. Upton, 174 Mass. 408, 54 N. E. Rep. 873.

² Gerding v. Haskin, 141 N. Y. 514, 36 N. E. Rep. 601.

³ Hall v. Grace, 179 Mass. 400, 60 N. E. Rep. 932; Cadigan v. Crabtree, 179 Mass. 474, 61 N. E. Rep. 37, 88 Am. St. 397.

amount. It was a bonus demanded of and granted by the vendor to effectuate the main sale. "The ultimate benefit, if any, to the principal; the fact that he made a profit, if he did; that he did not lose anything, but was so pleased that he gave another option for the next year,—if these be facts, cannot advance the broker's claim for commissions in any just view. This right depends upon the contract, express or implied, for the payment of commissions, and not upon any consideration of profit or loss to the principal. It may be that under other circumstances a broker negotiating for his principal at his request, express or implied, an option sale, or a general sale with an option attached, would be entitled to recover customary commissions; but it is another thing to say that a broker employed to make a particular sale, in which the element of an option for other sales was confessedly not included, is entitled to recover commissions when his principal is forced by the proposed purchaser to add the option for that purchaser's benefit. . . . Neither do we think that the doctrine of the ratification or adoption of an unauthorized contract made by the agent in behalf of his principal is involved in this case. Having found the fact, as we do on the proof, that the broker, not being specifically authorized to make an option contract in behalf of his principal, submitted to the option as an exaction from him and his principal by a purchaser who demanded it as a part of the consideration for the original sale, the assent of W. became only an agreement to the exaction, and his conduct cannot be treated as a ratification of the broker's theory that he was making a beneficial option contract for and in behalf of his principal, for which he was entitled, impliedly, to a commission for procuring the purchaser to make such a contract. That which the purchaser imposes as an exaction cannot be thus perverted into a yielding to the persuasive inducements of the broker, for which alone the broker should be paid."¹

If a mercantile usage prevails, and is shown, by which nothing is to be allowed to the broker unless the matter brought about by his instrumentality is completed, he can only recover in accordance with it, and especially where, by such usage, a

¹ Block v. Walker, 72 Fed. Rep. 650, v. Parrot Silver & Copper Co., 117 19 C. C. A. 61, approving Harnickell N. Y. 644, 22 N. E. Rep. 1079.

larger compensation is allowed by reason of the contingency.¹ In such case the claim of the broker rests upon the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied.² Where an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labor; he is not bound to resort to a special action for the withdrawal of the authority; the contract to pay what is reasonable is implied by law; it is not a question of fact for a jury; and the proper measure of damages is the entire amount of the agreed commission.³ But in Pennsylvania an agent who

¹ Broad v. Thomas, 7 Bing. 99.

² Read v. Rann, *supra*. See Cadi-gan v. Crabtree, 179 Mass. 474, 61 N. E. Rep. 37, 88 Am. St. 397.

Efforts of a real-estate broker to sell land after his authority to do so had been revoked do not entitle him to a commission on a sale made by the owner to one who was introduced to him as an intending purchaser by the broker, and whose offer to purchase was rejected in good faith by the owner. Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. Rep. 15.

³ Prickett v. Badger, 1 C. B. (N. S.) 296; Planche v. Colburn, 8 Bing. 14; Moses v. Bierling, 61 N. Y. 462; Doty v. Miller, 43 Barb. 529; Middleton v. Findley, 25 Cal. 76; Knapp v. Wallace, 4 N. Y. 477; Cook v. Fiske, 12 Gray, 491; Cook v. Welch, 9 Allen, 350; Wheeler v. Knaggs, 8 Ohio, 169; Evrit v. Bancroft, 22 Ohio St. 172; Rees v. Spruance, 45 Ill. 308; Chilton v. Butler, 1 E. D. Smith, 150; Morgan v. Mason, 4 id. 636; Short v. Millard, 68 Ill. 292; Glenworth v. Luther, 21 Barb. 145; McGavock v. Woodlief, 20 How. 221; Clapp v. Hughes, 1 Phila. 382; Bailey v.

Chapman, 41 Mo. 536; Stillman v. Mitchell, 2 Robert. 523; Edwards v. Goldsmith, 16 Pa. 43; Sibbald v. Bethlehem Iron Co., 83 N. Y. 384, 38 Am. Rep. 441; Carroll v. Pettit, 67 Hun, 418, 22 N. Y. Supp. 250; Atkinson v. Pack, 114 N. C. 597, 19 S. E. Rep. 628; Fraser v. Kennedy, 2 N. Z. L. R. (Sup. Ct.) 173; Equitable Mortgage Co. v. Weddington, 2 Tex. Civ. App. 373, 21 S. W. Rep. 576.

The plaintiff consigned to the defendant four hundred and ninety-seven barrels of whisky, to be sold on commission of two and a half per cent.; defendant sold eighty-four barrels; the plaintiff sold two hundred and twenty barrels, and gave an order on the defendant for delivery of them. Defendant having complied with the order refused to deliver the remaining one hundred and ninety-three barrels without being paid commissions on the whole, which the plaintiff paid, and brought suit to recover back all the commissions except on the eighty-four barrels; held, that the defendant was entitled to commissions on the two hundred and twenty barrels, and such part of the agreed commission

has been employed to sell land may, after the revocation of his authority, recover upon a *quantum meruit* the expenditures he has been encouraged by his principal to make in effecting the sale, and also compensation for his labor and time.¹ This seems to be in harmony with the English cases.² Where a land-owner agreed with an agent that the latter might dispose of land within a time limited for a share of the profits arising from the sale, and in the performance of such agreement the agent rendered services and expended time and money, and the principal unjustifiably revoked the contract, he was held liable for such sum as the agent's share of the profits would have been if the sale had been made.³ A broker who has procured a contract of sale to be entered into between the owner of land and a prospective purchaser may recover for the loss of his commission from the latter for his failure to carry out the contract, notwithstanding the broker had agreed to look to the vendor for compensation.⁴ An agent empowered by the receiver of an insolvent bank to sell real estate was entitled, in the absence of an agreement as to the time for paying the commissions, to be paid only as the purchase price had or should be received.⁵ An agent, acting on a *del credere* or guaranty commission, who has procured from other sources a part of the goods necessary to fill a contract made by him for his principal, the latter being unable to wholly fulfill it, may recover commissions on the whole quantity contracted

as was in proportion to the trouble and risk he had for the balance unsold; such proportion as the service and risk incurred bore to the whole trouble and risk of making sale, and was bound to refund what had been demanded beyond that sum. *Briggs v. Boyd*, 65 Barb. 197.

¹ *Jaekel v. Caldwell*, 157 Pa. 266, 22 Atl. Rep. 1063; *Vincent v. Woodland Oil Co.*, 165 Pa. 402, 30 Atl. Rep. 991; *Kelly v. Marshall*, 172 Pa. 396, 399, 33 Atl. Rep. 690; *Hawkins v. Chandler*, 8 Houst. 434, 32 Atl. Rep. 464.

² *Topping v. Healey*, 3 F. & F. 325; *Green v. Lucas*, 31 L. T. Rep. 731; *Prickett v. Badger*, 1 C. B. (N. S.) 296.

³ *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. 300, 21 Pac. Rep. 637; *Hawley v. Smith*, 45 Ind. 183; *Green v. Cole*, 24 S. W. Rep. 1058 (Mo. Sup. Ct., division No. 1), 177 Mo. 585, 601, 30 S. W. Rep. 135 (court *in banc*); *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. Rep. 313. See *Ames v. Lamont*, 107 Wis. 531, 83 N. W. Rep. 780.

⁴ *Livermore v. Crane*, 26 Wash. 529, 67 Pac. Rep. 231; *Cavender v. Waddingham*, 2 Mo. App. 551; *Atkinson v. Pack*, 114 N. C. 597, 19 S. E. Rep. 628.

⁵ *Peters v. Anderson*, 88 Va. 1051, 14 S. E. Rep. 974.

for; and if the principal is unable to fulfill a contract and the agent has procured a release of it, he may recover a proportionate share of the agreed commissions.¹

[451] If a broker is employed and no special compensation is agreed on, the customary rate of brokerage is the proper rate of compensation for his services.² But if one not a broker is employed to negotiate he is entitled to the reasonable worth of his services, which may be more or less than the usual brokerage.³ Whether the person who effected the sale was or was not a broker, the price usually paid in the vicinity of the land sold for such services as he rendered is competent evidence of the value of his services;⁴ but is not conclusive as to the measure of the plaintiff's compensation.⁵ The right of one rendering services for another to have their value estimated under a *quantum meruit* upon the basis of commissions can only arise out of general custom.⁶ If, on an even exchange of equities in real property, each party intentionally inflates the value of his interest the commissions of a broker will be based on the actual value of his principal's property.⁷

The broker must perform his duty in such manner as to reasonably answer the intended purpose; if he performs it so loosely that his principal can obtain no benefit from it the former cannot recover compensation.⁸ All agents will forfeit

¹ Albion Phosphate Mining Co. v. Wyllie, 77 Fed. Rep. 541, 23 C. C. A. 276.

² Erben v. Lorillard, 2 Keyes, 567; Childs v. Crithfield, 66 Mo. App. 422; Graves v. Dill, 159 Mass. 74, 34 N. E. Rep. 336.

As to what constitutes a real-estate broker, see O'Neill v. Sinclair, 54 Ill. App. 298, 302, and cases cited, 153 Ill. 525, 39 N. E. Rep. 124.

³ Erben v. Lorillard, 2 Keyes, 567; Dyer v. Sutherland, 75 Ill. 583.

⁴ Hollis v. Weston, 156 Mass. 357, 31 N. E. Rep. 483, citing Vilas v. Downer, 21 Vt. 419; Stanton v. Embrey, 93 U. S. 548; Thompson v. Bogle, 85 Pa. 477; Eggleston v. Boardman, 37 Mich. 14; Buckman v. Bergholz, 36 N. J. L. 531.

⁵ Kennerly v. Sommerville, 64 Mo. App. 75.

⁶ Erben v. Lorillard, Dyer v. Sutherland, *supra*.

⁷ Porter v. Hellingsworth, 30 N. Y. Misc. 628, 62 N. Y. Supp. 796.

⁸ Crombie v. Waldo, 137 N. Y. 129, 32 N. E. Rep. 1042; Inge v. McCreery, 60 App. Div. 557, 69 N. Y. Supp. 1052; O'Brien v. Gilliland, 4 Tex. Civ. App. 40, 23 S. W. Rep. 244; Hall v. Gambrill, 92 Fed. Rep. 32, 34 C. C. A. 190; Hammond v. Holiday, 1 C. & P. 384. See Hill v. Featherstonhaugh, 7 Bing. 569.

One employed to procure a mortgagee who will lend money for three years does not earn a commission by procuring one who will lend only on condition that the principal and in-

their right to compensation by misconduct which injures their principal,¹ as when the broker knows that the customer produced by him has not a title to the property which is offered for sale, and does not tell his principal of that fact.² And that result may follow though the principal does not sustain any financial loss; as where a selling agent knew that a customer was prepared to pay the price asked for property, which he had assured his principal would not sell for more than a nominal sum, sent the customer to the principal to negotiate directly, without informing the latter of the knowledge he had of the customer's purpose, notwithstanding the price asked was paid.³ A real-estate broker who conceals the name of the person he proposes as a purchaser, and also the fact that such person had bought a tract of land adjoining that of his principal, these things being done to prevent the latter from raising the price of the land, cannot recover commissions.⁴ An agent for the sale of property cannot recover a commission if he buys it himself.⁵ But he may recover it if the owner refuses to convey to a person willing to purchase, and the agent takes title to himself under an option given by the owner in order to complete the sale. Such option, though in writing, did not necessarily supersede the prior parol contract of agency for the sale of the same land on commission.⁶ An agent who acts for both parties to an exchange or sale of property, with a promise of a commission from each of them, cannot recover from one of them who did not know of, and consent to, his acting as agent for the other.⁷ But this principle does not ex-

terest shall be paid in gold. *Caston v. Quimby*, 178 Mass. 153, 59 N. E. Rep. 653.

¹ *Sea v. Carpenter*, 16 Ohio, 412; *Segar v. Parrish*, 20 Gratt. 672; *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. Rep. 303; *Fish v. Seeberger*, 154 Ill. 30, 39 N. E. Rep. 982; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. Rep. 211; *Hobart v. Sherburne*, 66 Minn. 171, 68 N. W. Rep. 841.

² *Burnham v. Upton*, 174 Mass. 408, 54 N. E. Rep. 873; *Butler v. Baker*, 17 R. I. 582, 23 Atl. Rep. 1019, 33 Am. St. 897.

³ *Soule v. Deering*, 87 Me. 365, 32 Atl. Rep. 998, citing *Pratt v. Patterson*, 112 Pa. 475, 3 Atl. Rep. 858; *Martin v. Bliss*, 57 Hun, 157, 10 N. Y. Supp. 886; *Henderson v. Vincent*, 84 Ala. 99, 4 So. Rep. 180.

⁴ *Wilkinson v. McCullough*, 196 Pa. 205, 46 Atl. Rep. 357.

⁵ *Dobson v. Racey*, 8 N. Y. 216; *Morgenstern v. Hill*, 8 N. Y. Misc. 356, 28 N. Y. Supp. 704.

⁶ *Riemer v. Rice*, 88 Wis. 16, 59 N. W. Rep. 450.

⁷ *Young v. Trainor*, 158 Ill. 428, 42 N. E. Rep. 139; *Hammond v. Book-*

tend to an agent whose authority is limited to negotiating a sale for a fixed price.¹

§ 684. Various modes of compensating for services. Contracts providing specific compensation for services thereby fix, as has been stated, the measure of damages recoverable on the performance of the stipulated work. This compensation may [452] be a share of the net profits in a business;² a share of the crops to be raised on a farm;³ such sum as can be raised by voluntary subscriptions for the purpose of such compensation;⁴ or wages may, by agreement, be payable in specific property or specific service, in which case, if not delivered, transferred or rendered, the employee may recover the value thereof, when he is entitled to receive it, with interest.⁵ For the breach of a con-

walter, 12 Ind. App. 177, 39 N. E. Rep. 872; *Wilson v. Webster*, 88 Iowa, 514, 55 N. W. Rep. 571; *McDonald v. Maltz*, 94 Mich. 172, 53 N. W. Rep. 1058, 34 Am. St. 331; *Humphrey v. Eddy Transportation Co.*, 107 Mich. 163, 65 N. W. Rep. 13; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Rice v. Davis*, 136 Pa. 439, 20 Atl. Rep. 513, 20 Am. St. 931; *Campbell v. Baxter*, 41 Neb. 729, 60 N. W. Rep. 90; *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. Rep. 867; *Gracie v. Stevens*, 56 App. Div. 203, 67 N. Y. Supp. 688; *Jameson v. Coldwell*, 25 Ore. 199, 35 Pac. Rep. 245; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. Rep. 365.

¹ *O'Neil v. Sinclair*, 54 Ill. App. 298, citing *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Ranney v. Donovan*, 78 Mich. 318, 44 N. W. Rep. 276; *Montross v. Eddy*, 94 Mich. 100, 53 N. W. Rep. 916, 34 Am. St. 323; *Haviland v. Price*, 6 N. Y. Misc. 372, 26 N. Y. Supp. 757; *Orton v. Scofield*, 61 Wis. 382, 21 N. W. Rep. 261; *Friar v. Smith*, 120 Mich. 411, 79 N. W. Rep. 633, 46 L. R. A. 229; *Childs v. Ptomey*, 17 Mont. 502, 43 Pac. Rep. 714; *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70, 36 N. E. Rep. 867; *Gracie v. Stevens*, 56 App. Div. 203, 67 N. Y. Supp. 688.

² *Wiggins v. Graham*, 51 Mo. 17;

Morrison v. Galloway, 2 Har. & J. 461; *Jennery v. Olmstead*, 90 N. Y. 363; *Woodberry v. Warner*, 53 Ark. 488, 14 S. W. Rep. 671. See *Ellster v. Brooks*, 54 N. Y. Super. Ct. 73.

³ *Owens v. Durham*, 5 Dana, 536.

⁴ *Myers v. Baptist Society*, 38 Vt. 614. In this case the defendant, a religious society, engaged the plaintiff to become its pastor for one year for \$300. About the commencement of the second year the defendant informed him that the amount subscribed was less than that of the first year, and he agreed to remain for such sum as could be raised by subscription, the defendant to collect the subscriptions. The defendant having failed to collect and pay over the subscriptions in full, the plaintiff commenced an action to recover for his services as pastor, he having continued as such for the defendant for five years under the same agreement. It was held that the contract was one of hire through the whole time, under which the defendant was bound to pay the plaintiff for his services; that the defendant was bound to use due diligence in obtaining and collecting subscriptions, and the plaintiff was entitled to recover such an amount as might have been collected.

⁵ *Strutt v. Farlar*, 16 M. & W. 249;

tract to compensate for services with clothing and attendance on school in winter, under a special count based upon a breach as to the attendance on school and alleging that the plaintiff was kept at work, the damages are not measured by the value of the services rendered while he was deprived of his right.¹ Where the consideration to be paid for services was a pass over the defendant's road the court thought the value was so uncertain as to be incapable of proof, and allowed a recovery upon a *quantum meruit*;² but it has been held that the value of a life pass for a plaintiff and his family was not so uncertain as to be incapable of ascertainment.³ On the breach of a contract of hiring by refusing to permit a clerk who was to be furnished goods at wholesale for his own use to enter upon his duties, there cannot be at once a recovery of the difference between the wholesale and retail prices of goods he might have bought if he had been allowed to purchase them. Such damages are too remote and speculative.⁴

If the employer is in no default in making payment he has a right to make it in the very mode specified in the contract.⁵ Thus, the plaintiff agreed that his minor son should work for the defendant for a certain time, to be compensated by the defendant boarding, clothing and schooling the son; the son

Owens v. Durham, 5 Dana, 536; Stone v. Stone, 43 Vt. 180; Fairbank's Ex'rs v. Humphreys, 18 Q. B. Div. 54; Gibson v. Whip Pub. Co., 28 Mo. App. 450; Woodberry v. Warner, 53 Ark. 488, 14 S. W. Rep. 671; Scott v. Schnadt, 70 Ill. App. 25; New York News Pub. Co. v. National Steamship Co., 148 N. Y. 39, 43 N. E. Rep. 514; Spinney v. Hill, 81 Minn. 316, 84 N. W. Rep. 116.

An agreement to pay for services in goods, chattels, or choses in action at the price of \$50 or more is not a sale within the statute of frauds. Spinney v. Hill, *supra*.

Under a contract to pay \$60 a month in cash and \$40 a month in water rights, the servant may recover \$100 a month, the value of such rights being fixed. Culbertson Irri-

gating & Water Power Co. v. Wildman, 45 Neb. 663, 63 N. W. Rep. 947.

Under a contract providing for the payment of commissions in paper, there can be a recovery of only the actual value of the paper which is tendered. Brown v. McCaul, 6 S. D. 16, 60 N. W. Rep. 151; Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. App. 200, 30 S. W. Rep. 454.

¹ Burroughs v. Morse, 48 Mich. 520, 12 N. W. Rep. 684.

² Brown v. St. Paul, etc. R. Co., 36 Minn. 236, 31 N. W. Rep. 941.

³ Erie & P. R. Co. v. Douthet, 88 Pa. 243, 32 Am. Rep. 451.

⁴ Harris v. Moss, 112 Ga. 95, 37 S. E. Rep. 123.

⁵ Kinch v. Moadinger, 26 N. Y. Misc. 778, 57 N. Y. Supp. 248.

worked a part of the time and then voluntarily abandoned the defendant without his consent. It was held that the law would not imply a promise to pay in money what the services of the son were reasonably worth, beyond the damages caused by his failure to complete the contract, the defendant being always ready to pay in the manner stipulated. The same rule applies though the contract is void by the statute of frauds. If the employer is willing to abide by the void contract, has not repudiated it, or done anything to put it out of his power to fulfill it, he cannot be made to pay in any other mode. The existence of such a contract will negative any tacit promise to make payment in any manner or on any terms different from [453] those mentioned in it.¹ But where a contract providing for a fixed compensation for services and a particular mode of payment is void by that statute because not being in writing, if the employer violates or repudiates it after services have been performed, they may be recovered for on a *quantum meruit* as services performed on request, without regard to the rate or mode of compensation contemplated in such contract.² If the services were to be paid for by the conveyance of specific land, the contract being verbal and void, the value of the land on a *quantum meruit* is not the fixed measure of damages; but such value is competent evidence to be considered on the question of damages.³ Where a verbal contract, void because not to be performed within a year, provided for services for two years, at \$100 for the first year and \$200 for the second, and was proved on the trial, being the only evidence tending to show any understanding between the parties in respect to the compensation for the second year, an instruction that if during the second year the parties under-

¹ Roundy v. Thatcher, 49 N. H. 526; Campbell v. Campbell, 65 Barb. 639; Abbott v. Draper, 4 Denio, 51; Quackenbush v. Ehle, 5 Barb. 469. See Burroughs v. Morse, 48 Mich. 520, 12 N. W. Rep. 684.

² Wallace v. Long, 105 Ind. 523, 55 Am. Rep. 222, 5 N. E. Rep. 666; Rodman v. Woolman, 2 Houst. 581; Watson v. Watson, 1 id. 209; Jones v. Hay, 52 Barb. 501; Updike v. Tenbroeck, 32 N. J. L. 105; Will-

iam Butcher Steel Works v. Atkinson, 68 Ill. 421, 18 Am. Rep. 560; King v. Welcome, 5 Gray, 41; Shute v. Dorr, 5 Wend. 204; Cornes v. Lemson, 16 Conn. 246; Banta v. Banta, 82 N. Y. Supp. 113, citing the text. The Connecticut case is modified by Clark v. Terry, 25 Conn. 395. See King v. Brown, 2 Hill, 485.

³ Ham v. Goodrich, 37 N. H. 185; Abbott v. Draper, 4 Denio, 51.

stood that the wages were to be \$200 the amount would be fixed by that understanding was held erroneous,¹ because otherwise the statute would be evaded by giving effect to the contract.² In Minnesota it is the rule that, while no action can be maintained on an oral agreement for services not to be performed within one year, such an agreement controls the rights and remedies of the parties with respect to what has been done, and fixes the value of services rendered under it when the person rendering such services is discharged after part performance without fault on his part.³ It is said in a late case so holding: We are compelled to admit that the reasoning on which the doctrine is based is not satisfactory, and has often been criticised as illogical because, although the statute denounces such agreements and deprives them of all legal validity, the doctrine itself validates them to some extent, and measures some of the rights of the parties by them.⁴ This rule is not to be carried so far as to imply, because there has been a continuance of labor on one side and payment for services on the other, a new period of service for the same term as that fixed by the first invalid contract.⁵ And one of the supreme courts of New York has reached a somewhat similar conclusion thus expressed: I am, however, inclined to the opinion that where parties make a contract for labor, not in any way involving the investment of capital farther than mere compensation for services, and work is performed under such void contract, that a party performing such labor is entitled to recover for so much labor as he performs, with the permission or consent of the other party to such void contract. He would, at all times, be subject to discharge from such service and his void contract would give him no immunity against dismissal from such service; and so long as he voluntarily, with the permission of the other party, performs service to his advantage and with his implied assent, there is no reason apparent, either in justice or in morals, why his void contract

¹ *Emery v. Smith*, 46 N. H. 151.

² *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *King v. Brown*, 2 Hill, 485; *Hill v. Hooper*, 1 Gray, 131.

³ *La Du-King Manuf. Co. v. La Du*, 36 Minn. 473, 31 N. W. Rep. 938; *Kri-*

ger v. Leppel, 42 Minn. 6, 43 N. W. Rep. 484.

⁴ *Spinney v. Hill*, 81 Minn. 316, 322, 84 N. W. Rep. 116; *Lally v. Crookston Lumber Co.*, 85 Minn. 257, 88 N. W. 846.

⁵ *Lally v. Crookston Lumber Co.*, *supra*.

and his failure to fulfill its terms should be interposed as a defense to his recovery upon a *quantum meruit*.¹

Under an employment, terminable at will, to solicit advertisements for a publishing company for a per centum upon the amount of all orders or contracts for advertisements, and also upon all business that followed the original contract, the employee is not entitled to commissions upon advertisements received after his discharge from customers originally secured by him.² But the rule is otherwise under a contract to pay a percentage on the actual sales of a manufactured article; sales made after the termination of the employment are included.³ And where commissions were to be paid upon the price of all articles sold to purchasers obtained by the employee he was entitled thereto on sales made after his discharge and until he did some overt act in the interest of another employer for the purpose of taking from the defendant the customers whom he had obtained for him.⁴ An agent who sells safes on commission, the title to remain in his principal until the full price is paid, the latter to retake any safe which was not paid for, is entitled to have his commissions credited with the proportion of each payment made; this applying to safes retaken or returned, the sum received as rent being regarded as the proceeds of a sale. He was not chargeable with collection fees or the costs or expenses of suits as to such sales.⁵ Where there was a parol agreement between a coal company and a person employed to carry on its business at a particular place for monthly compensation and one-third of the net profits of the business, no time being stipulated for the continuance of such relation and nothing being said respecting real estate, profits made on real estate bought for a coal yard were not such profits as the employee was entitled to share in, notwithstanding a large loss occurred in conducting the coal business.⁶ Under a contract between the owner of a farm and the man-

¹ Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486.

² Scott v. Engineering News Pub. Co., 47 App. Div. 558, 62 N. Y. Supp. 609.

³ Byrnes v. Baldwin, 17 N. Y. Misc. 280, 40 N. Y. Supp. 386; Dibble v.

Dimick, 143 N. Y. 549, 38 N. E. Rep. 724.

⁴ Law v. Billington, 180 Pa. 84, 36 Atl. Rep. 402.

⁵ Park v. Mighell, 3 Wash. 737, 29 Pac. Rep. 556.

⁶ Hawley v. Kansas & Texas Coal Co., 48 Kan. 593, 30 Pac. Rep. 14.

ager thereof whereby the latter was to receive, in lieu of salary, all the products of the farm and one-half interest in the increase of stock, on the exercise by the owner of his right to determine the contract, after due notice and at the beginning of some designated year, he is entitled to have a number of animals equal to that invested by him at the commencement of the contract or afterwards, and one-half the increase.¹ Under a contract providing for a commission upon the sale of each machine, which was to be received, housed, set up, run for the instruction of the purchaser, etc., the contract as to each is entire, and the commission is not earned except by the performance of all the requirements. Hence where the contract was lawfully terminated by the employer after the employee had obtained orders which were unfilled, he was not entitled to recover the stipulated commission, but only a reasonable compensation for his services in obtaining such orders as were filled.² Such recovery was not improper because, in some cases, the employer had the purchasers execute new orders before delivering the machines.³ A promoter of a corporation who is to be paid a percentage of the stock held in another corporation by his employer, is entitled to share in an increase of stock issued to the latter, and his damages on the refusal to issue the stock to which he was entitled are the value of his percentage of it to which the employer was entitled at the time the employee might have received it but for an agreement made by the employer which reduced the share to which it was entitled. In estimating the increased capital of the corporation an increase of stock represented by its earnings and put into betterments was not to be considered.⁴ In estimating the one-third of the profits on sales made by an employee, the cost of the goods sold is to be arrived at by the price actually paid for them; they are not to be charged against him at the invoice price if they were bought at a discount for cash.⁵ Under a contract providing

¹ Long v. Kee, 42 La. Ann. 899, 8 So. Rep. 610.

² Merriman v. McCormick Harvesting Machine Co., 96 Wis. 600, 71 N. W. Rep. 1050.

³ S. C., 101 Wis. 619, 77 N. W. Rep. 880.

⁴ Hix v. Edison Electric Light Co., 10 App. Div. 75, 41 N. Y. Supp. 680.

⁵ Bergen v. Hitchings, 22 App. Div. 395, 48 N. Y. Supp. 96.

for the payment of commissions on all of the principal's goods sold in a state the agent is entitled to commissions on goods sold therein by the principal, though the terms of sale were agreed upon without the state.¹ In estimating the profits to be shared in by an employee as part of his annual compensation, the contract providing for a settlement at the end of each year, pending actions in tort against the employer to recover unliquidated damages are not to be regarded; neither is the employer to be allowed interest on the money invested in the business. He is, however, to be credited with material and labor furnished the employee for his private use in the absence of his knowledge of a custom to charge the same to the expense account.² If services are to be paid for by a certain percentage on all sums which shall be collected from the sales made by the employee, he cannot recover commissions upon orders which did not produce collections without showing that the failure to collect was the fault of the employer, but may recover upon orders properly taken but not filled because the employer did not have the goods to fill them in the usual course of business.³ The employer is under an implied contract to ship goods for which an employee has taken orders within a reasonable time, and if he fails to do so and the sales are consequently lost, the employee may recover; while the stipulated commissions may not be recoverable *eo nomine*, they will measure his damages.⁴

§ 685. Continuation of original contract. If a person enters the service of another under an express contract specifying the time and wages, and continues in the same employment after his term has ended without any new bargain, he will be considered as working under the original contract, or as re-engaged on the same terms.⁵ But this presumption does

¹ Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. App. 200, 30 S. W. Rep. 454.

² Morrow v. Murphy, 120 Mich. 204, 79 N. W. Rep. 193, 80 id. 255.

³ Stone v. Argensinger, 32 App. Div. 208, 53 N. Y. Supp. 63.

⁴ Stevenson v. Morris Machine Works, 69 Miss. 232, 13 So. Rep. 834.

⁵ Travelers' Ins. Co. v. Parker, 92

Md. 22, 47 Atl. Rep. 1043; Dickinson v. Norwegian Plow Co., 101 Wis. 157, 76 N. W. Rep. 1108; Kellogg v. Citizens' Ins. Co., 94 Wis. 554, 69 N. W. Rep. 362; Sines v. Superintendents of the Poor, 58 Mich. 503, 25 N. W. Rep. 485; Tatterson v. Suffolk Manuf. Co., 106 Mass. 56; Wallace v. Floyd, 29 Pa. 184, 72 Am. Dec. 620; Ingalls v. Allen, 132 Ill. 170, 23 N. E. Rep.

not arise where the character of the service is altered, as where one completes the term for which he was hired as a carpenter and continues in the employ of the same person as a teamster.¹ If the nature of the service is the same, the fact that the later service is rendered at a different place, or was of a slightly different character, will not destroy the presumption if the service was a continuation of the original and within the general scope of it. If there is a change in the place where the service is rendered, and a considerable interval of time elapses between the rendition of the earlier and the later service, it is for a jury to determine whether there has been a change in the nature of it.²

§ 686. Necessity of full performance of entire contract.

The general principle is that where there is an express [454] contract none can be implied relating to the same subject. The rule is of extensive application. On this principle, and so far as it governs, if work is done under a special contract recovery for it can be had only by action on the contract, at least where such an action can be maintained, and when it appears that compensation has been earned and is due according to its provisions. Accordingly, under an agreement, which is entire, to pay a gross sum for a particular term of service or for doing a designated piece of work, performance is a condition precedent, and no action can be maintained on the contract without alleging and proving that the condition has been fulfilled. Hence, unless there is some exception³ to the gen-

1026; *Glucose Sugar Refining Co. v. Flinn*, 184 Ill. 123, 56 N. E. Rep. 400; *Crane Manuf. Co. v. Adams*, 142 Ill. 125, 30 N. E. Rep. 1030; *Beeston v. Colyer*, 4 Bing. 309; *New Hampshire Iron Factory v. Richardson*, 5 N. H. 294; *Grover & B. Sewing Machine Co. v. Bulkley*, 48 Ill. 189; *Huntingdon v. Claffin*, 38 N. Y. 182; *Vail v. Jersey Little Falls Manuf. Co.*, 32 Barb. 564; *Nicholson v. Patchin*, 5 Cal. 474; *Ranck v. Albright*, 36 Pa. 367; *Greer v. People's Telephone & T. Co.*, 50 N. Y. Super. Ct. 517; *Adams v. Fitzpatrick*, 56 id. 580; *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. Rep. 984; *Adams v. Fitz-*

patrick, 125 N. Y. 124, 26 N. E. Rep. 143. See *Tucker v. Philadelphia & R. C. & I. Co.*, 53 Hun. 139, 6 N. Y. Supp. 134; *Castigan v. Mohawk, etc. R. Co.*, 2 Denio, 609.

¹ *Ewing v. Janson*, 57 Ark. 237, 21 S. W. Rep. 430.

² *Ingalls v. Allen*, 132 Ill. 170, 23 N. E. Rep. 1026.

³ In *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 180, 85 N. W. 263, *Marshall, J.*, says, that like most general rules that stated admits of exceptions, there being several of them, one being that which is the key to the plaintiff's right of recovery here, viz.: "The condition

eral principle excluding an implied promise where there is an express contract, and to the consequent rule requiring the action to be brought on the contract, there can be no recovery for part performance of an entire contract however beneficial it may be to the employer. There are exceptions both as to the necessity of suing upon the contract, and also as to the right to recover only upon complete performance; but they do not embrace all cases of part performance. In respect to contracts for services the rigorous rule is generally enforced; and where there is a hiring for a particular term as an entire contract there can be no recovery if the party hired voluntarily quits, without cause or the consent of his employer, before the expiration of that term.¹ There is a like ina-

precedent, of full performance by one party, is waived if the contract be terminated by the other party, regardless of whether it is by his mere consent or by his rightfully or wrongfully preventing such performance. The bearing the cause for terminating an entire contract by one party has on the rights of the other, seeking compensation for what he has done under it, may be stated as follows: If one party to a contract withdraws from it by consent of the other after part performance thereof, he can recover for what he has done at the contract rate. If a party to an entire contract, after part performance by him, be prevented by the wrongful conduct of the other from rendering to such other complete performance, he can recover upon the contract for what he has done, at the contract rate, and his damages for not being allowed to fully perform, not exceeding the full amount he could have earned by such performance. If, after part performance of such a contract by one party, he is rightfully prevented by the other from full performance, he can recover on the contract for the part performance, not exceeding the contract

rate, being liable to respond in damages to the adverse party to the amount of the latter's legal damages caused by the acts that justified the termination of the contract."

¹St. Albans Steam Boat Co. v. Wilkins, 8 Vt. 54; Sherman v. Champlain Transportation Co., 31 Vt. 162; Henderhen v. Cook, 66 Barb. 21; Lewis v. Esther, 2 Cranch C. C. 423; Bowling v. Varnum, id. 423; Shaw v. Turnpike Co., 3 P. & W. 445; Krouse v. Deblois, 1 Cranch C. C. 156; Hutchinson v. Wetmore, 2 Cal. 310, 56 Am. Dec. 337; Hogan v. Titlow, 14 Cal. 255; Schnerr v. Lemp, 19 Mo. 40; Winn v. Southgate, 17 Vt. 355; Patnote v. Sanders, 41 Vt. 66, 98 Am. Dec. 564; Holmes v. Stummel, 24 Ill. 370; Bellinger v. Craigie, 31 Barb. 534; Clark v. Gilbert, 32 Barb. 576, 26 N. Y. 279, 84 Am. Dec. 189; Holloway v. Lacy, 4 Humph. 468; Olmstead v. Beale, 19 Pick. 528; Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425; Givhan v. Dailey, 4 Ala. 336; Whitley v. Murray, 34 Ala. 155; Greene v. Linton, 7 Port. 133, 31 Am. Dec. 707; Suber v. Vanlew, 2 Spear, 126; Abernathy v. Black, 2 Cold. 314; Posey v. Garth, 7 Mo. 94, 37 Am. Dec. 183; Caldwell v. Dickson, 17 Mo. 575; Hinson v. Hampton, 32 id.

bility in England to recover for part of the service stipulated for or wages for the current broken period in an entire contract, where the employee is discharged by his employer for good cause.¹ It has been so held in this country on the discharge of a servant for criminal violations of his duty.² The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, but subject to deductions for his torts or deficiencies.³ A contingent right

408; Aaron v. Moore, 34 id. 79; Larkin v. Buck, 11 Ohio St. 561; Noon v. Salisbury Mills, 3 Allen, 340; Cushman v. Sim, 2 Har. & J. 352; Brown v. Kimball, 12 Vt. 617; Cahill v. Patterson, 30 id. 592; Ewing v. Ingram, 24 N. J. L. 520; Hughes v. Cannon, 1 Sneed, 622; Marsh v. Ruleson, 1 Wend. 514; Hansell v. Erickson, 28 Ill. 257; Angle v. Hanna, 23 id. 429, 74 Am. Dec. 161; Hennessey v. Farrell, 4 Cush. 267; Davis v. Maxwell, 12 Met. 286; Jewell v. Thompson, 2 Litt. 53; Wright v. Wright, 1 id. 179; Morford v. Ambrose, 3 J. J. Marsh. 688; Rounds v. Baxter, 4 Me. 454; Miller v. Goddard, 34 id. 102, 58 Am. Dec. 638; Green v. Gilbert, 21 Wis. 395; Evans v. Bennett, 7 id. 404; Henderson v. Stiles, 14 Ga. 135; Codey v. Raynaud, 1 Colo. 272; State v. Beard, 1 Ind. 460; De Camp v. Stevens, 4 Blackf. 24; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Webb v. Duckingfield, 13 Johns. 390; Lantry v. Parks, 8 Cow. 63; McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Monell v. Burns, 4 Denio, 121; Taft v. Montague, 14 Mass. 282, 7 Am. Dec. 215; Preston v. American Linen Co., 119 Mass. 400; Lowry v. Farmington Prospecting & Mining Co., 65 Mo. App. 266; Lydecker v. Nyack, 6 App. Div. 90, 39 N. Y. Supp. 509; Boutin v. Lindsley, 84 Wis. 644, 54 N. W. Rep. 1017; Walsh v. Fisher, 102 Wis. 172, 72 Am. St. 865, 78 N. W. Rep. 437; Mallory

v. Mackaye, 93 Fed. Rep. 749, 34 C. C. A. 653; Hanuu v. Williams, 2 Hawaia, 323; Williams v. Luckett, 77 Miss. 394, 26 So. Rep. 967; Olmstead v. Bach, 78 Md. 132, 23 L. R. A. 74, 27 Atl. Rep. 501.

In Hughes v. Cannon, 1 Sneed, 622, the court refers to several Tennessee cases on special contracts for particular works, where a liberal rule for recovery on a *quantum meruit* for part performance had been laid down, and say of them: "Without impugning the rule laid down by this court in the cases referred to, where benefit has been conferred by the use of materials or valuable things furnished under contracts, we hold that it is different in the case of contracts for personal service."

¹ Atkin v. Acton, 4 C. & P. 208; Ridgway v. Hungerford Market Co., 3 A. & E. 171; Walsh v. Walley, L. R. 9 Q. B. 367, 43 L. J. (Q. B.) 102; Turner v. Robinson, 6 C. & P. 15.

² Libhart v. Wood, 1 W. & S. 265, 37 Am. Dec. 461; Ulrich v. Hower, 156 Pa. 414, 27 Atl. Rep. 243; Williams v. Eldridge, 9 Kulp, 566.

³ Murdock v. Phillips Academy, 12 Pick. 244; Carroll v. Welch, 26 Tex. 147; Green v. Hulett, 23 Vt. 188; Taylor v. Peterson, 9 La. Ann. 251; Congregation of Children of Israel v. Peres, 2 Cold. 620; Eaken v. Harrison, 4 McCord, 249; Hildebrand v. American Fine Art Co., 109 Wis. 171, 85 N. W. Rep. 268, quoting the text; Cotton v. Rand, 93 Tex. 7, 51 S. W.

to share in the profits of the employer's business is forfeited by withdrawing from his service without cause before any profits were realized notwithstanding they were subsequently realized before suit was brought.¹

When a laborer or other employee professing to be skilled in some particular work, art or mystery has been hired on that account, and for the exercise of the professed skill, and is found to be incompetent to do what he undertook, the employer is not obliged to go on employing him to the end of [456] the term, but may at once dismiss him.² So he may be dismissed for misconduct which involves a violation of duty in his employment or position,³ as where he uses insulting, disrespectful or abusive language to his employer, disobeys his orders and advises other employees to do the same.⁴ If a sufficient cause exists for the discharge of a servant, although it is not the inducing motive to the discharge, or even known to the master, it will justify the discharge.⁵

The requirement to fulfill the precedent condition to do the entire work for which a gross sum is promised to be paid results as a logical conclusion from such a contract; it is thus derived from the supposed intention of the parties, because they are held to mean what the contract thus expounded requires. What is done, short of full performance, being referable exclusively to the contract, there is no operative promise to pay for it, the express promise excluding any other, and is

Rep. 838; *Massey v. Taylor*, 5 Cold. 447; *Lawrence v. Gullifer*, 38 Me. 532 (an employee rightfully discharged is not liable to his employer for any damage he sustained by employing another); *Kessee v. Mayfield*, 14 La. Ann. 90; *Fulton v. Heffelfinger*, 23 Ind. App. 104, 54 N. E. Rep. 1079.

¹ *Mallory v. Mackaye*, 92 Fed. Rep. 749, 34 C. C. A. 653.

² *Horton v. McMurtry*, 5 H. & N. 667; *Crescent Horse-Shoe & Iron Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

³ *Harmer v. Cornelius*, 5 C. B. (N. S.) 235; *Robinson v. Hindman*, 3 Esp. 235; *Atkin v. Acton*, 4 C. & P. 208;

Lilley v. Elwin, 11 Q. B. 742; *Arding v. Lomax*, 24 L. J. (Ex.) 80, 10 Ex. 734; *Shaw v. Chairitie*, 3 C. & K. 25; *Spain v. Arnott*, 2 Stark. 256; *Read v. Dunsmore*, 9 C. & P. 588; *Lacy v. Osbaldiston*, 8 id. 80; *Turner v. Mason*, 14 M. & W. 112; *Amor v. Fearon*, 1 Perry & D. 398; *Wise v. Wilson*, 1 Car. & K. 662; *Lamby v. Gage*, 2 El. & B. 216; *Voelckel v. Banner Brewing Co.*, 9 Ohio Ct. Ct. 318.

⁴ *Darst v. Mathieson Alkali Works*, 81 Fed. Rep. 284. See *Ulrich v. Hower*, 156 Pa. 414, 27 Atl. Rep. 243.

⁵ *Crescent Horse-Shoe & Iron Co. v. Eynon*, *supra*.

not itself available until all the work is done. There is no defect in the logic of this rule; and it may be said that as it never applies except to carry out the intention of the parties, it is not to the rigor of the law, but to the improvidence of the contract, that any hardship in individual cases must be ascribed. It is true the employee might stipulate for a different rule, or an exception, if he should be prevented by sickness or death from completely fulfilling; and it may be deemed his fault that he has entered into a contract in such form that in no event but that of full performance can he claim any compensation. Formerly this logic was law, invariably enforced; the intention of the parties, deduced by this rule of construction, was the iron rule and law of their contract, not dispensable, or subject to any legal evasion or mitigation. Thus it was held that where a sailor hired for a voyage took a promissory note from his employer for a certain sum, provided he should proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship died, no wages could be claimed either on the contract or on a *quantum meruit*.¹ The intention of the parties is still the law of contracts, and even in the matter of performing conditions precedent there has been [457] slight amelioration of the rule. If a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him.²

§ 687. **Same subject; dispensation in case of inability.** The rule which binds parties to fulfill contracts has been somewhat relaxed by applying an equity to relieve against penalties and by admitting exceptions to the principle that an express contract excludes an implied promise on the same subject. This implication of a promise is so purely a fiction to enforce an equitable duty that, in this class of contracts, the implication is sometimes that of a proviso to the express contract leading to the same result. Thus, it is now well settled that if the

¹Cutter v. Powell, 6 T. R. 320, 2 Johnson, 19 Wend. 500, 32 Am. Dec. Smith's Lead. Cas. 17. 518; McKay v. Barnett, 21 Utah, 239,

²Dermott v. Jones, 2 Wall. 1; Paradyne v. Jayne, Alleyn, 26; Beal v. Thompson, 3 B. & P. 405; Beebe v. Jones v. United States, 96 U. S. 29.

employee is prevented by sickness or death from performing an entire contract for labor, where such performance is by the terms of the contract a condition precedent to the right to claim any compensation, he will not, for such failure, be denied all right to be paid for what he has done.¹ The election of an attorney to the bench was held to afford such excuse for not completing contracts for professional services that he could recover for part performance on a *quantum meruit*.² So when the contract was dissolved by the servant being called away as a witness.³ In *Smith v. Hill*⁴ a firm of lawyers contracted with a client for the personal services of a particular partner. [458] It was held that if he failed to perform, though it was a breach of the contract, the damages would be but nominal if another partner had performed the stipulated service with equal professional skill and without injury to the client; that such a contract cannot be abandoned by the client upon the death of the partner whose services he has engaged, without tendering to the survivor a fair compensation for the services already rendered; and if the latter render the service with due professional skill and diligence he will be entitled to the entire fee. But the amount of recovery will be reduced by any damage sustained by the employer in consequence of the contract not being strictly and literally performed.⁵ In a New York case⁶ it is said: "This rule is equitable, and it should be applied to such cases although the servant is not to be regarded as violat-

¹ *Parker v. Macomber*, 17 R. I. 674, 24 Atl. Rep. 464, 16 L. R. A. 858; *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Green v. Gilbert*, 21 Wis. 401; *La Du-King Manuf. Co. v. La Du*, 36 Minn. 473, 31 N. W. Rep. 938; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, id. 759; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388, 24 Barb. 174; *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Met. 440; *Jones v. Judd*, 4 N. Y. 412; *Fahy v. North*, 19 Barb. 341; *Hunter v. Waldron*, 7 Ala. 753; *Greene v. Linton*, 7 Port. 133, 31 Am. Dec. 707; *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Smith v. Hill*, 13

Ark. 173; *Moulton v. Trask*, 9 Met. 577; *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82; *Clendinen v. Black*, 2 Bailey, 488, 23 Am. Dec. 149; *Callahan v. Shotwell*, 60 Mo. 398; *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. Rep. 452, 16 Am. St. 806, 6 L. R. A. 728.

² *Baird v. Ratcliff*, 10 Tex. 81.

³ *Melville v. De Wolf*, 4 El. & B. 844.

⁴ 13 Ark. 173. See the first note to § 689.

⁵ *Smith v. Hill*, 13 Ark. 173; *Walsh v. Fisher*, 103 Wis. 172, 78 N. W. Rep. 437, 72 Am. St. 865; *Allen v. McKibbin*, 5 Mich. 449.

⁶ *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

ing his contract in consequence of his inability fully to perform it by reason of his sickness or death. His failure fully to perform his contract for such cause is his misfortune and not his fault; and his employer should neither gain nor lose by it. . . . Much more might be said in favor of this rule, but it needs no vindication; it is so well grounded in good sense it sufficiently commends itself. It may be said to be a common sense rule, and common sense is the basis of all just law." In an explanatory note to this case it is said that some of the judges dissented from the idea that the person employed, not being in fault in dying, could be treated as liable to damages to compensate the employer for a reduction of the profits in the further prosecution of the work, arising from the loss of such employee's services. In such cases, however, such allowance to the employer is not strictly damages; that allowance is essential to a fair apportionment of wages earned on the basis of the contract.'

§ 688. **Same subject.** In *Jones v. Judd*¹ an action was brought by subcontractors for part of the work of constructing a canal. This contract was with the party who had contracted with the state, and their contract specified one price per yard for excavation and another for embankment, and provided that the employer might reserve ten per cent. until the final estimate. The defendant proved on the trial that [459] the work done was worth less than the contract prices, and offered to prove that the remaining work was more difficult and would be more expensive, but this evidence was rejected. The court of appeals, evenly divided on the question, held it was properly rejected; and as it appears to the writer erroneously, on the general theory of the prevailing opinion; for the plaintiffs were thus permitted to recover more than was due on the basis that the defendant was not at fault, and therefore not liable to damages. In such an adjustment the contract price, uniform for all the work, would not be due for a part relatively easier and less expensive to do. Gardiner, J., said: "If the contract had been performed by the plaintiffs they might have recovered upon the special agreement, or upon the common counts, and in either case they would be entitled to the

¹ 4 N. Y. 412.

price fixed by the agreement.¹ If the performance had been arrested by the act or omission of the defendant, the plaintiffs would have had their election to treat the contract as rescinded, and recover on the *quantum meruit* the value of their labor, or they might sue upon the agreement and recover for the work completed according to the contract, and for the loss in profits or otherwise which they had sustained by the interruption.² In this case the performance was forbidden by the state. Neither party was in default. All the work for which recovery was sought was done *under the contract*, which fixed a precise sum to be paid for each yard of earth removed without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant.³ The defendants, in the language of Judge Beardsley, 'are not by their wrongful act to deprive the plaintiff of the advantage secured by the contract.' Here there was no breach of the agreement by either party. The [460] plaintiffs could not recover profits, and the defendant cannot, consequently, recoup them in this action.⁴ Again, the plaintiffs assumed the risk of all accidents which might enhance the expense of the work while the contract was subsisting;⁵ and are entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work by state authority was an accident unexpected by either party. It was one which, under the offer, we are bound to assume was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price for what has been done unless he could demand it in case a flood had partially excavated or embanked the section of the canal to be completed by the plaintiffs."

¹ Phil. Ev. 109 (2d ed.); *Dubois v. Delaware & H. Canal Co.*, 4 Wend. 285, and cases cited.

² *Linningdale v. Livingston*, 10 Johns. 36; *Boorman v. Nash*, 9 B. & C. 145; *Masterton v. Mayor*, 7 Hill, 69.

³ 7 Hill, 71, 73.

⁴ *Blanchard v. Ely*, 21 Wend. 346.

⁵ *Boyle v. Canal Co.*, 22 Pick. 384, 33 Am. Dec. 749; *Sherman v. Mayor*, 1 N. Y. 316.

In *Fahy v. North*¹ a laborer was hired for a year, commencing in November, to work on a farm. He worked until July, when he was taken sick; he was taken care of in the employer's family, and after three weeks recovered and offered to work his time out, which the employer would consent to if the party employed would allow \$20 damages for the time lost. The court held that this claim was not admissible, and that requiring such an allowance as a condition to permitting him to resume work justified him in departing, and gave him the right to recover on a *quantum meruit*. The claim of damages seems to have been rejected because none could be claimed; not because it was excessive. On a just apportionment under such a contract, if it appeared that the services of the laborer would be more valuable during the time lost by his sickness than during other parts of his term of service, his wages for the time he served should be proportionately less; otherwise the laborer's sickness would not be his, but the employer's, misfortune. In this case the servant recovered fifty cents a month less than the employer was bound by the contract to pay him. There is an implication that this deduction was deemed wrong in the allusion of *Balcom, J.*, to this case in *Clark v. Gilbert*.² And yet the learned judge, continuing, said: "There is no case which holds [461] that where the full performance of a contract for personal services is prevented by the sickness or death of the party who was to render the services, a greater compensation can be recovered than the stipulated value on proof that the services were worth more than such value. But there are decisions that the recovery in such a case cannot exceed the contract price or the rate of it for the service performed."³ This apportionment should be so made that all loss which must result from the contract not being fully performed will fall on the party whose misfortune caused it, or by whose sickness or other providential disability its complete performance has been prevented. In other words, the compensation

¹ 19 Barb. 341.

² 26 N. Y. 283.

³ *Coe v. Smith*, 4 Ind. 79; *Allen v. McKibbin*, 5 Mich. 449. The doctrine was asserted in *Allen v. Mc-*

Kibbin that the servant cannot be permitted to gain by his sickness, nor can the employer be permitted to lose by it. See *Walker v. Norton*, 29 Vt. 230, 70 Am. Dec. 406.

for part performance should be determined on the basis of the benefit of it to the employer, regarding the obligation and consideration of the whole contract.¹ If a household servant hired for a year or any aliquot portion thereof is hurt or temporarily disabled, or falls sick whilst doing his master's business, the latter is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work;² but if he has been struck down with disease and permanently disabled, so that he can never be expected to resume work, the contract is dissolved and the master may dismiss him.³

§ 689. Same subject. In contracts for personal services for a stipulated time, whether for manual labor or where skill is required or confidence reposed, the performance can be only by the very person employed.⁴ In such cases the contract is [462] understood to be on the condition that health and life continue; and, therefore, when inability from such causes arises to commence or continue in the employment performance is excused, and for any work done there may be a recovery on a *quantum meruit*.⁵ The justice and reason of this rule are

¹ Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

In Nichols v. Coolahan, 10 Met. 449, there was a hiring by the month for stated wages, including board. After several months' work the laborer became sick and continued so for three weeks. It was held that he was not chargeable for board nor entitled to wages during that time.

In Fahy v. North, 19 Barb. 341, the employee was charged for his care and board while sick.

² A stenographer employed by the week will not be presumed to lose her wages for the time she was necessarily absent on account of sickness, there being no agreement to that effect. Mott v. Baxter, 13 Colo. App. 63, 56 Pac. Rep. 192.

³ 2 Add. on Cont., § 894; Rex v. Sudbrooke, 1 Smith, 59; Chandler v. Grieves, 2 H. Bl. 606, n.; Cuckson v. Stones, 1 El. & El. 248, 28 L. J. (Q. B.) 25.

⁴ A contract between a physician and a county requiring him to furnish medicines and surgical appliances and attend, take care of and give proper medical attention to all poor persons who might be a charge upon the county does not call for his personal services so as to prevent him from substituting another competent physician to discharge his duties while he was absent from the county because of sickness of himself and wife. Board of County Commissioners v. Bedell, 13 Co'o. App. 261, 57 Pac. Rep. 187. See § 687.

⁵ Parker v. Macomber, 17 R. I. 674, 24 Atl. Rep. 464, 16 L. R. A. 858; McClellan v. Harris, 7 S. D. 447, 64 N. W. Rep. 522, quoting the text; Britton v. Turner, 6 N. H. 481; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Lacy v. Getman, 119 N. Y. 109, 23 N. E. Rep. 452, 16 Am. St. 806, 6 L. R. A. 728;

clearly and forcibly explained by Storrs, J.:¹ "It is difficult to reconcile the reported cases on the subject of the liability of an employer of a person who is hired to labor for a specified time on wages to be paid at the expiration of that time, where such person has, without his fault, failed to labor for the whole time; or to extract from them any well defined rule. There is much confusion in them which seems to have arisen from the different views entertained by the courts on the question whether such contract of hiring is to be governed by the principle which prevails in regard to a contract to do a specific piece of work, as to build a house or a machine, for a particular sum; in which case the contract is held to be entire, and the performance of it a condition precedent to any right of action against the employer, and the non-fulfillment of it is not excused by inevitable necessity. We do not propose to examine those cases in detail. In the earliest of them it was established that the same principle applied to both of these species of contracts, and that, therefore, where the service of a person hired to labor for a specified time ceased within that time, there could be no apportionment of wages for the actual time of service, and, consequently, no recovery for the services rendered within that time. But this rigid and unreasonable rule has recently been relaxed, and it is now generally, if not universally, held that wages may in particular cases be apportioned; which, in our judgment, is much more in accordance with the true character of such a contract, the presumed intention of the parties and the demands of justice. A contract of this kind is for the personal services of the individual who is hired, and cannot be performed by the agency of another person, and in this important respect is peculiar and different from a contract by which one agrees to do a particular piece of work, as, for instance, to build a house, which may

Green v. Gilbert, 21 Wis. 401; Stewart v. Loring, 5 Allen, 306, 81 Am. Dec. 747; Powell v. Newell, 59 Minn. 406, 61 N. W. Rep. 335; Dickey v. Linscott, 20 Me. 453, 37 Am. Dec. 66; Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; People v. Manning, 8 Cow. 297; Gray v. Murray, 3 Johns. Ch. 167; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Robinson v. Davison, L. R. 6 Ex. 268; Boast v. Frith, L. R. 4 C. P. 1; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Story on Bailm., § 36, and notes.

¹ Ryan v. Dayton, *supra*.

be performed through another person. It is unreasonable to suppose that the parties in such an agreement as the former, knowing that the person hired is liable to be interrupted in his labor by the act of God or inevitable necessity, intended or expected, although there should be no express stipulation on the subject, that he should, in such an event, not only lose his services, but, as the case might be, be bound to repay his employer what he has received in payment for them. And it is obvious that the rule which would subject him to these consequences would be not only harsh but unjust. Viewing the present as a contract for the personal services of the plaintiff, and which could only be performed by himself, we think that from its nature a condition was impliedly attached to it that an inability to labor during a part of the time stipulated, produced by inevitable necessity, should so far constitute an excuse for not laboring during that period that he should not be deprived of a right to a reasonable compensation for the service performed by him under it; and that the rule that where a person by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, which, properly understood, we do not impugn is not applicable to such a contract.¹ In regard to a contract of this kind we are induced to adopt, as the most suitable and just general rule in a case, where the servant leaves the service before the end of the time for which he was hired, the one laid down by Chancellor Kent,² that unless he so leaves without reasonable cause or is dismissed for such misconduct as justifies the dismissal, he does not forfeit a right to his wages for the period for which he has served. It should be observed, however, that we do not intend to say that in such a case he would be entitled to a proportional part of the sum agreed to be paid for the whole time, and that it [464] should not be reduced so as to indemnify the employer for the loss which he has sustained by the non-fulfillment of the agreement."

The reasons which require that the servant shall be excused from a full performance when it is prevented by the act of

¹ 1 Coke, 98; *Williams v. Hide*, *bert on Cov.*, 472; *Nash v. Ashton*, *Palm.* 548; 1 *Shep. Touch.* 180; *Gil-Skin.* 42.

² 2 *Com.* 258, 259.

God also demand that the employer shall be relieved from liability under the like circumstances. Hence a contract to work as a farm laborer for one year is terminated by the death of the employer, and the servant cannot recover from the executrix of the decedent for services performed thereafter, there being no new contract of hiring.¹

§ 690. **Same subject.** Where the right to quit at pleasure is reserved in the contract of hiring, but it is stipulated that such quitting shall be preceded by notice, a sudden going away, without notice, in consequence of sickness, will not work a forfeiture of wages already earned. The stipulation for notice will be construed to apply to a voluntary leaving.² And the same rule was applied where the party hired stopped work before his time expired because he was arrested and convicted of a crime. The court say: "The stipulation [requiring two weeks' notice of intention to leave] evidently had reference only to a voluntary abandonment of the defendant's service, and not to one caused *vis major*, whether by visitation of God or other controlling circumstances. Clearly the abandonment must have been such that the plaintiff could have foreseen it. He could give notice only of such departure as he could anticipate, . . . and when it was within his power to give the notice. . . . The true and reasonable rule of interpretation to be applied to such contracts is this: To work a forfeiture of wages the abandonment of the employer's service must be the direct, voluntary act or the natural consequence of some voluntary act of the person employed, or of some act committed by him with a design to terminate the contract or employment or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment

¹ *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. Rep. 452, 16 Am. St. 806, 6 L. R. A. 728.

² *Fuller v. Brown*, 11 Met. 440.

It was held in *Hunt v. Otis Co.*, 4 Met. 464, that where one hires with no express agreement to continue in the service for any definite time, but with knowledge of a regulation adopted by the employers requiring all persons employed by them to give

four weeks' notice of the intention to quit, he does not forfeit his wages by quitting without giving the notice, but he is liable for all damages caused by not giving it; and these may be deducted from the wages in a suit therefor. See *Harrington v. Fall River Iron Works Co.*, 119 Mass. 82; *Preston v. American Linen Co.*, id. 100.

is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was to cause the termination of the employment of a party under a contract for services or labor.”¹ In a Vermont case the court [465] held that in contracts for labor, where the plaintiff is not guilty of a wilful deviation from their terms, but has failed to fulfill them, and has performed work and labor beneficial to the employer, he is entitled to recover under the general counts for work and labor; that the true rule of damages in such case is to allow for the labor according to the contract price, deducting whatever damages the employer has sustained in consequence of the work not being done according to the terms of the contract.² In *Wolfe v. Howes*³ Allen, J., said: “There is good reason for the distinction which seems to obtain in all cases between the case of a wilful or negligent violation of a contract and that where one is prevented by the act of God. In the one case the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other its exception is calculated to protect the rights of the unfortunate and honest man who is providentially, and without fault on his part, prevented from a full performance.”

This relaxation of the rule requiring full performance as a precedent condition of an entire contract where disability by sickness intervenes, or there is other involuntary prevention, shows that the rule is technical, and does not in truth rest on the principle that there can exist no legal obligation to pay except on the express terms of the contract. Full performance is not excused in such a case on the ground that it has become impossible; nor on the ground that the employer has done some act to evince an acceptance of the benefit of part performance after default, so as to subject him to the duty of paying independently of his special undertaking in the contract. Neither is the rule founded on the principle that the parties intended, except in the sense of a penalty,⁴ that bene-

¹ *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Millot v. Lovett*, 2 Dane's Abr. 461.

² *Blood v. Enos*, 12 Vt. 625, 36 Am. Dec. 363.

³ 20 N. Y. 201, 75 Am. Dec. 388.

⁴ The cases very generally treat the loss of wages earned in consequence of a failure to fulfill the entire contract as a forfeiture, and hence the

ficial part performance should not be compensated; [466] otherwise there could be no exception when default is involuntary, as where caused by sickness or death; for no party to a contract is obliged to pay another party merely because of his disability or misfortune. The loss of wages earned for failure to complete performance is treated as in some sort a penalty, but a wholesome one, to secure a faithful execution of contracts. When, therefore, there is an earnest and *bona fide* endeavor to fulfill, frustrated by sickness or other similar cause, the penalty is taken off, and the employee is then entitled to recover on a *quantum meruit*. The rule against an implied, where there is an express, promise does not apply; an exception is admitted. And this exception, being based on equitable grounds, ought to embrace, but does not, all cases where the injured party would otherwise receive a benefit from part performance beyond his actual injury. A defaulting party should not be compelled to pay damages by one measure when he fails to perform a condition precedent and is plaintiff, and another when he commits a breach of an independent stipulation of the same import and is sued upon it. There is no essential difference between a penalty stipulated to be paid if a condition of defeasance is not performed and a penalty in a sum withheld. In the former case, in equity as well as at law, the obligor is relieved from paying more than the actual damage the injured party has suffered from the deficient performance of the condition. Why should he be permitted to retain, in the other case, what is equally penalty but happens to be in his hands?¹

In several states recovery on *quantum meruit* may be had for part performance of an entire contract, though there be no

right to them will become absolute by mere waiver of the forfeiture. Thus in *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564, a laborer left his employer before the term of service expired, without consent or cause. The employer, although insisting that he did not admit his liability by offering to pay the laborer for his service at the rate he would have received if he had labored until the

end of the time agreed upon, or making a tender of the amount due at that rate, was held to have waived thereby the forfeiture of the wages for the services performed. See *Hughes v. Wamsutta Mills*, 11 Allen, 201; *Boyle v. Parker*, 46 Vt. 343; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388.

¹ See *Richardson v. Woehler*, 26 Mich. 90.

cause or excuse for its abandonment, if such performance is beneficial; and on the basis of the contract price after deducting the damages resulting from the failure to perform in full.¹ But an action cannot be brought to recover on a *quantum meruit* until the time when the wages would be due if the contract had been performed.² Where the contract of hiring is for a term, but each party reserves the privilege of putting an end to it when he pleases, the servant is entitled to recover at the stipulated rate for the time he serves although he quits upon his own motion.³ Nor is a person hired by the day to work upon a particular job required to prolong his services to complete a piece of work he has undertaken, or upon which he may happen to be employed, unless he has restricted himself by his contract.⁴ An infant will not be subjected to the loss of what he has earned by failing to fulfill an entire contract for service;⁵ but if, during the term for which he has engaged himself, he becomes of age and con-

¹ Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713; Theobald v. Burleigh, 66 N. H. 574, 23 Atl. Rep. 367; Page v. Marsh, 36 N. H. 305; Powers v. Wilson, 47 Iowa, 666; Barr v. Van Duyn, 45 id. 228; Pixler v. Nichols, 8 id. 106, 74 Am. Dec. 298; Byerlee v. Mendel, 39 Iowa, 382; Carroll v. Welch, 26 Tex. 147; Riggs v. Horde, 25 Tex. Supp. 456, 78 Am. Dec. 584; Coe v. Smith, 4 Ind. 82; Ricks v. Yates, 5 id. 115; Downey v. Burk, 23 Mo. 228; Wilson v. Adams, 15 Tex. 323; Robinson v. Sanders, 24 Miss. 391; Hariston v. Sale, 6 Sm. & M. 634; McClure v. Pyatt, 4 McCord, 22; Dover v. Plemmons, 10 Ired. 23; Eaken v. Harrison, 4 McCord, 142; Byrd v. Byrd, id. 141; Lincoln v. Schwartz, 70 Ill. 134; Dobbins v. Higgins, 78 id. 440. See Boutin v. Lindsley, 84 Wis. 644, 54 N. W. Rep. 1017.

² Hartwell v. Jewett, 9 N. H. 249; Bailey v. Wood, 17 id. 365; Thompson v. Phelan, 22 id. 339; Davis v. Barrington, 30 id. 517. See Knutson v. Knapp, 35 Wis. 86.

³ Evans v. Bennett, 7 Wis. 404; Steed v. McRae, 1 Dev. & Bat. 435; Cox v. Skeen, 3 Ired. 443; Craig v. Pride, 2 Spear, 121.

⁴ Wyngert v. Norton, 4 Mich. 286.

⁵ Van Pelt v. Corwine, 6 Ind. 363; Dallas v. Hollingsworth, 3 Ind. 537; Wheatly v. Miscal, 5 Ind. 142; Lufkin v. Mayall, 25 N. H. 82; Nickerson v. Easton, 12 Pick. 110; Vent v. Osgood, 19 Pick. 572; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Lowe v. Sinklear, 27 Mo. 308; Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690; Hoxie v. Lincoln, 25 Vt. 206; Millard v. Hewlett, 19 Wend. 301; Medbury v. Watrous, 7 Hill, 110; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Ray v. Haines, 52 Ill. 485; Whitmarsh v. Hall, 3 Denio, 375; Derocher v. Continental Mills, 58 Me. 217; Moses v. Stevens, 2 Pick. 332; Garner v. Board, 27 Ind. 323. See De France v. Austin, 9 Pa. 309; Taft v. Pike, 14 Vt. 405, 39 Am. Dec. 228; Mountain v. Fisher, 22 Wis. 93; Davies v. Turton, 13 Wis. 185; Weeks v. Leighton, 5 N. H. 343; Harney v. Owen, 4 Blackf.

tinues thereafter to work, he thereby affirms the contract and must abide by it.¹

§ 691. **Entire and apportionable contracts.** There [468] can be no forfeiture of wages under the rigorous rule which has been stated, unless there is a failure to perform some stipulated service which as a whole is a condition precedent. Whether a contract is entire does not depend on any formal arrangement of the words, but on the intention of the parties, as it is collected from the whole of it.² Contracts are entire when it is the intention that service for a specified period, or some stipulated service or work, shall be entirely performed before any part of the consideration or wages can be demanded, and then that they are to be paid in one sum. A hiring for a year for a specified sum, to be paid when the work has been done, is a plain instance of such a contract.³ The intention governs, and it is manifest that a year's work is to be performed before any wages are to be paid; nothing short of the agreed sum can be earned; it is a unit of compensation. Where a contract was made to completely repair certain chandeliers for a specified sum, and they were returned in an incomplete state, it was held that an action could not be maintained for what had actually been done.⁴ So where an attorney covenanted to pay a clerk 2s. for every quire of paper he copied, the contract was held entire as to each quire, and there could be no recovery for copying any less number of sheets.⁵ The contract of an attorney to carry a suit to its termination is an entire one, and he cannot recover for doing a part of this service and then abandoning the case, unless he is able to put the client in fault.⁶ A reward offered for the apprehension and conviction of a person cannot be apportioned;

337, 30 Am. Dec. 662; *McCoy v. Huffman*, 8 Cow. 84; *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Holmes v. Blogg*, 8 Taunt. 508; *Dunton v. Brown*, 31 Mich. 182.

¹ *Forsyth v. Hastings*, 27 Vt. 646.

² *Ritchie v. Atkinson*, 10 East, 295; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621.

³ *Stark v. Parker*, 2 Pick. 267, 13

Am. Dec. 425; *Olmstead v. Beale*, 19 Pick. 528; *Davis v. Maxwell*, 12 Met. 286; *Ewing v. Ingram*, 24 N. J. L. 520; *Cranmer v. Graham*, 1 Blackf. 406; *Jewell v. Thompson*, 2 Litt. 52.

⁴ *Sinclair v. Bowles*, 4 Man. & R. 3, 9 B. & C. 94.

⁵ *Needler v. Guest*, Aleyn, 9.

⁶ *Harris v. Osbourn*, 2 Cr. & M. 629; *Vansandan v. Browne*, 9 Bing. 402; *Nicholls v. Wilson*, 11 M. & W. 106.

it must be enforced as an entirety or not at all.¹ A contract by which an actor was to give his services as author and inventor to another for ten years in consideration of an annual salary and, under contingencies, a proportion of the profits which the employer might make, the latter having the right to terminate the employment at the end of any year, is entire.²

If the consideration is in its nature apportionable, as where it is money, and the stipulated service is to be continuous for a considerable period, or consists of a series of distinct acts, and there is no entire sum to be paid for all, nor anything in the contract inconsistent with a demand of payment as the work [469] progresses, on part performance there may be a recovery for what is done.³ Thus, where a shipwright agreed to put a ship in thorough repair, but there was no stipulation as to the time or mode of payment, it was held that he might sue for payment *pro tanto* when part of the work had been done.⁴ And where a party contracted to carry to market three kinds of lumber for different prices, and the contract was silent as to the time of payment, it was not deemed entire; delivery of the whole at market was not a condition precedent to the payment of freight, but it became due and was demandable as fast as the lumber was delivered.⁵ A contract for one year at an annual salary, payable quarterly, together with the necessary expenses of the employee, is not an entirety.⁶

The question in every case is whether the intention of the

¹ Hogan v. Stophlet, 179 Ill. 150, 44 L. R. A. 809, 53 N. E. Rep. 604; Pool v. Boston, 5 Cush. 219; Jones v. Phoenix Bank, 8 N. Y. 228; Blain v. Pacific Exp. Co., 69 Tex. 74, 6 S. W. Rep. 679; Furman v. Parke, 21 N. J. L. 310.

² Mallory v. Mackaye, 92 Fed. Rep. 749, 34 C. C. A. 653, citing, as peculiarly apposite, Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Cockley v. Brucker, 54 Ohio St. 214, 44 N. E. Rep. 590; also Larkin v. Heckscher, 51 N. J. L. 133, 16 Atl. Rep. 703, 3 L. R. A. 137; Rockwell v. Newton, 44 Conn. 333; Hulsey v. Bonsack Machine Co., 65 Fed. Rep. 864, 13 C. C. A. 180.

³ Taylor v. Laird, 1 H. & N. 266; Perkins v. Hart, 11 Wheat. 237. See May v. Gloucester, 174 Mass. 583, 55 N. E. Rep. 465.

⁴ Roberts v. Havelock, 3 B. & Ad. 404.

⁵ Dunn v. Daly, 78 Cal. 640, 21 Pac. Rep. 377; Sickels v. Pattison, 14 Wend. 257, 28 Am. Dec. 527; Ritchie v. Atkinson, 10 East, 295; Robinson v. Green, 3 Met. 159.

⁶ La Coursier v. Russell, 83 Wis. 265, 52 N. W. Rep. 176; Williams v. Luckett, 77 Miss. 394, 26 So. Rep. 967. Compare Rosenberger v. Pacific Coast R. Co., 111 Cal. 313, 43 Pac. Rep. 693.

parties was that the compensation should depend upon full performance and it is so expressed in the contract. Where such intention would seem contrary to the equity of the case, courts ought to require that it should be clearly expressed before they enforce it.¹ If an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each being considered as forming the matter of a separate agreement after it is so closed.² And this is more obviously so where the service or other thing to be done consists of distinct periods or parts, and a separate sum is agreed to be paid for each. Thus, an agreement to deliver straw at the rate of three loads in a fortnight for a specified period, at a stated price per load, was silent as to the time of payment. The party delivering was entitled to demand payment on the delivery of each load.³ But even where the compensation is by the contract to be computed at so much per month, or on some other detail, the intention may be found that the promise shall be deemed entire on one side, based on an entire consideration on the other. Where a plaintiff undertook to cure a flock of sheep and lambs at so much per [470] head for the sheep and so much for the lambs, and not to be paid anything unless he cured all, it was held there could be no recovery for any partial performance.⁴ So where a party agreed to work ten and a half months to spin yarn at three cents per run, and there was no stipulation as to the time of payment, in an action for spinning eight hundred and forty-five runs at three cents per run, he having worked only part of the time, it was held that the contract was entire for the whole period of ten and a half months, and performance of it a condition precedent; therefore the action could not be maintained.⁵

It seems generally to have been considered that a contract of hiring for a year, or a less time, for so much per month, per week or per day, silent as to the time of payment, is entire, and the wages only payable on the services being rendered

¹ Leonard v. Dyer, 26 Conn. 177, 68 Am. Dec. 382.

² Perkins v. Hart, 11 Wheat. 237. Compare Manda v. Sullivan County Club, 16 N. Y. Misc. 366, 38 N. Y. Supp. 55.

³ Withers v. Reynolds, 2 B. & Ad. 882; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621.

⁴ Bates v. Hudson, 6 Dowl. & R. 3.

⁵ McMillan v. Vanderlip, 12 Johns. 165.

for the whole time.¹ Hubbard, J., speaking of such a contract, said:² "There is no time fixed for the payment, and the law therefore fixes the time; and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part and payment on the other, and not part performance and full payment for the part performed." The cases are numerous and harmonious enough to establish this as the proper construction of this class of contracts; but it is to be observed that this construction is based more upon the policy of the rule than the intention of the parties. The amount earned can be ascertained under the contract from time to time, and in the absence of any promise to pay for the whole service in one sum at the end of the stipulated period, there would seem to be no legal impediment to a demand of instalments of wages as the benefit accrues therefrom; there is a general expectation of such payments, and a need of them.³ [471] Where wages are payable by instalments in the ratio of part performance while the work is in progress, these may be recovered as they fall due, although there is a hiring for a definite term; and if the work is abandoned without serving the full term, there can be no loss of any which is completely earned and due. There can be no recovery for an unfinished wages-period.⁴

¹ *Decamp v. Stevens*, 4 Blackf. 24; *Monell v. Burns*, 4 Denio, 121; *Lantry v. Parks*, 8 Cow. 63; *Hansell v. Erickson*, 28 Ill. 257; *Swanzy v. Moore*, 22 Ill. 63, 74 Am. Dec. 184; *Davis v. Maxwell*, 12 Met. 286; *Olmstead v. Beale*, 19 Pick. 528; *Thayer v. Wadsworth*, id. 349; *Winn v. Southgate*, 17 Vt. 355; *Reab v. Moor*, 19 Johns. 337; *Larkin v. Buck*, 11 Ohio St. 561; *Thorpe v. White*, 13 Johns. 53.

² *Davis v. Maxwell*, *supra*.

³ See 2 Smith's Lead. Cas. [*47].

In *Thorpe v. White*, 13 Johns. 53, it was held that where there is a contract of hiring for a definite period at a certain rate per day, and a part only of the time having elapsed, the parties settle the amount of the wages

which had then been earned, and the hirer gives his note to the servant for the amount, in an action on the note it is no defense that the payee had left the maker's service before the expiration of the time for which he had been originally hired; although, had there been no subsequent modification of the agreement, he could not have recovered wages until he had served the whole period agreed upon.

⁴ *Cunningham v. Morrell*, 10 Johns. 203, 6 Am. Dec. 332; *Hamlin v. Race*, 78 Ill. 422; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. Rep. 581; *Beach v. Mullin*, 34 N. J. L. 343; *Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. Rep. 292; *Seed v. Johnston*, 63 App. Div. 340, 71 N. Y. Supp. 579.

§ 692. Liability for wrongful dismissal of employee.

Where the employer prevents the servant from performing his contract the latter is entitled to recover wages for the time he has served whether the contract is entire for a longer period or not, and whether the prevention is by wrongfully discharging him, or by giving him sufficient cause to quit work of his own motion.¹ He is entitled to damages for the wrongful dismissal without cause before the expiration of the term for which he was employed.² The same rule applies when no services are performed on account of the employer's wrongful conduct; if he puts it out of the employee's power to perform the latter need not make an offer.³ But the damages will not be substantial where the employment is for such time as the employee may elect to serve unless he makes his election before or at the time of his discharge.⁴ If his time is subject to the employer's will the recovery will not be diminished by allowing compensation for such time only as he may have given to the performance of his duties.⁵ Under a contract providing for a weekly salary and that the employer might cancel it on giving one week's notice, and paying one week's additional salary, an employee who is not permitted to enter the service is in effect discharged without notice, and may recover two weeks' salary.⁶ On the breach of a contract to furnish a life support, in consideration of such services as the person entitled thereto could render, the recovery should be such a sum as, with reasonable interest and what such person could earn, would be sufficient for his support during the remainder of his life.⁷

¹ *Gates v. Davenport*, 29 Barb. 160; *Bull v. Schuberth*, 2 Md. 57; *Congregation of Children of Israel v. Peres*, 2 Cold. 620; *Manger v. Grodnick*, 3 Colo. App. 534, 34 Pac. Rep. 688; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 180, 85 N. W. Rep. 268.

² *Paige v. Barrett*, 151 Mass. 67, 23 N. E. Rep. 725; *Hildebrand v. American Fine Art Co.*, *supra*; *Pritchard v. Martin*, 27 Miss. 305; *Brinkley v. Swicegood*, 65 N. C. 626; *Adams v. Pugh*, 7 Cal. 150; *Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Pren-tiss v. Ledyard*, 28 *id.* 131; *Roberts v.*

Crowley, 81 Ga. 429, 7 S. E. Rep. 740; *Alberts v. Stearns*, 50 Mich. 349, 5 N. W. Rep. 505.

³ *Brown v. Board of Education*, 29 Ill. App. 572.

⁴ *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. Rep. 862.

⁵ *Stevens v. Crane*, 37 Mo. App. 487.

⁶ *Watson v. Russell*, 149 N. Y. 388, 44 N. E. Rep. 161, approving *French v. Brookes*, 6 Bing. 354. *Derry v. Board of Education*, 102 Mich. 631, 61 N. W. Rep. 61, was ruled on the same principle.

⁷ *Morrison v. McAtee*, 23 Ore. 530, 32 Pac. Rep. 400.

For the services actually rendered by the employee he may recover on a *quantum meruit*, treating the contract as rescinded on being discharged, or departing for good cause;¹ or he may sue on the contract and recover damages, including the wages earned, to the amount of the actual loss sustained,²

¹ *Beck v. Thompson*, 108 Ga. 242, 33 S. E. Rep. 894; *Farron v. Sherwood*, 17 N. Y. 227; *Welch v. Livingston*, 33 N. Y. Misc. 116, 67 N. Y. Supp. 149; *Purdy v. Nova Scotia Midland R. & Iron Co.*, 11 N. Y. Misc. 406, 32 N. Y. Supp. 157; *Brinkley v. Swicegood*, 65 N. C. 626; *Bull v. Schubert*, 2 Md. 57; *Given v. Charron*, 15 Md. 502; *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. Rep. 581.

Interest is not recoverable anterior to verdict or judgment. *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. Rep. 100, 9 Am. St. 164.

In the absence of dispute as to either the date of discharge or the amount of wages, the plaintiff is entitled to interest. *Laming v. Peters Shoe Co.*, 71 Mo. App. 646.

In Illinois if the contract of employment is in writing the servant may recover interest on the amount due. *Morris v. Taliaferro*, 75 Ill. App. 182.

In Ohio, where the amount recovered by the employee was reduced on appeal, interest was allowed from the date of the charge on the reduced amount to the first day of the term at which judgment was rendered. *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 615, 57 N. E. Rep. 984.

² *Shea v. Kerr*, 1 Pennewill, 530, 40 Atl. Rep. 241; *Kelley v. Louisville & N. R. Co.*, 49 Ill. App. 304; *McKinley v. Goodman*, 67 Ill. App. 374; *Trawick v. Peoria, etc. St. R. Co.*, 68 Ill. App. 156; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802, 51 Am. St. 289; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154; *French v. Cunningham*, 149 Ind. 632,

49 N. E. Rep. 797; *Worthington v. Oak & Highland Park Imp. Co.*, 100 Iowa, 39, 69 N. W. Rep. 258; *Hayworth v. Haldeman*, 14 Ky. L. Rep. 202 (Ky. Super. Ct.); *William Tarr Co. v. Kimbrough*, 17 Ky. L. Rep. 1284, 34 S. W. Rep. 528; *Baltimore Base Ball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 Atl. Rep. 279, 44 Am. St. 304, 22 L. R. A. 690; *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. Rep. 120, 27 L. R. A. 409; *Singer Manuf. Co. v. Potts*, 59 Minn. 240, 61 N. W. Rep. 23; *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. Rep. 151; *Kauffman v. Mendelsohn*, 24 N. Y. Misc. 182, 52 N. Y. Supp. 631; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504; *Allen v. Maronne*, 93 Tenn. 161, 23 S. W. Rep. 113; *Galveston County v. Ducie*, 91 Tex. 665, 45 S. W. Rep. 798; *Winkler v. Racine Wagon & Carriage Co.*, 99 Wis. 184, 74 N. W. Rep. 793; *Kennedy v. South Shore Lumber Co.*, 102 Wis. 284, 78 N. W. Rep. 567; *Schroeder v. California Yukon Trading Co.*, 95 Fed. Rep. 296; *Darst v. Mathieson Alkali Works*, 81 Fed. Rep. 284; *Mathesius v. Brooklyn Heights R. Co.*, 96 Fed. Rep. 792; *Spinney v. Hill*, 81 Minn. 316, 84 N. W. Rep. 116; *Gates v. School District*, 57 Ark. 370, 21 S. W. Rep. 1060, 38 Am. St. 249; *Crescent Horse-Shoe & Iron Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935; *Pritchard v. Martin*, 27 Miss. 305; *Stewart v. Walker*, 14 Pa. 293; *Willoughby v. Thomas*, 24 Gratt. 521; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381; *Walworth v. Pool*, 9 Ark. 394; *Fowler v. Waller*, 25 Tex. 695; *Saxonia Mining & R. Co. v. Cook*, 7 Colo. 569, 4 Pac. Rep. 1111; *Richard-*

which is, *prima facie*, the amount due under the contract. In some states if the contract of employment is void because not in writing, the servant is not limited to the price fixed in it, but may recover what his services are worth.¹ The damages cannot be increased by showing that the servant invented a new device while using the time and material of his master and that the latter has appropriated it, the intention and understanding being that it should become his property.² The employee cannot avail himself of both the remedies named. After treating the contract as in force by bringing an action upon it for damages for a wrongful discharge, he cannot [472] recover in general *assumpsit* for services actually rendered.³ And either action may be brought immediately. In the special action, however, there will be a disadvantage in some states in its being brought before the expiration of the term of employment. The full damages for that term cannot be assessed in advance. This was strikingly illustrated in a Wisconsin case. The plaintiff had been employed at an annual salary of \$2,000 to act as superintendent of a lumbering establishment for five years. He was discharged at the end of the first year, and then brought suit to recover damages in respect to the remaining four years. He had found other employment for one

son v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Nixon v. Myers, 141 Pa. 477, 21 Atl. Rep. 670.

¹Schanzenbach v. Brough, 58 Ill. App. 526, citing William Butcher Steel Works v. Atkinson, 68 Ill. 421, 18 Am. Rep. 560. See § 684, and especially Spinney v. Hill, 81 Minn. 316, 84 N. W. Rep. 116; Purdy v. Nova Scotia Midland R. & Iron Co., 11 N. Y. Misc. 406, 32 N. Y. Supp. 157; Banta v. Banta, — App. Div. —, 82 N. Y. Supp. 113.

²Gill v. United States, 160 U. S. 426, 16 Sup. Ct. Rep. 322; Baldwin v. Von Micheroux, 5 N. Y. Misc. 386, 25 N. Y. Supp. 857; Pape v. Lathrop, 18 Ind. App. 633, 643, 46 N. E. Rep. 154.

³Richardson v. Eagle Machine Works, 78 Ind. 422, 41 Am. Rep. 584; Goodman v. Pocock, 15 Q. B. 576;

Colburn v. Woodworth, 31 Barb. 381. See Watts v. Todd, 1 McMull. 26; Blun v. Holitzer, 53 Ga. 82.

The plaintiff does not, by filing the common counts, elect to sue for wages due him at the time of his discharge upon a *quantum meruit* so as to bar him from afterwards proceeding for damages accruing from a breach of the contract. "*Indebitatus assumpsit* lies upon a written contract, though it be under seal, when the plaintiff has performed, and nothing remains to be done under it but the payment of money, which payment it is the duty of the defendant under the contract to make. In such case the plaintiff need not declare specially." Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, 74, 28 N. E. Rep. 834,

year at a salary of \$1,000, and the trial having taken place while he was performing this engagement, the trial court proceeded on the presumption, as a legal one, that the state of facts existing at the time of the trial would continue through the ensuing years to the end of the contract term, and a verdict for \$4,000 was found in favor of the plaintiff. This was set aside on appeal on the ground that there could be no such presumption. Cole, J., said: "In any business the price of labor fluctuates greatly within four years; particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year \$500, and so on, would it not be unjust to say he should only recover according to the rule adopted by the jury in this case. Or suppose the value of the labor should rise so that he could obtain for his services \$2,000 or \$2,500 a year, what then would be his loss for the failure of the appellant to fulfill his contract? Still further difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? . . . As the case now stands we think he was only entitled to recover his salary on the contract down to the day of trial,¹ deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime."²

¹If the defendant defaults in pleading the assessment of damages is the trial, and not the time when such default occurred. *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. Supp. 667.

²*Gordon v. Brewster*, 7 Wis. 355; *Wright v. Falkner*, 37 Ala. 274; *Fowler v. Armour*, 24 id. 194; *Saxonia Mining & R. Co. v. Cook*, 7 Colo. 569, 4 Pac. Rep. 1111; *Mt. Hope Cemetery Ass'n v. Weidenmann*, 139 Ill. 67, 28 N. E. Rep. 834; *Wilson Sewing Machine Co. v. Sloan*, 50 Iowa, 367; *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. Rep. 1113, 23 L. R. A. 853; *Harris v. Moss*, 112 Ga. 95, 37 S. E. Rep. 123; *Pape v. Lathrop*, 18 Ind. App. 633, 46 N. E. Rep. 154; *Colburn v. Woodworth*, 31 Barb. 381; *McMullan v.*

Dickinson Co., 60 Minn. 156, 62 N. W. Rep. 120, 27 L. R. A. 409, citing the text; *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. Supp. 667, citing the text and a *dictum* in *Everson v. Powers*, 89 N. Y. 527, 528, 42 Am. Rep. 319; *Zender v. Seliger-Toothill Co.*, 17 N. Y. Misc. 126, 39 N. Y. Supp. 346; *Sommer v. Conhaim*, 25 N. Y. Misc. 166, 54 N. Y. Supp. 146; *Schroeder v. California Yukon Trading Co.*, 95 Fed. Rep. 296; *Darst v. Mathieson Alkali Works*, 81 Fed. Rep. 284. See *Hartland v. General Exchange Bank*, 14 L. T. (N. S.) 863; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Gifford v. Waters*, 67 N. Y. 80; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735; *Lewis v. Atlas Mut. L. Ins.*

There is, however, a strong and well supported dissent from this doctrine. The tendency of judicial opinion is in favor of the application of the general rule that all the damages resulting from the breach of a contract must be recovered in one action. The difficulties in the way of assessing the damages before the expiration of the time during which the contract was to run are not greater than those which exist in some other actions — notably those for personal injuries. In several states an employee who has been wrongfully dismissed must recover full damages in one suit, though it be tried before the expiration of the stipulated term of service.¹ A recent case in Massachusetts thus vindicates this doctrine: "The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action. In estimating his damages the jury have the right to consider the wages he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time. But it is not the law that damages which may be larger or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the

Co., 61 Mo. 534; Washburn v. Hubbard, 6 Lans. 11; Pritchard v. Martin, 27 Miss 305.

¹ Hamilton v. Love, 152 Ind. 641, 53 N. E. Rep. 181, 71 Am. St. 384, citing Schell v. Plumb, 55 N. Y. 592; Remelee v. Hall, 35 Vt. 582; Wake-man v. Wheeler & W. Manuf. Co., 101 N. Y. 205, 4 N. E. Rep. 264, 54 Am. Rep. 676. To the same effect, King v. Steiven, 44 Pa. 99, 84 Am. Dec. 419; Chamberlin v. Morgan, 68 Pa. 168; Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. Rep. 151; Prichard

v. Martin, 27 Miss. 305; Wilke v. Harrison, 166 Pa. 202, 30 Atl. Rep. 1125; Tarbox v. Hartenstein, 4 Baxter, 78; Eastern Tennessee, etc. R. Co. v. Staub, 7 Lea, 397; Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. Rep. 975; James v. Allen Co., 44 Ohio St. 226, 6 N. E. Rep. 246; Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319 (it seems); Sutherland v. Wyer, 67 Me. 64; Ætna L. Ins. Co. v. Nexsen, 84 Ind. 347; Morrison v. McAtee, 23 Ore. 530, 32 Pac. Rep. 400.

jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and if he did not wish to be subjected to it he should have kept his agreement.”¹ Neither does the doctrine of the *Wisconsin* case apply to the breach of a contract of employment made in consideration of the release of a claim for damages asserted by an employee against his employer, the contract covering a much longer period than the usual engagement for service—the period of the continuance of the disability. In a case of this kind there was proof of the permanent character of the plaintiff’s injuries; that he was always ready and offered to do for the defendant such work as he was able to do, and labored at that work as he was able and bound to work under the contract; and that the defendant, without any reasonable ground therefor, denied its obligation to pay the stipulated wages claimed longer than it pleased, and had disregarded the contract and dismissed the plaintiff from its service. On this state of facts Justice Gray said for the supreme court of the United States: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or resort to successive actions for damages from time to time, or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the

¹ *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. Rep. 1010. The court considered the question settled in accordance with its ruling by the cases of *Dennis v. Maxfield*, 10 Allen, 138; *Blair v. Laffin*, 127 Mass. 518, 522; *Jewett v. Brooks*, 134 Mass. 505; *Paige v. Barrett*, 151 Mass. 67, 23 N. E. Rep. 725.

value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those by the contract now sued on. In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault."¹ The recovery in such a case should be the fair and reasonable present value of the contract,² or, as more fully stated in a later case, the amount which would have been earned up to the time of the trial but for the master's wrongful act, and the present worth of what the servant would be able to earn in the future so long as he would, in the ordinary course of events, be able to perform the stipulated service, less any sums he would be able to earn in other employments.³ On the breach of a contract to maintain a servant for life in consideration of his services, the damages are not measured by the value of the services rendered over the value of the maintenance furnished for the period the contract had been performed, but by the expense of the plaintiff's maintenance which the defendant had not met before the commencement of the action, and the prospective expense thereof during the balance of the former's life.⁴ Interest is not to be computed on the damages anterior to the end of the term for which service was to be rendered.⁵ One employed at a salary guaranteed

¹ *Pierce v. East Tennessee Coal, Iron & R. Co.*, 173 U. S. 1, 16, 19 Sup. Ct. Rep. 335, approving *Eastern Tennessee, etc. R. v. Staub*, 7 Lea, 397, a similar case. To the same effect, *Brighton v. Lake Shore, etc. R. Co.*, 103 Mich. 420, 61 N. W. Rep. 550, 112 Mich. 217, 70 N. W. Rep. 432; *Stearns v. Same*, 112 Mich. 651, 71 N. W. Rep. 148; *Rhoades v. Chesapeake & O. R. Co.*, 49 W. Va. 494, 36 S. E. Rep. 209

² *Brighton v. Lake Shore, etc. R. Co.*, 103 Mich. 420, 61 N. W. Rep. 550.

³ *Stearns v. Lake Shore, etc. R. Co.*, 112 Mich. 651, 71 N. W. Rep. 148. See § 693.

⁴ *Carpenter v. Carpenter*, 66 Hun, 177, 20 N. Y. Supp. 928, citing *Schell v. Plumb*, 55 N. Y. 592.

⁵ *Hartsell v. Masterson*, 132 Ala. 275, 31 So. Rep. 616.

not to be less than a sum fixed, and who is to receive a larger sum if the business makes it, cannot, after being wrongfully discharged, recover more than the former sum if the employer was not bound to operate the factory to any given capacity or to supply materials or labor for manufacturing any stated quantity of product.¹ Where the suit is for the breach of a contract to give the plaintiff and his wife a farm and money enough to buy another of equal value in consideration of their caring for the defendant so long as he should live, the difficulty of estimating the damages is not cause for denying a recovery. The probable duration of the defendant's life may be shown by standard tables.²

[473] § 693. **Same subject.** Where the action is not tried until the period of the stipulated service has expired the plaintiff will be entitled to recover the agreed wages or salary for the whole time, but reduced by the amount which he has or might have earned by engaging to any other party during the time of the breach.³ This is not the rule, however, where

¹Kelly v. Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. Rep. 894.

²Banta v. Banta, — App. Div. —, 82 N. Y. Supp. 113.

³Baltimore Base Ball Club & Exhibition Co. v. Pickett, 78 Md. 375, 389, 28 Atl. Rep. 279, 44 Am. St. 304, 22 L. R. A. 690; Winckler v. Racine Wagon & Carriage Co., 99 Wis. 184, 74 N. W. Rep. 793; O'Neill v. Traynor, 24 N. Y. Misc. 686, 53 N. Y. Supp. 918; Holloway v. Talbot, 70 Ala. 389; Everson v. Powers, 89 N. Y. 527, 42 Am. Rep. 319; Hartsell v. Masterson, 132 Ala. 275, 31 So. Rep. 616; McCormick Harvesting Machine Co. v. Cordisemon, 101 Ill. App. 140; Bartlett v. Hawaiian Carriage Manuf. Co., 13 Hawaia, 311, citing the text; Barker v. Knickerbocker L. Ins. Co., 24 Wis. 630; Prentiss v. Ledyard, 28 id. 131; Congregation of Children of Israel v. Peres, 2 Cold. 620; Decker v. Hassel, 26 How. Pr. 528; Blun v. Holitzer, 53 Ga. 82; Fereira v. Sayres, 5 W. & S. 210, 40 Am. Dec. 496; Algeo v. Algeo, 10 S. & R. 235; McDaniel v.

Parks, 19 Ark. 671; Whitaker v. Sandifer, 1 Duv. 261; Colburn v. Woodworth, 31 Barb. 381; Shannon v. Comstock, 21 Wend. 457; Byrd v. Byrd, 4 McCord, 141; Squire v. Wright, 1 Mo. App. 172; Sprague v. Morgan, 7 Ala. 952; Davis v. Ayres, 9 id. 292; Fowler v. Armour, 24 id. 194; Martin v. Everett, 11 id. 375; Ramey v. Holcombe, 21 id. 567; Bromley v. School District, 47 Vt. 381; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Hendrickson v. Anderson, 5 Jones, 246; Williams v. Anderson, 9 Minn. 50; Horn v. Western Land Ass'n, 22 id. 233; Walworth v. Pool, 9 Ark. 394; Utter v. Chapman, 38 Cal. 659; Jaffray v. King, 34 Md. 217; Cumberland, etc. R. Co. v. Slack, 45 id. 161; Costigan v. Mohawk, etc. R. Co., 2 Denio, 609. See § 692.

In Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 586, it was held that the death of the employer, who had retained a clerk and salesman in his business for three years, occurring before the expiration of that term,

a school teacher has been wrongfully discharged, and such action has been reversed by competent authority. In that case there is no legal obstacle in the way of his performance of the contract, and he must at least offer to perform in order to recover compensation subsequent to the reversal.¹ Neither does the rule apply to a professional man if the services he was required to render did not purport to occupy all his time, but were of a character consistent with the pursuit of his profession and were expected to be discharged concurrently therewith. In such a case the recovery is measured by the contract price.² "Where a public officer or policeman entitled to a fixed salary is unlawfully removed and prevented, through no fault of his own, from performing the duties of his office, he is entitled to recover the salary, and the amount earned by him in other employment during his unlawful removal should not be deducted from the unpaid salary, even if the whole salary has been paid to another who filled the supposed vacancy."³ The usual damages are recoverable by a school teacher notwithstanding he made an unsuccessful effort to start a private school.⁴ There are, however, but few exceptions to the rule which requires that where there has been a wrongful discharge of an employee it is his duty to be reasonably diligent in the endeavor to find other employment during the time for which he claims damages from the defendant. This is required because the law discourages idleness, and on the principle that it is the duty of the injured party to reasonably exert himself to prevent or diminish damages arising from the acts of the wrong-doer.⁵ But, it has been said, the same reasoning does not

excused the further performance of the contract, and that no action could be maintained against the administrators of the employer for their refusal longer to employ such clerk. *Lacy v. Getman*, 119 N. Y. 109, 6 L. R. A. 728, 23 N. E. Rep. 452, 16 Am. St. 806.

¹ *Park v. Independent School District*, 65 Iowa, 209, 21 N. W. Rep. 567.

² *Galveston County v. Ducie*, 91 Tex. 665, 45 S. W. Rep. 798.

³ *Everill v. Swan*, 20 Utah, 56, 57 Pac. Rep. 716, citing *Fitzsimmons v.*

Brooklyn, 102 N. Y. 530, 7 N. E. Rep. 787; *Andrews v. Portland*, 79 Me. 484; *Mechem on Pub. Officers*, secs. 865, 872; *Throop on Pub. Officers*, sec. 443; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *United States v. Addison*, 6 Wall. 291; *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. Rep. 1034. *Contra*, *Leadville v. Bishop*, 14 Colo. App. 517, 61 Pac. Rep. 58.

⁴ *Worthington v. Oak & Highland Park Imp. Co.*, 100 Iowa, 39, 69 N. W. Rep. 258, citing this section.

⁵ *Van Winkle v. Satterfield*, 58 Ark.

apply to a rescission before the time fixed for the service to commence as to a discharge from the service. In the latter case the servant is presumed to be out of employment, and it is clearly his duty to accept other similar employment; but in the former case he is not presumed to be out of employment, and cannot, therefore, in reason, be required to seek other employment to cover the future period. If, however, as in the case of teachers, they are taking their vacation for rest and recreation, they cannot legally be called upon to abandon it and seek employment for the coming year.¹ The servant is bound only to use reasonable diligence in earning money elsewhere, and is not to be charged with that earned if he could not collect it; nor is he bound to continue in an employment of which the reward was precarious.² Expenses reasonably incurred in obtaining employment should be included in the damages.³ But where the plaintiff, after his discharge, was unable to find similar employment at the place where he was discharged, and removed his family to another place, the defendant was not liable for the expense thereof, "for, while the defendant was entitled to be credited by the plaintiff's net earnings, yet it may fairly claim that its proper credit shall

617, 25 S. W. Rep. 1113, 23 L. R. A. 853; *Fish v. Glass*, 54 Ill. App. 655; *Lewis v. Scott*, 14 Ky. L. Rep. 713 (Ky. Super. Ct.); *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. Rep. 661, 663, 27 L. R. A. 409; *Allen v. Maronne*, 93 Tenn. 161, 23 S. W. Rep. 113; *Kennedy v. South Shore Lumber Co.*, 102 Wis. 284, 78 N. W. Rep. 567; *The Abbie M. Deering*, 105 Fed. Rep. 400; *Ruland v. Waukesha Water Co.*, 52 App. Div. 280, 65 N. Y. Supp. 87; *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 So. Rep. 712; *Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341; *Jones v. Jones*, 4 Md. 609; *Chamberlain v. Morgan*, 68 Pa. 168; *Sutherland v. Wyer*, 67 Me. 64; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Benziger v. Miller*, 50 Ala. 206; *Baker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Shannon v. Comstock*,

21 Wend. 457; *Hecksher v. McCrea*, 24 id. 300; *Walworth v. Pool*, 9 Ark. 394; *Polk v. Daly*, 14 Abb. (N. S.) 156; § 88.

It is for the jury to say whether eighteen days is an unreasonable time for an employee to spend in trying to adjust his rights against his employer so that he might be charged with the amount he could have earned in that time. *Chisholm v. Preferred Bankers' L. Assur. Co.*, 112 Mich. 50, 70 N. W. Rep. 415.

¹ *Farrell v. School District*, 98 Mich. 43, 56 N. W. Rep. 1053.

² *Bassett v. French*, 10 N. Y. Misc. 672, 31 N. Y. Supp. 667.

³ *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. Rep. 802, 51 Am. St. 289; *Van Winkle v. Satterfield*, 58 Ark. 617, 623, 25 S. W. Rep. 1113, 23 L. R. A. 853; vol. 1, § 88.

not be diminished by any sum which he shall expend for his own purposes, or for the convenience of his family."¹

The great weight of authority is to the effect that the opportunity to be employed by another will not be presumed, but must be affirmatively shown by the defendant. While the rule here is the same as in other cases, that compensation is limited to the actual injury, and this is deemed to be [474] only the difference between the wages stipulated to be paid by the defendant and the amount the plaintiff by diligence can obtain for like service elsewhere, yet the burden is on the defendant to show the latter amount; otherwise the damages will be measured by the salary or wages agreed to be paid.²

¹Tickler v. Andrae Manuf. Co., 95 Wis. 352, 70 N. W. Rep. 292.

²Van Winkle v. Satterfield, *supra*; Kelley v. Louisville & N. R. Co., 49 Ill. App. 304; Fish v. Glass, 54 Ill. App. 655; Hamilton v. Love, 152 Ind. 641, 53 N. E. Rep. 181, 71 Am. St. 384; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. Rep. 802, 51 Am. St. 289; Farrell v. School District, 98 Mich. 43, 56 N. W. Rep. 1053; Allen v. Whitlark, 99 Mich. 492, 58 N. W. Rep. 470; Chisholm v. Preferred Bankers' L. Assur. Co., 112 Mich. 50, 70 N. W. Rep. 415; Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. Rep. 151; Bassett v. French, 10 N. Y. Misc. 672, 31 N. Y. Supp. 667; Heyer v. Cunningham Piano Co., 6 Pa. Super. Ct. 504; Winckler v. Racine Wagon & Carriage Co., 99 Wis. 184, 74 N. W. Rep. 793; Mathesius v. Brooklyn Heights R. Co., 96 Fed. Rep. 792; Rosenberger v. Pacific Coast R. Co., 111 Cal. 313, 43 Pac. Rep. 963; Priest v. Montague, 103 Mich. 516, 61 N. W. Rep. 876; Dearing v. Pearson, 8 N. Y. Misc. 269, 276, 28 N. Y. Supp. 715, citing the text; Babcock v. Appleton Manuf. Co., 93 Wis. 124, 67 N. W. Rep. 33; Dunn v. Daly, 78 Cal. 640, 21 Pac. Rep. 377; Brown v. Board of Education, 29 Ill. App. 572; School Directors v. Kimmel, 31 id. 537; Miller v. Boot &

Shoe Co., 26 Mo. App. 57; Koenigkraemer v. Missouri Glass Co., 24 id. 124; Saxonia Mining & R. Co. v. Cook, 7 Colo. 569, 4 Pac. Rep. 1111; Ansley v. Jordan, 61 Ga. 482; Roberts v. Crowley, 81 id. 429, 7 S. E. Rep. 740; Hinchliffe v. Koontz, 121 Ind. 422, 23 N. E. Rep. 271; Larkin v. Hecksher, 51 N. J. L. 133, 16 Atl. Rep. 703, 3 L. R. A. 137; Fee v. Orient Fertilizing Co., 36 Fed. Rep. 509; Costigan v. Mohawk, etc. R. Co., 2 Denio, 609; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Gillis v. Space, 63 Barb. 177; King v. Sturer, 44 Pa. 99, 84 Am. Dec. 419; Griffin v. Brooklyn Ball-Club, 68 App. Div. 566, 73 N. Y. Supp. 864; Chamberlain v. Morgan, 68 Pa. 168. See Gazette Printing Co. v. Morss, 60 Ind. 153; Williams v. Chicago Coal Co., 60 Ill. 149.

In some states the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize. Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Fowler v. Waller, 25 Tex. 695; McDaniel v. Parks, 19 Ark. 671; Huntington v. Ogdensburgh, etc. R. Co., 33 How. Pr. 416. See Whitaker v. Sandifer, 1 Duv. 261; Willoughby v. Thomas, 24 Gratt. 521.

In Kentucky the wrongful dis-

On its being shown by the defendant that the plaintiff has declined employment because he could not succeed in getting what he wanted, and that he made no effort to secure work of the kind in which he had been engaged, he is not bound to show the precise amount the plaintiff could have earned; the latter was bound to give evidence limiting the result of his failure to do his duty. Under such a state of facts there can be a recovery of only nominal damages.¹ But in Alabama such evidence does not entirely defeat the action.²

The plaintiff is not required to diminish the damages measured by the agreed wages by engaging in a different business;³ nor at a different place;⁴ nor under a contract covering a longer period than that breached by the defendant.⁵ If, however, compensation is received for services rendered in a dissimilar employment, the damages are lessened correspondingly.⁶ The employee is not bound to accept service of the employer who has wrongfully discharged him at less wages than the

dismissal of a servant does not raise a presumption of damage; hence he must allege that it will result in his being unemployed during the unexpired term of his engagement, otherwise only nominal damages can be recovered. *Lewis v. Scott*, 14 Ky. L. Rep. 713 (Ky. Super. Ct.).

¹ *Ruland v. Waukesha Water Co.*, 52 App. Div. 280, 65 N. Y. Supp. 87.

² *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 So. Rep. 712.

³ *Briscoe v. Litt*, 19 N. Y. Misc. 5, 42 N. Y. Supp. 908; *McKinley v. Goodman*, 67 Ill. App. 374 (not required to seek employment in occupations different in their general nature and character); *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *Holloway v. Talbot*, 70 Ala. 389; *Fuchs v. Koerner*, 107 N. Y. 529, 14 N. E. Rep. 445. But see *Perry v. Simpson Waterproof Co.*, 37 Conn. 520.

A teacher who has been employed to teach in a graded school is not bound to seek or accept service in an ordinary district school. *Farrell v.*

School District, 98 Mich. 43, 56 N. W. Rep. 1053.

⁴ *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609.

In an action against a labor organization for maliciously procuring the discharge of an employee, he is not bound to show, in order to recover for the time lost, that he sought employment in other localities than that in which he had been employed. *Connell v. Stalker*, 20 N. Y. Misc. 423, 45 N. Y. Supp. 1048.

⁵ *Griffin v. Brooklyn Ball Club*, 68 App. Div. 566, 73 N. Y. Supp. 864.

⁶ *Stevens v. Crane*, 37 Mo. App. 487; *School Directors v. Birch*, 93 Ill. App. 499.

A lawful discharge of an employee from a new employment does not affect his right to recover from an employer who wrongfully discharged him, if, after the lawful discharge, he obtains other employment for better wages and a longer time. *Allen v. Maronne*, 93 Tenn. 161, 23 S. W. Rep. 113.

original contract stipulated for, if to do so would be a modification of that contract and a waiver of the right to claim under it. The rejection of such an offer neither prejudices the employer's right of action nor affects the amount he may recover.¹ But an offer to continue in the same employment under the terms of the original contract, if nothing has occurred to make it degrading for the employee to do so, or he will not suffer loss or injury thereby, must be accepted; if it is refused he cannot recover for such time as he thereafter remains unemployed.² If the dismissed employee fails to secure other employment and goes to work for himself, it is held in Michigan that the value of his services is not to be deducted from his claim against his former employer.³ A more reasonable doctrine is that the employer cannot lessen the damages due by showing that the employee has performed work on his own account unless he proves that such work was incompatible with the service due under the broken contract.⁴ Where the discharged employee leased a farm, it was held that whatever sum would be reasonable wages for such service as he rendered thereon should be deducted from his recovery against his employer.⁵ The share of the profits of a business in which an employee engages may be deducted from his recovery;⁶ but if he is a member of a partnership engaged in conducting an independent business in which he has put capital, the fact that he participates in the

¹ *People's Co-operative Ass'n v. Lloyd*, 77 Ala. 387; *Whitmarsh v. Littlefield*, 46 Hun, 418; *Trawick v. Peoria, etc. St. R. Co.*, 68 Ill. App. 156; *Chisholm v. Preferred Bankers' L. Assur. Co.*, 113 Mich. 50, 70 N. W. Rep. 415; *Howard v. Vaughan-Monning Shoe Co.*, 82 Mo. App. 405; *Wilson v. Kisri*, 18 N. Z. 816.

² *Birdsong v. Ellis*, 62 Miss. 418; *Saunders v. Anderson*, 2 Hill (S. C.), 486; *Bigelow v. American Forcrite Powder Manuf. Co.*, 39 Hun, 599; *Beymer v. McBride*, 37 Iowa, 114; *Squire v. Wright*, 1 Mo. App. 172; *Wilson v. Kisri*, 18 N. Z. 816, citing the text; *Brace v. Calder*, [1895] 2 Q. B. 253.

In an action upon the contract the

defendant cannot prove an offer to give the plaintiff other employment. *Hecht v. Brandus*, 4 N. Y. Misc. 58, 23 N. Y. Supp. 1004.

³ *Harrington v. Gies*, 45 Mich. 374, 8 N. W. Rep. 87.

⁴ *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. Rep. 1113, 23 L. R. A. 853; *Gates v. School District*, 57 Ark. 370, 21 S. W. Rep. 1060; *Huntington v. Ogdensburgh, etc. R. Co.*, 33 How. Pr. 416.

⁵ *Lee v. Hampton*, 79 Miss. 321, 30 So. Rep. 721.

⁶ *Richardson v. Hartmann*, 68 Hun, 9, 22 N. Y. Supp. 645; *Toplitz v. Ullman*, 2 N. Y. Misc. 130, 20 N. Y. Supp. 863.

management of the business after his discharge does not lessen the liability of his employer unless he shows that the profits made subsequent to the discharge were the result of the personal services of such partner, in whole or in part, and, in the latter case, the percentage which resulted from such services.¹ If the plaintiff has been constantly employed since his discharge in the same occupation as before, it will be presumed, nothing appearing to the contrary, that his compensation was not less than the defendant was to pay.² The employer is not concerned with the living expenses of his employee, and the fact that they were lessened after his discharge does not affect the damages which may be recovered, the expenses forming no part of the cost of the performance of the contract.³

It has been supposed that the right to recover at the rate of the stipulated wages rests upon the fact that the service is personal, and therefore during the term the employee keeps or should keep himself in readiness actually to do the stipulated work, and is not required or at liberty to enter into any engagement inconsistent with his duties under the contract sued upon.⁴ Where the party employed stipulated to cause certain services to be performed, and was not expected or required to render them in person, and they were to be performed for a stated period for a stipulated sum, it was held that the contract was assimilated to an agreement for particular work to be performed or materials to be furnished; that the damages for the employer's breach would be the difference between the cost of the work and the amount agreed to be paid; that the employee was entitled to a *pro rata* compensation according to the terms of the contract for the time he had performed and had not been paid, and for the profits which he could have made during the residue of the time the contract had to run.⁵

[475] § 694. **Same subject.** The damages recoverable are not wages for constructive services, but compensation for being

¹ Kyle v. Pou, 96 Ga. 166, 23 S. E. Rep. 114.

² Schroeder v. California Yukon Trading Co., 95 Fed. Rep. 296.

³ Gates v. School District, 57 Ark. 370, 21 S. W. Rep. 1060.

⁴ Jaffray v. King, 34 Md. 217.

⁵ Ramey v. Holcombe, 21 Ala. 567. See Shannon v. omCstock, 21 Wend. 457.

prevented from earning the stipulated wages according to the contract. If at the beginning of the period hired for the employer refuses to take the person employed into his service, or afterwards, before the end of that period, wrongfully discharges him, there is no further duty on his part to be in readiness to perform, or to decline any engagement which would have been incompatible if the other party had kept his agreement.¹ The employer's violation of his contract to employ for a specified time or service has sometimes given a right to other damages than an equivalent for the direct wages or salary thus prevented from being earned. Thus, the defendant, residing in New Hampshire, by letter proposed to the plaintiff, who was residing in Minnesota, that if he would come to New Boston he might move into the defendant's house; that he would give the plaintiff and his wife a year's board; and he might carry on the defendant's farm on any terms he might elect; the plaintiff, accepting the offer, moved there, and an arrangement for carrying on the farm was made. On a breach of this contract, by refusing to allow him to enter upon its performance, it was held that in assessing the damages the jury might take into consideration the expenses of such removal, which were treated as part of the consideration paid by the plaintiff, and distinctly contemplated by the parties.² It is material that such expenses be incurred in consequence of the contract, and be contemplated when it is made.³ [476]

¹ *McMullan v. Dickinson Co.*, 60 Minn. 156, 62 N. W. Rep. 120, 27 L. R. A. 409, 63 Minn. 405, 65 N. W. Rep. 661, 663; *Arnold v. Adams*, 27 App. Div. 345, 49 N. Y. Supp. 1041; *Kennedy v. South Shore Lumber Co.*, 102 Wis. 284, 78 N. W. Rep. 567; *Morris Mining Co. v. Knox*, 96 Ala. 320, 11 So. Rep. 207; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Moody v. Leverich*, 14 Abb., Pr. (N. S.) 145; *Sutherland v. Wyer*, 67 Me. 64; 2 *Parsons on Cont.* 40 and note. See *Shaw v. Republic Ins. Co.*, 69 N. Y. 286; *Beckwith v. Baldwin*, 12 Ala. 720; *Williams v. Anderson*, 9 Minn. 50; *Heyer v. Cunningham Piano Co.*, 6 Pa. Super. Ct. 504.

Where S. contracted for the services of himself and son for a given time at the rate of \$50 per month, and S. alone went into the employ of the employer, and never tendered the son's services, and it was not shown that the latter was ready or willing to give them, S. could not, after being discharged before the termination of the contract period, recover for the wrongful discharge. *Hale v. Sheehan*, 36 Neb. 439, 54 N. W. Rep. 682.

² *Woodbury v. Jones*, 44 N. H. 206; *Cadman v. Markle*, 76 Mich. 448, 43 N. W. Rep. 315, 5 L. R. A. 707.

³ *Benziger v. Miller*, 50 Ala. 206.

In *Johnson v. Arnold*, 2 Cush. 46,

Where the defendant, doing business in Massachusetts, wrote to the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year," and the plaintiff accepted the offer and came, but the defendant refused to employ him, it was held that he was not entitled to recover as part of his damages either his expenses in coming from the Islands, or compensation for the time consumed in the journey.¹ The discharge of a minor in contravention of a contract made with his father entitles the latter to recover for the trouble and expense incurred in obtaining other employment for his son.² Where a deed of apprenticeship gave the master the right to discharge for a designated cause on giving a week's notice, and a dismissal was made for another cause without notice, the damages were not restricted to the value of the week's notice, but extended to all that naturally resulted from the breach, including the difficulty the plaintiff had, as a discharged apprentice, in obtaining employment elsewhere.³ A dismissal was made after four and a half months' service had been rendered under a contract which was to continue for two years, at a fixed salary and one-half the profits. The court refused

the defendant agreed with plaintiff, who lived in Massachusetts, to furnish goods to a certain amount to stock a store in Indiana for two years. The plaintiff was to take charge of the business, and to have half of the net profits. It was held that, in estimating the damages, it was competent for the arbitrators, to whom the case was referred, to allow the plaintiff compensation for the loss of time and expenses of removing his family to and from the agreed place of business, instead of the profits he would probably realize if the business had continued. The breach was the failure of defendant to fulfill his agreement, thus preventing the plaintiff from continuing the business.

¹ *Noble v. Ames Manuf. Co.*, 112 Mass. 492. Compare *Moore v. Mountcastle*, 72 Mo. 605. See *Peters v.*

Whitney, 23 Barb. 24; *Woodbury v. Brazier*, 48 Me. 302; § 80.

² *Dickinson v. Talmage*, 138 Mass. 249.

³ *Maw v. Jones*, 23 Q. B. Div. 107.

This case was followed in *Darling v. Vulcan Iron Works*, 26 Ore. 405, 38 Pac. Rep. 342. The contract there involved permitted the master to retain ten per cent. of the apprentice's wages till the expiration of the contract, to be forfeited if he left the service without the master's consent, or was discharged for wilful violation of the contract, and gave the master the right to terminate the contract at any time on paying the sum credited to the apprentice. On arbitrarily discharging him, the master was liable for that sum and also for all damages sustained by the apprentice.

to set aside a verdict which awarded a year's salary and the stipulated share of the profits for that time.¹ If an auctioneer has incurred expense in cataloguing the goods he has been authorized to sell,² or in advertising them and for his license, he may recover it on the revocation of his authority.³ In a New York supreme court case⁴ it was held by Lawrence, J., that one who relies upon a contract giving him the agency for the sale of a proprietary article and gives up his previous profitable employment may, on the failure of his employer to perform stipulations essential to success in the undertaking, recover as damages the profits lost by withdrawing from his former employment and the expenses incurred in engaging in the new enterprise, the first item to be computed only for the time and to the extent he was unable to follow his previous occupation. If the servant was to pay his own expenses in his employment they must be deducted from the damages.⁵ A superintendent of works who has been wrongfully discharged cannot recover, in addition to his salary, costs, counsel fees and expenses incurred by him in litigation with certain members of a limited partnership which was his employer.⁶ One who hires his services and property to another is entitled, after such other has prevented the performance of the contract, to the possession of the property, and if the wrong-doer has destroyed the business of the other he must respond in damages therefor.⁷

In the consideration of the certainty of damages and profits as damages a number of cases which pass upon the rights of agents to compensation on the basis of commissions on the amount of sales which might have been made but for the principal's wrongful act in terminating their employment have already been considered.⁸ The uncertainty which attends all mercantile transactions has generally induced the courts to disallow claims for compensation so far as they are based upon unearned commissions.⁹ But there are several recent cases

¹ *Smith v. Thompson*, 8 C. B. 44, 65 Eng. C. L. 44.

² *Carpenter v. Le Count*, 22 Hun, 106.

³ *Russell v. Miner*, 25 Hun, 114.

⁴ *Meylert v. Gas Consumers' Benefit Co.*, 26 Abb. N. C. 262, 14 N. Y. Supp. 148.

⁵ *Hayworth v. Haldeman*, 14 Ky. L. Rep. 202 (Ky. Super. Ct.).

⁶ *Jennings v. Beale*, 146 Pa. 125, 23 Atl. Rep. 225.

⁷ *Wilson v. Press Pub. Co.*, 14 N. Y. Misc. 514, 36 N. Y. Supp. 12.

⁸ § 69.

⁹ *Brigham v. Carlisle*, 78 Ala. 243,

which have allowed such compensation. Thus, where an agent who had agreed to sell his principal's goods within a certain district for a given time was wrongfully discharged, he was entitled to show, as bearing upon his damages, the extent and volume of his business while he acted as agent, and the extent and volume of it under the agent who succeeded him.¹ In an English case the plaintiff was employed by the defendant to introduce customers, and was to be paid a commission on all business done with the customers introduced by him. After he had received commissions the employment was terminated; but the defendant continued to do business with the customers the plaintiff had introduced, and contended that it was not liable for commissions thereon. It was ruled that there was a liability for damages, which were recoverable in a lump sum; that they were measurable by such sum as the plaintiff might reasonably have expected to have earned if he had not been discharged; but that they were assessable with reference to the chances of life, the vicissitudes of trade, the probability of the customers continuing to deal with the defendant, and other similar considerations.² The damages resulting from the breach by an insurance company of an agreement not to interfere with the business of a general agent and his sub-agents, though difficult of ascertainment, are so real as to demand reparation to such degree as the jury may award.³ In another case⁴ it was held that the damages resulting from the refusal of such a company to continue business according to its contract with an agent, and also the damages caused by

56 Am. Rep. 28; *Beck v. West Sewing Machine*, 87 Ala. 213, 6 So. Rep. 70; *Stern v. Rosenheim*, 67 Md. 503, 10 Atl. Rep. 221, 307; *Washburn v. Hubbard*, 6 Lans. 11; *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735. The authority of this case is affected by *Hirschhorn v. Bradley*, — Iowa, —, 90 N. W. Rep. 592.

¹*Pittsburg Gauge Co. v. Ashton Valve Co.*, 184 Pa. 36, 39 Atl. Rep. 223.

²*Faulkner v. Cooper*, 4 Rep. of Com. Cas. 213 (1899). *Matthew, J.*, awarded \$500 as damages.

³*Stowell v. Greenwich Ins. Co.*, 20

App. Div. 188, 46 N. Y. Supp. 802; reversed on another question, 163 N. Y. 299, 57 N. E. Rep. 480.

⁴*Stowell v. Manufacturers' & Merchants' Ins. Co.*, 61 App. Div. 58, 70 N. Y. Supp. 80. The court did not regard the cases of *Matter of English & Scottish M. Ins. Co.*, L. R. 5 Ch. 737, *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. Rep. 502, referred to *infra*, as well considered, nor as in harmony with the local law which permits the recovery of prospective profits.

its refusal to transfer to the plaintiff all existing local agencies and the business of the agencies which he had established under the contract were recoverable, notwithstanding the first item included prospective commissions, the amount of which was uncertain. As to the second claim, the court said that the evidence showed that the plaintiff suffered damage, and details were given sufficient to enable the jury, under the cases referred to,¹ to fix such damages. On the discontinuance of a business before the expiration of an employee's term of service, he being entitled, in addition to a fixed salary, to a percentage of the profits, if profits were made while the business was carried on and the amount of them is shown, it may be inferred that substantially the same result would have been obtained if the business had not been abandoned; the weight of the inference would depend upon the nature of the business. Such evidence justifies the recovery of damages based on future profits.² In a Georgia case an insurance company broke its contract with an agent by increasing its rates for policies to such a figure that he was unable to obtain any risks. He was entitled to recover what he would have earned if the rates had remained as they were fixed by the contract.³ The commissions due an insurance agent on the renewal of life policies have been held to be computable with sufficient certainty for the purpose of awarding damages.⁴ A case in the United States court of appeals, seventh circuit, decided by Judges Grosscup and Seaman (each acting on somewhat differing considerations), is not in harmony with those stated, though it is distinguishable from some of them. There the recovery of commissions by an insurance agent was denied because the contract which was breached contained no restrictions upon the company as to the risks it should take or the length of time it should continue in

¹ *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205, 4 N. E. Rep. 264, 54 Am. Rep. 676; *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. Rep. 801; *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 36 N. E. Rep. 266, and other cases in the supreme court.

² *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901, citing *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. Rep. 291; *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. Rep. 801. *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. Rep. 125, is in accord.

³ *Life Association of America v. Ferrill*, 60 Ga. 414. See *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87.

⁴ *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534.

business, the effect being that the uncertainty made an assessment of damages practically impossible, notwithstanding proof was made of the commissions received by the plaintiff from the defendant before the contract was broken.¹ Where an agent sued to recover damages for the breach of a contract of employment to sell machines on commission, the suit being brought three years before the time fixed for the expiration of the contract, it appearing that the defendant was not bound to furnish any definite number of machines, or to continue their manufacture, the damages were not measurable by the profits which the plaintiff would have made, but by the value of the contract at the time of its breach. In arriving at that value the liberty of the defendant to cease manufacturing or to furnish a limited number of machines was to be considered, as also the contingencies of business and depression of trade, as well as the probable earnings of the plaintiff in some other way.²

§ 695. **Liability of employee for violation of contract; recoupment of damages.** The employee is liable to the employer for violation of his contract of service, and damages therefor may not only be recovered by action, but may be deducted or recouped from the sums due for service in actions for their recovery.³ Although the acceptance of service performed under a contract, but not in accordance with it, waives the absolute performance of the contract as a condition precedent to the right to recover its value,⁴ the waiver does not

¹ *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. Rep. 502, 43 C. C. A. 669. In *re English & Scottish Marine Ins. Co.*, L. R. 5 Ch. 737, was approved, and *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534, was disapproved. See note 4, p. 2096.

² *Rightmire v. Hirner*, 188 Pa. 325, 41 Atl. Rep. 538.

³ *Barnes v. Sisson*, 44 Ill. App. 327; *Corey v. Eastman*, 166 Mass. 279, 44 N. E. Rep. 217, 55 Am. St. 401; *Snyder v. Walker*, 13 Ohio Ct. Ct. 93; *Lawall v. Groman*, 180 Pa. 532, 37 Atl. Rep. 98, 57 Am. St. 662; *Columbus Co. v. Clowes*, [1903] 1 K. B. 244; *Walsh v. Fisher*, 102 Wis. 172, 78 N. W. Rep. 437, 72 Am. St. 865; *Thomas*

Fruit Co. v. Start, 107 Cal. 206, 40 Pac. Rep. 336; *Leep v. Railroad Co.*, 58 Ark. 407, 25 S. W. Rep. 75; *Alberts v. Stearns*, 50 Mich. 349, 15 N. W. Rep. 505; *Still v. Hall*, 20 Wend. 51; *Harper v. Ray*, 27 Miss. 622; *Dunlap v. Hand*, 26 id. 460; *Doan v. Warren*, 4 Up. Can. C. P. 423; *Peters v. Craig*, 6 Dana, 307; *Marshall v. Hann*, 17 N. J. L. 425; *Forman v. Miller*, 5 McLean, 218; *Swift v. Harriman*, 30 Vt. 607; *Peters v. Whitney*, 23 Barb. 24. See section on Recoupment and Counterclaim. See *contra*, *N. & K. Turnpike Co. v. Harris*, 8 Humph. 558.

⁴ *Tickler v. Andrae Manuf. Co.*, 95 Wis. 352, 70 N. W. Rep. 293.

necessarily extend to the right to recover for the injury caused by the breach of the contract. "If the employer, either expressly or impliedly, accept the service as a performance of the contract, he cannot recover for its improper performance, but if he merely accept it as all that he can get toward a performance, he may sue for the injury caused by a breach of the undertaking or recoup his damages in an action for the value of the service, notwithstanding he may have waived, by accepting it, his right to insist upon full performance as a condition precedent to recovering anything."¹ The right to recover or recoup damages exists where the employee by dishonesty compels his employer to discharge him; in such a case he is regarded as having voluntarily refused to comply with his contract.² Such right is not affected where the employee leaves his employment without notice and goes on a strike, by an agreement made between the parties interested settling the differences which led to the strike.³ Where an overseer, employed at a stipulated sum per annum, was sick a part of the time so as to unfit him for active duty, but was permitted to remain in the service up to the end of the year, he was held entitled to *pro rata* compensation, and it was declared as a general principle that if the employer had been injured by the imperfect performance of the overseer's undertaking damages adequate to the injury should be recouped.⁴ And this kind of de-

¹ Ewing v. Janson, 57 Ark. 237, 21 S. W. Rep. 430, citing Wiley v. Athol, 150 Mass. 426, 23 N. E. Rep. 311, 6 L. R. A. 342; Phillips, etc. Co. v. Seymour, 91 U. S. 646; Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. In accord, Hattin v. Chase, 88 Me. 237, 33 Atl. Rep. 989; Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36; Button v. Russell, 55 Mich. 478, 21 N. W. Rep. 899.

² Fuqua v. Massie, 95 Ky. 387, 393, 25 S. W. Rep. 875.

³ Ayling v. London & India Docks Committee, 9 T. L. Rep. 409.

⁴ Hattin v. Chase, 88 Me. 237, 33 Atl. Rep. 989; Hunter v. Waldron, 7 Ala. 753; Jones v. Dyer, 16 id. 221;

McLane v. Miller, 12 id. 643; McCracken v. Hare, 2 Spear, 256; Farnsworth v. Garrahd, 1 Camp. 38; Marshall v. Hann, 17 N. J. L. 243.

In the last case it appeared that H. engaged to M. as a glass blower, with a specification of his services, duties and compensation; it was also stipulated that for every wilful neglect or refusal to blow, flatten or do other work customary, etc., the person so neglecting or refusing should pay to M. the sum of \$10. In an action for services, it was held competent for the defendant to show that the services had not been performed in the manner agreed on, and that these penal sums, being in the nature of liquidated damages,

[477] fense may be made for unfaithful service against wages in a proceeding to enforce a lien.¹ In an action by the father for the services of his sons, on an answer that they had been engaged for a specific time and broke their contract, it was held that the defendant had a right to show the damages from such a breach to reduce the recovery.² So in an action for work and labor against a manufacturing company, it appearing that the plaintiff was subject to a regulation requiring all persons in the company's employ to give four weeks' notice of their intention to leave the service, and had departed without doing so, it was held that the defendants were entitled to a deduction from the plaintiff's claim of the damages sustained by reason of his breach of the contract.³ In an action by a factor against his principal to recover a general balance the defendant was allowed to prove in mitigation of damages that the plaintiff had orders to sell the goods consigned immediately, and that they might have been sold in compliance with such order for more than sufficient to put the plaintiff in funds to the amount of his shipments and all costs and charges; and it was held that such a defense would be a bar to all commissions, interest, storage and other charges caused by such negligence and breach of orders.⁴

According to the weight of American authority the employer may obtain by way of recoupment damages, either direct or consequential, estimated by the same standard or measure as in an action for breach of the servant's contract.⁵ An attorney for a mortgagee who is negligent in examining the title to the land mortgaged is subject to immediate suit

might be set off against the plaintiff's claim. See *Spalding v. Vandercook*, 2 Wend. 431.

Where the counter-claim alleged that if an abstract of title had been made in time the defendant would have been enabled to borrow money on his property and with such money would have been able to purchase land for which he was negotiating, which subsequently increased in value to a large extent over what it would have cost him, the claim was held to be for damages which were

too remote. *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. Rep. 659.

¹ *Ward v. Wilson*, 3 Mich. 1.

² *Lowen v. Crossman*, 8 Iowa, 325.

³ *Hunt v. Otis Co.*, 4 Met. 464. See, as to stipulated damages in such a case, § 292.

⁴ *Dodge v. Tileston*, 12 Pick. 328; *Montrou v. Jefferys*, 2 C. & P. 113.

⁵ *Railroad Co. v. Smith*, 21 Wall. 255; *Lufburrow v. Henderson*, 30 Ga. 482; *Ward v. Fellers*, 3 Mich. 281; § 188.

and liable for the difference in value between the security contracted for and that which was received. In such a case the breach of duty is the cause of action.¹ On the refusal of laborers for three days to go to work with a non-union workman, such refusal being the result of a preconcerted course of action, the employer may recover substantial damages for the breach of contract.² The damages for the breach of a contract to render service is the amount required to be paid to supply the place of the party pending the contract,³ unless it is made to appear that a supply could not be obtained or that the person who broke the contract had superior qualifications for the work.⁴ In a late English case the defendant was employed to prepare plans for a building to be erected by the defendants on a site owned by them. By reason of neglecting to measure the site, the plans were prepared on the assumption that the site was smaller than it was in fact. After having paid for the plans the plaintiffs found themselves unable to build on the site, and, after having sold it, discovered the error in the plans. In an action to recover the money paid for them, or, in the alternative, for damages, it was ruled that there was not a total failure of consideration, but that the defendant, having been negligent, was liable for damages; under the facts these were nominal.⁵ Where the vendor of sheep agreed with the vendee that if the disease known as "scab" should break out among the sheep sold he would at once treat and cure them so that they should not be injured thereby, and breached his contract, he was liable for the difference between the value of the sheep in their diseased condition and what their value would have been had they not been diseased. In answer to the contention that the damages were such sum as it would reasonably cost to procure treatment for the sheep, the court said there were two reasons against it: First, if the defendant, when notified that the sheep were affected, did not refuse to treat them or procure some one to do so, the plaintiff

¹ *Lawall v. Groman*, 180 Pa. 532, 37 Atl. Rep. 98, 57 Am. St. 662. 610, affirmed without opinion, 52 Ohio St. 663.

² *Bowes v. Press*, 10 T. L. Rep. 55. ⁴ *Haskell v. Osborn*, 33 App. Div. 127, 53 N. Y. Supp. 361.

³ *Fordyce v. Easthope*, 10 Ohio Dec. ⁵ *Columbus Co. v. Clowes*, [1903] 1 K. B. 244.

had the right to wait a reasonable time to give him an opportunity to perform his contract before taking other steps to have them treated; and, second, because the plaintiff did not know how to treat the sheep and could not procure treatment for them.¹

In an action for the breach of a contract to work on a farm evidence of damage accruing to plaintiff's crops in consequence of the defendant leaving his service is inadmissible, the loss being too remote.² The employer may set up as a ground of recoupment, not only want of diligence or skill, but even the torts of the person employed which involve a breach of duty in his employment. In an action brought upon a promissory [478] note given for work done by the plaintiff for the defendants, the defense was permitted by way of recoupment that while the plaintiff was in the defendants' employ as their servant, they were possessed of drawings, plans, models and patterns of steam-engines, etc., which had names, numbers and marks inscribed on them so as to identify them; and that the plaintiff, contrary to his duty as such servant, destroyed the drawings and plans, and obliterated the names, numbers and marks of the plans, models and patterns. The damages, however, were restricted to compensation; it was held that nothing could be allowed on account of the malice with which the wrong was done.³ The defendant may plead in an action for work and labor done in cutting trees the damages sustained by

¹ *Burnham v. Meredith*, 91 N. W. Rep. 553 (Neb.).

² *Peters v. Whitney*, 23 Barb. 24; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. Rep. 507; *Prosser v. Jones*, 41 Iowa, 674; *Macy v. Peach*, 2 Kan. App. 525, 44 Pac. Rep. 687.

There is not sufficient connection between unskilfulness in performing labor by a servant and the loss of the lease of a farm by the employer to make the former liable therefor. *Hartman v. Rogers*, 69 Cal. 643, 11 Pac. Rep. 581.

On the breach of a contract to act as agent for the sale of an article after entering upon the agency the principal elements of the damages

sustained by the other party are the expense of procuring another agent and the increased expense of selling the article direct to customers. The fact that the price of the article is reduced is not ground for making the difference in the price before and after the breach the basis of the recovery. *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. Rep. 238.

³ *Allaire Works v. Guion*, 10 Barb. 55; *Brigham v. Hawley*, 17 Ill. 38; *Lee v. Clements*, 48 Ga. 128; *Satchwell v. Williams*, 40 Conn. 371; *Fowler v. Payne*, 49 Miss. 32; *Conger v. Fincher*, 28 Ill. 347; *Wilder v. Stanley*, 49 Vt. 105.

the plaintiff's negligence in permitting fire to escape, whereby property was destroyed and expense incurred in preventing greater damage.¹ Where a servant who lived in his master's family seduced his daughter and got her with child, the damages resulting to the master were the subject of recoupment against an action for wages.² It is not a defense to an action for wages that the employee has so misconducted himself as to injure a third person, thereby exposing his master to liability for damages, if the latter has not been found liable therefor.³

The omission to set up the defense of recoupment was held in one case in England to be a bar to an action for the same matter;⁴ but that is not the law in this country. Here matter of recoupment which constitutes a cross-claim for which a separate suit could be brought may be used as a defense or not at the election of the defendant. But if set up in a plea or notice, and the defense is offered on the trial, the judgment will be a bar, even though the defense be disallowed.⁵

¹ *Branch v. Chappell*, 119 N. C. 81, 25 S. E. Rep. 783 (two judges dissented).

² *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246.

³ *Merlette v. North & East River Steamboat Co.*, 13 Daly, 114.

⁴ *Kist v. Atkinson*, 2 Camp. 63.

⁵ *Fabricotti v. Launitz*, 3 Sandf. 743; *McLane v. Miller*, 12 Ala. 643; § 189.

CHAPTER XVI.

CONTRACTS FOR PARTICULAR WORKS.

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SECTION 1.

EMPLOYER AGAINST CONTRACTOR.

[479] § 696. Nature of the contract. Contracts of this sort do not contemplate service by particular persons as the chief object, but the accomplishment of certain results, by work, or work and material, as the making of a carriage or the erection of a building. The labor and materials are but means or instrumentalities of the contractor, and are at his discretion,

except as they are prescribed, as they often are, to more certainly insure the required product. Such contracts are fulfilled by any service or means, in the absence of stipulations on that subject, if the end contracted for is attained.

§ 697. **General rule as to contractor's liability.** The rules for the assessment of damages, being based on the principle of compensation, are closely analogous to those which apply to executory contracts for the sale of personal property. If there is a total breach by the contractor only nominal damages can be recovered where the thing to be done or produced would be of no value to the employer, or if damage is merely possible or conjectural.¹ Thus, the plaintiff leased to the defendant certain premises, naming no term, and reserving no rent, the lessee covenanting to sink an oil well on them of a prescribed depth, by a certain day, and to pay a fixed price per cord for the wood standing on the lot; a right of re-entry was reserved on breach of the covenant. The defendant having failed to sink the well, the court, on con- [480] sideration of the improbability of injury to the lessor, held that only nominal damages could be recovered.² It was said: "The measure of damages is to be sought in the contract made by the parties; and where the amount of compensation is not fixed by the contract³ the natural approximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages. Where compensation is to be made to the plaintiff by delivery of an article of value, the value of the article is the loss sustained by the plaintiff if the contract is broken. So where a defendant for a compensation paid should agree to build a house for the plaintiff, the value of the house would measure the damages if the defend-

¹ *Adams Exp. Co. v. Egbert*, 36 Pa. 360, 78 Am. Dec. 382; *Petrie v. Lane*, 67 Mich. 454, 35 N. W. Rep. 70; *Patrik v. Colorado Smelting Co.*, 20 Colo. 268, 38 Pac. Rep. 236; *Kenderdine Hydro-Carbon Fuel Co. v. Plumb*, 182 Pa. 463, 38 Atl. Rep. 480; *Brighton v. Auston*, 19 Ont. App. 305.

The same principle applies where there is a partial breach of a contract to do a designated piece of work.

Carroll v. Caine, 27 Wash. 402, 67 Pac. Rep. 993.

² *Chamberlain v. Parker*, 45 N. Y. 569.

³ Contracts stipulating the damages from delay in completing particular works have been upheld in several recent cases. *De Graff v. Wickham*, 89 Iowa, 720, 52 N. W. Rep. 503; *Lincoln v. Little Rock Granite Co.*, 56 Ark. 405, 19 S. W. Rep. 1056. See § 290.

ant omitted to perform the contract. In these and like cases it is easily seen that actual pecuniary loss has been sustained in consequence of the default of the defendant. But there may be loss, in a legal sense, sustained by the plaintiff from the breach of a contract by the other party, although it could be seen that the performance would have not benefited but might have injured him. If the owner of land employs and pays another to perform a certain act upon it, or to erect a certain structure, it would be no defense to an action by the employer for the breach of the contract to show that the act to be done, or the erection to be made, would injure the land or impair its value. The owner would be entitled to recover the value of the work and labor which the defendant was to perform, although the thing to be produced had no marketable value. A man may do what he will with his own, having due regard to the rights of others, and if he chooses to erect a monument to his caprice or folly on his premises, and employs and pays another to do it, it does not lie with a defendant who has been so employed and paid for building it to say that his own performance would not be beneficial to the plaintiff. . . . The contract on his (the defendant's) part to dig the well, . . . if performed, could result in no benefit to the lessor, except in the possible contingency that after the well was dug the default of the defendant in paying [481] for the standing timber on the premises, according to his undertaking in the lease, might enable them to re-enter on the premises. The whole production of the well, if oil should be found, would belong to the defendant for all time, unless the possible ground of forfeiture should occur, just suggested. If this contingency happened it might be delayed until the supply of oil in the well was exhausted and the possession of the well had become of no value. The loss or gain in sinking a well was wholly the defendant's. It may be conjectured that the lessor had in view some advantage to other property in the vicinity from the prosecution of the work of exploration by the defendant. There are no facts shown authorizing this inference, and such a ground of damage, if averred, would be speculative and conjectural, and could furnish no satisfactory basis for a recovery. The defendant was not paid for digging a well for the plaintiff on his premises.

The well, when dug, would be upon the land of the defendant, and its product would be his. It is idle to say, and the law does not require it to be said, in face of the obvious facts, that the lessors have been damaged to the extent of the cost of digging the well by the defendant's default. . . . It is not probable that any authority can be found precisely in point; but the rule which has been held by the English courts in several cases, to the effect that in an action of covenant by lessor against lessee for non-repair of the demised premises under an unexpired lease the proper measure of damages is not the amount required to put the premises in repair, but the amount in which the reversion is injured by the premises being out of repair, tends to support the conclusion that the rule of damages adopted in this case [the amount it would cost to bore such a well] was erroneous."¹

§ 698. **Same subject.** The rule which is applied when there is a breach of a contract to deliver personal property governs the damages recoverable on the failure to publish an advertisement in a prescribed manner, if its publication in substantially that way can be obtained. If that is not shown to be impracticable it will be presumed that it can be done, and the price paid will be the measure of damages.² A larger measure of liability has been imposed in an English case,³ and in a later case in the same court which decided the case stated.⁴ A general statement of the rule which applies as between a contractee and contractor, on a breach by the latter, is that the former is entitled to such damages as will be equivalent to the benefit which he would derive from having a full performance of the contract.⁵ Where a defendant had agreed to build a house for the plaintiff, for which he covenanted to convey to the defendant a house and lot, for a neglect to build the [482] measure of damages is the difference in value between the

¹ Doe v. Rowland, 9 C. & P. 734; Smith v. Peat, 9 Ex. 161; Turner v. Lamb, 14 M. & W. 412; Payne v. Haine, 16 id. 541.

² Tribune Co. v. Bradshaw, 20 Ill. App. 17. See Stevens v. Gale, 113 Mich. 680, 72 N. W. Rep. 5.

³ Marcus v. Myers, 11 T. L. Rep. 327, stated in note to § 61.

⁴ World's Columbian Exposition Co. v. Pasteur-Chamberland Filter Co., 82 Ill. App. 94, stated in note to § 61.

⁵ Springfield Milling Co. v. Barnard & Leas Manuf. Co., 81 Fed. Rep. 261, 26 C. C. A. 389.

house and lot to be conveyed and the house to be built.¹ A plaintiff agreed to let the defendants have all the pine timber on his land that was suitable for good lumber; they agreed to saw the same into lumber and sell it as soon as they could; to

¹Laraway v. Perkins, 10 N. Y. 371; Mayor, etc. v. Second Avenue R. Co., 102 id. 572, 55 Am. Rep. 839, 7 N. E. Rep. 905; Morrell v. Long Island R. Co., 15 Daly, 127; Cincinnati & S. R. Co. v. Carthage, 36 Ohio St. 631; Taylor v. North Pacific Coast R. Co., 56 Cal. 317; Louisville, etc. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. Rep. 404; Baker Transfer Co. v. Merchants' Refrigerating & Ice Manuf. Co., 12 App. Div. 260, 42 N. Y. Supp. 76; Neale v. Smith, 61 Ark. 564, 33 S. W. Rep. 1058; Sherman v. Connor, 88 Tex. 35, 29 S. W. Rep. 1053; Gray v. Reed, 65 Vt. 178, 26 Atl. Rep. 526.

A provision in a policy giving insurer the right to rebuild, if it is availed of, converts the policy into a building contract. If the insurer does not wholly complete the building he is liable for such sum as will finish it. Morrell v. Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

In Kidd v. McCormick, 83 N. Y. 391, the plaintiff covenanted to convey lots to the defendant, who was to give a bond and mortgage on each lot to secure the purchase-money; he also agreed to erect a house upon each, plaintiff to make advances as work on the houses progressed, and to be repaid out of the mortgage. Subsequently, and after building was begun, the vendee negotiated a loan of G., which was secured by a mortgage upon a portion of the lots. All the parties agreed that a certain part of the moneys loaned should be deposited as collateral security for the completion of the houses, and that the last mentioned mortgage should have priority over that given to the plaintiff. The dwellings were not

completed, and after the time fixed for erecting them the vendee abandoned the premises, and plaintiff went on and completed the buildings. The question as to the measure of damages arose in an action to reach the trust funds. After stating the general rule as it is given in the text, Folger, C. J., said: "I am aware that there has not been harmony in the expressions of learned judges in passing upon the question of the measure of damages. I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at, rather than in the rule that was to govern. Stated in its broadest form the plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed. With more particularity, he has a right to a house as good as that which the defendants agreed to furnish; and his damage is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, what it did in fact cost to finish it. But these ways all lead to the same end; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be ob-

saw no other lumber until it was done, and to pay the plaintiff annually in money one-fifth of the gross proceeds of the lumber sold and collected by them. For breach of this contract by failing and refusing to saw all the timber on the plaintiff's land, it was held that but one action would lie, in which, although the time of performance may not have elapsed, he would be entitled to recover damages for the continued and prospective failure of performance, to be assessed on the basis of the value at the time of the breach. And the measure of his recovery would be the profits which would have accrued to him from the performance of the contract, to be ascertained by deducting the value of the timber left unsawed from one-fifth of the value of the lumber which it would have made.¹ On the breach of a contract to keep ice ponds, used for putting up ice, flooded, there may be a recovery of the value of the ice that could have been put up with reasonable diligence.² On a con-

served of the last-named kind of testimony, first, that the plaintiff is not under obligation to go on and finish the house; second, that he cannot always finish it, as he could not in the case at hand, at the day called for by the contract, when there will come into the damages the element of loss from delays; and third, that the cost of actual building may have increased after the day of performance, and so be a detrimental gauge of damage for the defaulting contractor. . . . The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, rentable, and so productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums. He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of completed houses by a purchase in the market. The work needed to complete was one of

time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent. It is plain to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to G., and lose interest on his own mortgages, and pay taxes and premiums. To put him in as good predicament as he would have been had the buildings been done on the 1st of September, 1877, he should have the difference in value between the buildings thrown on his hands unfinished, and the houses as they would have been if completed according to the contract."

¹ *Fail v. McRee*, 36 Ala. 61; *Whalton v. Aldrich*, 8 Minn. 346; *McGovern v. Lewis*, 56 Pa. 231, 94 Am. Dec. 60; *Houser v. Pearce*, 13 Kan. 104; *Robinson v. Bullock*, 66 Ala. 548; *Leonard v. Beaudry*, 68 Mich. 312, 36 N. W. Rep. 88.

² *Farr v. Griffith*, 9 Utah, 416, 35 Pac. Rep. 506.

tractor's failure to perform the contractee may recover at least the difference between the contract price and the compensation he is obliged to pay under a new contract for the same work.¹ If there has been a part performance of a contract to build a factory in consideration of a conveyance of land, in an action to foreclose a mortgage given to secure performance of the contract the measure of the plaintiff's damages is the difference between the value of the land, considering all that was done in performance of the contract, and what the value of the land would have been if the contract had been fully performed.² In a case which arose in Ontario the plaintiff had paid the defendant, in pursuance of a contract, a bonus for carrying on a factory, which he bound himself to conduct for ten years, but which ceased at the end of six years. It was a term of the contract that the instalment of the bonus due each year should cease if the business terminated within five years; but no provision was made for the return of any bonus paid. The damages were not assessable on the principle of an apportionment of the bonus with reference to the term and the period for which the business had been carried on.³ The measure of recovery by a contractor for the transportation of mails against his subcontractor is such sum as will protect him from actual loss and place him in his original situation. The subcontract is not renewed by the resumption of service by the contractor under his original agreement with the government.⁴ On the refusal of a bidder, whose bid has been accepted, to perform the work interest from the time of bringing suit may be recovered on the difference between the amount of his bid and the sum the plaintiff paid to have the work done.⁵ The employer cannot increase his recovery by the neglect of reasonable precautions,⁶ nor is he bound to take

¹ *Goldsboro v. Moffett*, 49 Fed. Rep. 213; *Forsyth v. Mann*, 68 Vt. 116, 34 Atl. Rep. 481, 32 L. R. A. 788; *Nichols v. Superior*, 109 Wis. 643, 85 N. W. Rep. 428; *Griffin v. Ogletree*, 114 Ala. 343, 21 So. Rep. 488; *Anderson v. Nordstrom*, 60 Minn. 231, 61 N. W. Rep. 1132.

² *Ironton Land Co. v. Butchart*, 73 Minn. 39, 75 N. W. Rep. 749.

³ *Brighton v. Auston*, 19 Ont. App. 305.

⁴ *Woodlief v. Logan*, 51 La. Ann. 1935, 26 So. Rep. 627.

⁵ *McCormack v. Lynch*, 69 Mo. App. 524.

⁶ *Hensen v. Beebe*, 111 Iowa, 534, 82 N. W. Rep. 942; *Anderson v. Nordstrom*, 60 Minn. 231, 61 N. W. Rep. 1132.

the burden off the defendant by executing the contract himself on better terms than it calls for.¹

Where the defendant agreed to pull down and remove buildings and to build a new structure on their site, and the plaintiff agreed to grant him, as a consideration for so doing, a lease of the land and buildings at a stated rent for a long term, and nothing was done in execution of the contract except to pull down and remove the buildings, and the plaintiff, after the default, re-entered under the contract, such re-entry did not exonerate the defendant from damages previously sustained. After the re-entry the plaintiff relet the premises at the best rent obtainable. Kennedy, J., said the damages were to be assessed upon well recognized principles. They must be such as flowed naturally and, under the circumstances, necessarily from the breach of contract, and must be such as might reasonably be shown to have been in the contemplation of the parties when they contracted. Subject to these rules the plaintiff was entitled to have his damages assessed at the pecuniary amount of the difference between his state upon the breach and what it would have been if there had been no breach. If the defendant had performed this contract before the date of re-entry, the old building would have been removed and a new and valuable structure erected on the site, and if he had then failed to complete the plaintiff would have had no difficulty in getting some one to take up the undertaking on at least as profitable terms. But, as it was, the plaintiff had only been able to relet on terms involving a loss of 7,200 $\frac{1}{2}$ %, for which the defendant was liable. *Oldershaw v. Holt*² was the case most in point, and there it was held, it being a case of re-entry after neglect to build, that the jury might properly give a verdict on an estimate of the plaintiff's real damage, taking into con-

If the employer has furnished tools and material to the employee for the purpose of executing his contract, and could use them in carrying out the same after the breach occurred, he was bound to do so, and the contractor is entitled to the value of their use. That obligation does not require that such tools and material should be used for that purpose to

the exclusion of the use of other tools provided for the express purpose of using them in the work the contractor was to do. *Baker Transfer Co. v. Merchants' Refrigerating & Ice Manuf. Co.*, 12 App. Div. 260, 42 N. Y. Supp. 76. See § 702.

¹ *Anderson v. Nordstrom*, *supra*.

² 12 Ad. & E. 590.

sideration an increased rent secured by the agreement made with a new lessee. Upon the same principle it was right in this case to consider the reduced rent which the plaintiff had been obliged to accept from a new contractor.¹

§ 699. Defects in work must be remedied. The measure of damages for breach of contract for putting up particular work, as, for instance, a steam boiler, by doing it unskilfully or with defective material, is the difference between its value in its defective condition and what its value would be if completed in compliance with the contract. This latter sum may be more or less than the contract price, but it is obviously the proper standard by which to measure the damages of the employer, because a boiler so completed is exactly what he is entitled to;² then the contractor obtains just what his defect-

¹ *Marshall v. Mackintosh*, 14 T. L. Rep. 458 (1898).

² *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 408, 52 N. E. Rep. 621; *Wagner v. Allen*, 174 Mass. 563, 55 N. E. Rep. 320; *Pinches v. Swedish Lutheran Church*, 55 Conn. 183, 10 Atl. Rep. 264; *Mack v. Snell*, 140 N. Y. 193, 35 N. E. Rep. 493; *Chamberlain v. Hibbard*, 26 Ore. 428, 38 Pac. Rep. 437; *Deberry v. Young*, 1 Tenn. Cas. 51; *Bush v. Jones*, 2 Tenn. Cas. 224; *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 133, 81 N. W. Rep. 136; *Arndt v. Keller*, 96 Wis. 274, 71 N. W. Rep. 651; *Walter v. Hangen*, 71 App. Div. 40, 75 N. Y. Supp. 683; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. Rep. 271; *More v. Arnfield*, 15 Pa. Super. Ct. 140; *Eaton v. Gladwell*, 121 Mich. 444, 449, 80 N. W. Rep. 292; *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. Rep. 621; *Short v. Moore*, 19 Ky. L. Rep. 1225, 43 S. W. Rep. 211; *White v. Brockway*, 40 Mich. 209; *White v. McLaren*, 151 Mass. 553, 24 N. E. Rep. 911; *Mack v. Sloteman*, 21 Fed. Rep. 109; *Leathers v. Sweeney*, 41 La. Ann. 287, 5 So. Rep. 662; *Florence Oil & Refining Co. v. Farrar*, 119 Fed. Rep. 150, 55 C. C. A. 656, citing the

text; *Norway Plains Savings Bank v. Moors*, 134 Mass. 129.

In the last case the defendant borrowed money on houses in process of erection, and covenanted that they should cost not less than a stated sum and should be finished in a good and workmanlike manner. There having been a breach of the contract, it was ruled in an action by the mortgagee that the measure of damages was the difference between the value of the houses as they were to be and their value as they were left, not exceeding the amount due on the mortgage. The time for determining the damage was when the houses were left as finished, or as soon afterwards as plaintiff had notice, or might have had it, of their condition. See *Lamoreaux v. Rolfe*, 36 N. H. 33; *Colton v. Good*, 11 Up. Can. Q. B. 153.

On objection being made to the use of material on the ground that it was not first class, it was agreed that if it was not first class the employer need not pay anything for it. On its being proved that the material was not up to the standard, the employer was entitled to have deducted the reasonable value of the material

ive work is worth. Substantially the same measure is allowed when the rule is stated, as it sometimes is, that the contractor is liable to damages for the reasonable cost and expense, after his default, of procuring to be done any specific work [483] which he undertook to do and has not done; or to cure defects in his work when that is a prudent and practicable method of removing objections.¹ In determining the value of the article or thing made, the fair value of it to the employer is to be considered.² Expenses necessarily incurred because of the existence of defects in the work done may be recovered.³

of the quality contracted for, and not merely the value of the material used. *Wheaton v. Lund*, 61 Minn. 94, 63 N. W. Rep. 251.

Where the owner of a garment takes it to the vendor to have it altered and the alterations result in making the garment so small that it cannot be worn, the damages are not measured by the full value of the garment, but by the cost of making it fit and suitable for the owner's wear, this representing the difference between the value of the cloak in its existing condition and the value it would have had if the alterations had been properly made. *May v. Georger*, 21 N. Y. Misc. 622, 47 N. Y. Supp. 1057, citing the text, and reversing *May v. Gunther*, 20 N. Y. Misc. 659, 46 N. Y. Supp. 379.

¹ *Weed v. Draper*, 104 Mass. 28; *Pittsburg Coal Co. v. Foster*, 59 Pa. 365; *Brown v. Foster*, 57 id. 165, 98 Am. Dec. 213; *Spink v. Mueller*, 77 Mo. App. 85; *Long Beach City School District v. Dodge*, 135 Cal. 401, 67 Pac. Rep. 499; *Cutler v. Close*, 5 C. & P. 337; *Thornton v. Place*, 1 M. & Rob. 318; *Houser v. Pearce*, 13 Kan. 104; *Mayne on Dam.* 97; *Clifford v. Richardson*, 18 Vt. 620; *Dean v. White*, 5 Iowa, 266; *Goddard v. Barnard*, 16 Gray, 205; *Sunman v. Clark*,

120 Ind. 142; *Lord v. Comstock*, 52 N. Y. Super. Ct. 548; *O'Brien v. Anniston Pipe Works*, 93 Ala. 582, 9 So. Rep. 415; *White v. Sisters of Charity*, 79 Ill. App. 646; *Belvidere Gas Light & Fuel Co. v. Wayland*, 77 Ill. App. 657; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa, 524, 55 N. W. Rep. 518; *Indianapolis Terra-Cotta Co. v. Murphy*, 99 Iowa, 633, 68 N. W. Rep. 898; *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. Rep. 621; *Haines v. Young*, 13 Pa. Super. Ct. 303; *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 133, 81 N. W. Rep. 136; *Maryland Ice Co. v. Arctic Ice Machine Manuf. Co.*, 79 Md. 103, 29 Atl. Rep. 69; *Davis v. Ford*, 81 Md. 333, 32 Atl. Rep. 280; *Watts v. Board of Education*, 9 App. Div. 143, 41 N. Y. Supp. 141; *Williams v. Island City Milling Co.*, 25 Ore. 573, 37 Pac. Rep. 49; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. Rep. 1017; *North Chicago St. R. Co. v. Burnham*, 42 C. C. A. 584, 102 Fed. Rep. 669, citing *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. Rep. 696; *Stillwell & Bierce Manuf. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601; *Keeler v. Herr*, 157 Ill. 57, 60, 41 N. E. Rep. 750; *Johnson v. Freeman*, 160 Pa. 317, 28 Atl. Rep. 780. *Commonwealth Roofing Co. v. Palmer*

² *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. Rep. 621.

³ *Johnson v. Freeman*, *supra*; *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. 167, 32 Atl. Rep. 432.

If in an action on a bond to save the plaintiff harmless from liens on a certain building and to secure its erection by a specified day there is a breach in both particulars, the expenditures incurred by the plaintiff in completing the building and in discharging liens made necessary by the defendant's default constitute the measure of damages.¹ And where a bond had been given conditioned to do certain work in clearing land, for breach of it the cost of performing the stipulated work was recoverable.² On the failure to cut and remove within two years growing timber on land and to pay a stipulated price for it, the damages are the difference in the value of the timber not removed at the contract price and its market value where it is. If, however, it was within the contemplation of the parties that the timber was to be removed for the purpose of fitting the land for cultivation, there may be a recovery of the damage sustained from that cause, but only for such a reasonable time, after the expiration of the two years, as will enable the plaintiff to complete the work left unfinished by the defendant.³

The plaintiff, an engineer, was employed by one S. to repair a steam threshing-machine, the work to be finished before harvest or by the end of July or the beginning of August. It being found necessary to get a new fire-box made, the plaintiff, in June, contracted with the defendants to make one for him for 12%, which was paid, and they agreed to make it in about a fortnight. The fire-box was not sent to the plaintiff until the 3d of September, when it was found to be useless. He was then obliged to employ another person to make another fire-box, for which he had to pay 20%. The threshing

Leather Co., 67 N. J. L. 566, 52 Atl. Rep. 389, is to the same effect.

If, on account of the abandonment of a building contract, the owner finds it necessary to employ an architect to advise about and superintend the completion of the building, the contractor is liable for that expense as well as for the difference between the value of the building if completed and the contract price. *Watson v. De Witt County*, 19 Tex. Civ. App. 150, 46 S. W. Rep. 1061.

In *Walker v. Ellis*, 1 Sneed, 515, it was held that expenses incurred in attempting to get elsewhere the articles that the defendant had contracted to make were not recoverable as damages.

¹ *Hirt v. Hahn*, 61 Mo. 496.

² *Sullivan v. Reardon*, 5 Ark. 140; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. Rep. 597.

³ *Furstenbury v. Fawsett*, 61 Md. 184.

engine, in consequence of these delays, not being ready until November, S. brought an action against the plaintiff to recover damages in respect of his breach of contract, claiming 50%, but he ultimately settled the matter by accepting 20% and costs, making altogether 25%. 17s. It did not appear that the plaintiff, when he gave the defendants the order for the fire-box, communicated to them the nature of his contract with S., or that they were made aware of it until after there [484] had been a complete breach of their contract. It was held that the plaintiff was entitled to recover the sum he had paid the defendants for the fire-box, and the further sum of 8%, which he had to pay in securing another one; but that the compensation paid to S. was not such a damage as might fairly and reasonably be considered either as arising naturally from the defendants' breach of contract, or as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it.¹ In such cases the employer is gen- [485]

¹Portman v. Middleton, 4 C. B. (N. S.) 322; Hadley v. Baxendale, 9 Ex. 341. See Smeed v. Foord, 1 E. & E. 602; Collins v. Baumgardner, 52 Pa. 461; Hawley v. Belden, 1 Conn. 93; Fisher v. Goebel, 40 Mo. 475.

Missouri, etc. R. Co. v. Fort Scott, 15 Kan. 435, is an interesting case on the subject of damages. The city of Fort Scott subscribed for \$75,000 of stock in the Missouri, Kansas & Texas Railway Co., and issued \$75,000 of its bonds in payment therefor. In pursuance of the same contract the city also issued \$25,000 of its bonds to the company for the purchase of right of way through the city, and for grounds for machine shops, engine houses, etc. In consideration thereof, the company promised that, within six months, it would construct a railroad from Sedalia, Mo., through Fort Scott, to connect with the line running from Junction City in a southeasterly direction; that it would make this a great through

line to the Indian Territory and Texas, and construct no other line of road south of Fort Scott in the same direction; that it would make Fort Scott the end of a division, and erect engine houses and machine shops at or near that place, before doing so at any other point southwest of Sedalia, on the through line of its road. The company completed this contract, except that it did not make Fort Scott the end of a division, and did not erect an engine house and machine shops there, but erected them at Parsons. In an action by the city for the breach of this contract, testimony was admitted, against objection on behalf of the company, of a diminution of population for the purpose of showing a decline in the price of real estate in the city during a period subsequent to the construction of the road, and prior to the building of the shops and engine house at Parsons, and ending after the fact of such building became known at Fort Scott.

erally entitled to measure his damages by what the necessary expense would be to procure to be done the work which the contractor neglected to do, whether it is done or not;¹ for the same reason that a vendee in an executory contract for the sale of goods need not, in fact, purchase the goods he was entitled to receive from the vendor in order to have his damages computed on the basis of what they would cost him at the time of the breach. It has been contended that, because a discharged contractor may recover the probably certain profits he would have made if he had been permitted to proceed with his undertaking, an employer whose contractor has unjustifiably abandoned his contract may, without completing the work, recover the difference between the contract price and the sum which it would cost to complete it. But the court could not agree to this contention. It did not become neces-

This testimony was held, on appeal, inadmissible, because speculative; it only tended to show a loss of uncertain profits expected to accrue from the performance of the contract; and also because such depreciation and depopulation might have resulted from other causes as well as from the breach of the contract. The court suggested that recovery might be measured by the consideration, as though the company's undertaking were a condition precedent or subsequent; and, in the latter case, the city is entitled to recover the amount paid with interest; or, where the unperformed condition is the erection of buildings or other improvements within the city, the value thereof for the purposes of taxation might be treated as the measure of damages. *Brewer, J.*, said: "The city, by the non-performance of the condition, loses the value of the improvement for the purpose of taxation, and this is a direct pecuniary loss, and one susceptible of determination with reasonable certainty. The average rates of taxation in the past—there being no exceptional causes of temporary

taxation—may fairly be accepted as the rates of the future. The value of the improvement being shown, the amount of the annual tax is a simple mathematical calculation. This annual tax may be considered in the nature of an annuity whose present value is susceptible of exact determination by the ordinary tables."

But where there is a breach of a contract to locate a depot on the land of an individual the damages are measured by the difference in the value of the land without the depot and its value if the location had been made. *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 436, 5 So. Rep. 138; *Louisville, etc. R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; 5 N. E. Rep. 404; *Watterson v. Allegheny Valley R. Co.*, 74 Pa. 208; *Houston, etc. R. Co. v. Molloy*, 64 Tex. 607. These cases are cited with approval in *Blagen v. Thompson*, 23 Ore. 239, 31 Pac. Rep. 647, 18 L. R. A. 315, stated in § 702.

¹ *King v. Nichols*, 53 Minn. 453, 55 N. W. Rep. 604; *American Surety Co. v. Woods*, 105 Fed. Rep. 741, 45 C. C. A. 282.

sary for it to lay down a rule as to the measure of damages in such a case, though the inference is that the view was entertained that none in excess of nominal can be recovered because of the absence of proof.¹ In an earlier case² in which the employer set up as a counter-claim to an action to recover damages for a breach of the contract with the plaintiff for the construction of a railroad the loss of certain freight which it had arranged to carry over the road and for the sum it would cost to complete the road in excess of the contract price, both these grounds of recoupment were denied,—the first, because arising on a collateral contract not within the contemplation of the parties, and the second, because of its uncertainty, and because contingent on the construction of the road by the defendant. A contractor, by failing to fulfill his undertaking, may become responsible for the employer's loss of rent, in which event his liability is measured by the fair rental value of the premises—not by what a responsible party had offered for them.³ The acceptance of work does not waive latent defects in it if they are not open to inspection.⁴ An employer who has paid in advance for work is not entitled to recover the payment made as the measure of damages for the breach of the contract; that can only be done on showing that the work was of no value to him, or of less value than the amount paid.⁵ If the owner avails himself of the right to finish the work at the expense of the contractor the latter is entitled to the benefit of the work so done, and cannot be prejudiced by the manner in which it was done.⁶

§ 700. Liability if accident prevents performance. Where the undertaking is to make some article, or even to build or complete a house on the employer's land, the contractor is not exempt from liability as for a breach of his contract, though he has been prevented from performing it solely by some accident or casualty, by which the result of his work before completion

¹ *American Surety Co. v. Woods*, City School District v. Dodge, 135 *supra*. Cal. 401, 67 Pac. Rep. 499.

² *Hunt v. Oregon Pacific R. Co.*, 36 Fed. Rep. 481, 1 L. R. A. 842.

³ *Hawley v. Florsheim*, 44 Ill. App. 320.

⁴ *Monahan v. Fitzgerald*, 164 Ill. 525, 45 N. E. Rep. 1013; *Long Beach*

⁵ *Smith v. Cowen*, 3 App. Div. 230, 38 N. Y. Supp. 482, affirmed without opinion, 157 N. Y. 714.

⁶ *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. Rep. 271.

has been destroyed without any fault on his part; as where the building he has contracted to erect has fallen in consequence of some latent defect in the soil impairing the foundation,¹ by lightning or fire,² or other cause beyond the control of the promisor,³ unless it arises, directly or indirectly, from the acts of the promisee.⁴ But it is otherwise if the building has been approved and accepted by the owner, though before its completion; in case of its loss by fire he must bear the loss,⁵ or where a person agrees to expend labor upon a specified subject, the property of another, as to shoe his horse, or slate or perform other work upon his dwelling-house, and the horse dies, or the house is destroyed by fire;⁶ or where a building is

¹ *Dermott v. Jones*, 2 Wall. 1; *School Trustees v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Stees v. Leonard*, 20 Minn. 494; *Brown v. Laurie*, 1 Low. Can. Rep. 343, 5 id. 65; *Satterlee v. United States*, 30 Ct. of Cls. 31, 50.

² *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *School District v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Bacon v. Cobb*, 45 Ill. 47; *Shanks v. Griffin*, 14 B. Mon. 153. See *Clark v. Franklin*, 7 Leigh, 1.

³ *Hawley v. Florsheim*, 44 Ill. App. 320; *Southern Building & Loan Ass'n v. Price*, 88 Md. 155, 42 L. R. A. 206, 41 Atl. Rep. 53; *Budget v. Binnington*, 25 Q. B. Div. 320.

⁴ *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. Rep. 167; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. Rep. 941, 48 L. R. A. 685.

⁵ *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. Rep. 508.

⁶ *Atlantic & D. R. Co. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. Rep. 13; *Clark v. Franklin*, 2 Leigh, 1; *Garretty v. Brazell*, 34 Iowa, 100; *Angus v. Scully*, 176 Mass. 357, 57 N. E. Rep. 674, 49 L. R. A. 562; *Taylor v. Caldwell*, 3 B. & S. 826; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Walker v. Tucker*, 70 Ill. 527; *Weis v. Devlin*, 67 Tex. 507, 3 S. W.

Rep. 726, 60 Am. Rep. 38; *Livingston Co. v. Graves*, 32 Mo. 479 (compare the last case with *Brecknock Co. v. Pritchard*, 6 T. R. 65); *Lord v. Wheeler*, 1 Gray, 282; *Cleary v. Sohler*, 120 Mass. 210; *Wells v. Calnan*, 107 id. 514, 9 Am. Rep. 65; *Niblo v. Binsse*, 1 Keyes, 476; *Schwartz v. Saunders*, 46 Ill. 18; *Sinnott v. Mullin*, 82 Pa. 333; *Bianchi v. Maggini*, 17 Nev. 322; *Rawson v. Clark*, 70 Ill. 656; *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. Rep. 507. *Contra*, *Brumby v. Smith*, 3 Ala. 123. See *Wilson v. Knott*, 3 Humph. 273, 39 Am. Dec. 165; *Hayes v. Gross*, 9 App. Div. 12, 40 N. Y. Supp. 1098, affirmed without opinion, 162 N. Y. 610; *Hysell v. Sterling Coal & Manuf. Co.*, 46 W. Va. 158, 33 S. E. Rep. 95; *Kenwood Bridge Co. v. Dunderdale*, 50 Ill. App. 581.

In *Hollis v. Chapman*, 36 Tex. 1, the plaintiff, a carpenter, undertook to furnish material and do the wood work necessary to finish defendant's brick building, and to turn over the building, complete, by a given day for a specified gross sum. When the plaintiff had nearly completed the work the building was destroyed by fire without his fault. *Ogden, J.*: "Under our blended system of legal jurisprudence, and especially under our peculiar system of pleading,

agreed to be erected on the employer's lands, and is de- [487]

common counts in declarations, as technically known at common law, have never been considered as necessary or essential. But while most of the fictions and many of the forms recognized and prescribed in the books have in this state been abolished, yet the substance of every count and form is as requisite under our practice as under any other system; every action being a special action on the particular case, the petition should set forth a full and clear statement of the cause of action 'without ambiguity or contradiction, and also a clear statement of the relief sought.' The case was therefore stated so as to exhibit the particulars, and might appear to be an action on the real transaction."

The opinion continues after disposing of some preliminary questions: "It may be admitted that by the civil and common law, where there is a specific and positive contract absolutely to do an entire piece of work, or job, subject to no conditions either express or implied, and to be paid for only when the work is completed according to the contract, such contract is not apportionable, and the contractor is not entitled to any pay until the work is completed. But where there is a condition, or when the contract is dependent upon the execution of another contract, or where the payment is not specially deferred to the completion of the undertaking, in such a case the contract is apportionable; and in case of an accident rendering the completion of the contract impossible, the contractor is entitled to *pro rata* pay for his work; and this appears to have been the rule recognized by the best authorities. Story on Bailments, 363. In the case at bar the appellant Hollis agreed to furnish the material and

do the carpenter work on two brick buildings then in process of erection for a specified sum. He further agreed to turn the buildings over finished complete, and to do the work with all possible dispatch. This agreement could not possibly have been an entire, independent contract, for it was dependent on many circumstances, such as the erection of the walls to receive the carpenters' work, etc., etc. And we think the weight of authority authorizes us in deciding that on the event of the accidental destruction of the building by fire, he was entitled to recover the value of his labor and materials expended on the building. *Clark v. Franklin*, 7 Leigh, 1; *Hayward v. Leonard*, 7 Pick. 181; *Story's Eq.* 362."

The court puts the recovery on the "*apportionability*" of the contract, and the authority of Texas cases to that quality of such contracts. *Baird v. Ratcliff*, 10 Tex. 81; *Hillyard v. Crabtree*, 11 id. 284; *Gonzales College v. McHugh*, 21 id. 256; and *Carroll v. Welch*, 26 id. 147. But neither of the cases cited bears any analogy to the case decided. They do not decide any question as to the contract being apportionable; they were contracts not apportionable, and the workmen recovered on the *quantum meruit*, based on the benefit received by the other party from the part performance. In the case of *Hollis v. Chapman* the right to recover may be maintained, but certainly not on the ground that the contract was apportionable, but because the risk of such destruction was properly on the other party, and the complete performance of the contract was prevented by the destruction of the building. The provision for payment on completion should be deemed to be on the implied condition that the building be not destroyed. Where there is no

stroyed by any cause against which he was bound to provide.¹ The measure of damages in such a case is, *prima facie*, the *pro*

express stipulation as to the time of payment the contract is apportionable, and it may be demanded as the work progresses, as stated in the quotation contained in the opinion from *Appleby v. Myers*, L. R. 2 C. P. 651: "It is quite true that materials worked by one into the property of another become part of the property, and therefore, generally, in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not completed. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as in the case of *Roberts v. Havelock*, 3 B. & Ad. 404, or because in consequence of a fire he could not go on with it, as in *Meneston v. Athawes*, 3 Burr. 1592."

In *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. Rep. 507, the authorities are considered by Casaday, J., and these conclusions reached: "1. Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible. 2. But this rule is only applicable when the contract is positive and absolute and not subject to any condition, either express or implied. 3. Where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into

the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. 4. Where, as here, one having nothing to do with the painting, glazing, carpenter or joiner work contracts to furnish materials for the mason work of a building and perform the labor thereon, except that the owner, for whom the same is to be constructed, is to furnish upon the ground all the sand, stone, and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before completion is destroyed by fire without the fault of the contractor, the loss must fall upon the owner, especially where he has the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed."

¹ In *Sinnott v. Mullin*, 82 Pa. 333, the plaintiff contracted to build four houses for defendant and failed to complete them by reason of the falling of a stone wall on another part of the defendant's lot, whereby the buildings, which were nearly finished, were destroyed. In an action to recover for work done and materials furnished, it was contended for the plaintiff that it was the duty of the defendant to provide a place for the erection of the houses under the contract that was

rata share of the contract price.¹ The contractor cannot recover for materials which he had procured in order to place

reasonably secure and safe, and that the contract itself implied an undertaking on his part that the place chosen was free from danger. The court say, by Woodward, J., that this point should have been affirmed "subject to the qualification that the plaintiff was barred of all right to a verdict, if he had taken upon himself the risk of danger from the condition of the defendant's property. The wall was on the ground on which the houses were to be built, but on a part of it over which he had no rights. The case stands as if the injury had resulted from the fall of a structure on adjoining property belonging to the defendant. The relations of the parties were created by the contract, and for the purposes of this question they do not essentially differ from the relations towards each other which exist between master and servant in the ordinary contract for the employment of labor. The plaintiff had the right to require that the place where his work was to be done should, in the language of the point, 'be reasonably safe and secure,' and such a place it was the duty of the defendant to afford. Against manifest and patent danger the plaintiff would be held to take his chance. It was for the jury to say whether the danger was manifest and patent here. Was this wall reasonably safe and secure? If not, were the defects in its construction latent? And were they such defects as the defendant was bound to know? Without entering on the perilous regions of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of the employer to advise the employee of all defects which the employee ought to know; and

that the employer, if he fail in performing his duty, is liable to the employee for injury the latter may thereby receive. Wharton on Negligence, § 209. Further than this, the employer is not only liable for injury sustained from extraneous latent dangers, if he withhold from the employee notice of them (*Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160), but he is liable also for injury caused by defects of which the employer may not have been cognizant, but which it was his duty to have searched for and remedied. Whart. on Neg., § 211. Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger can occur. The risks necessarily involved in the service must not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had the right to expect it would be kept. *Cockburn, C. J.*, in *Clark v. Holmes*, 7 H. & N. 937. There was evidence that the attention of the plaintiff was called to the condition of the wall while negotiations for the contract were going on. But whether he satisfied himself as to its safety, and assumed the risk which his work in its neighborhood might involve, or relied on the assurance of the defendant, and concluded his contract in ignorance of latent dangers, it was the province of the jury to decide."

¹ *Cook v. McCabe*, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. Rep. 507;

them in or upon the employer's building but which had not been actually placed there at the time it burned; they were not the latter's property.¹

In England the law does not imply an absolute promise or warranty that the employer's premises shall continue fit for the performance of the contract. Where the premises are destroyed without fault on either side, it is said to be a misfortune equally affecting both parties, and excusing both from further performance of the contract, but giving a cause of action to neither.²

§ 701. Contractor not answerable for defects in plans. [488] Where the builder constructs the building in a workmanlike manner, according to the plans referred to in the contract, or, in case of any material deviation, where it is made with the consent of the other party, such builder will be under no responsibility for its subsequent destruction, whether caused by its own inherent weakness or from the violence of storms. When his undertaking is simply to do the work with reasonable skill after the designs furnished by the architects, he is not a guarantor of the strength of the edifice when finished, or its capacity to withstand the violence of the winds.³ But when the same person is architect, contractor

Atlantic & D. R. Co. v. Delaware Construction Co., 98 Va. 503, 37 S. E. Rep. 13; Butterfield v. Byron, 153 Mass. 517, 27 N. E. Rep. 667, 25 Am. St. 654, 12 L. R. A. 571; Clark v. Franklin, 7 Leigh, 1; Angus v. Scully, 176 Mass. 357, 49 L. R. A. 562, 57 N. E. Rep. 674; Hayes v. Gross, *infra*; Hysell v. Sterling Coal & Manuf. Co., 46 W. Va. 158, 33 S. E. Rep. 95. See Eichelberger v. Miller, 20 Md. 332.

¹ Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098, affirmed without opinion, 162 N. Y. 610.

² Appleby v. Myers, L. R. 2 C. P. 651, 658.

³ Clark v. Pope, 70 Ill. 128; Wright v. Sanderson, 20 Mo. App. 534; Mac-Knight Flintic Stone Co. v. Mayor, 160 N. Y. 72, 54 N. E. Rep. 661, citing Kellogg Bridge Co. v. Hamilton, 110

U. S. 108, 3 Sup. Ct. Rep. 537; Mac Ritchie v. Lake View, 30 Ill. App. 393; Filbert v. Philadelphia, 181 Pa. 530, 37 Atl. Rep. 545; Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. Rep. 496; Bentley v. State, 73 Wis. 416, 41 N. W. Rep. 338; Burke v. Dunbar, 128 Mass. 499; Rice v. Forsyth, 41 Md. 389; Weld v. Goldenberg, 65 Fed. Rep. 466; Smith v. Consumers' Cotton Oil Co., 86 Fed. Rep. 359, and other cases. See Thorn v. Mayor, L. R. 1 App. Cas. 120, which is distinguished from the cases holding the general rule in the opinion of Cassoday, J., in Bentley v. State, *supra*, where the characteristics of the English case are stated.

The rule as stated in the text may be inapplicable where the contractor has warranted the result which his work will produce. Bryson v. Mc-

and builder and is bound in these several capacities he cannot, as contractor and builder, obtain relief because the faulty result was occasioned by him as architect.¹

§ 702. Liability for non-performance if works contracted for a particular purpose. If a contract is made for the manufacture of a specific article, or for specific work for a particular use or purpose, mutually contemplated by the parties, damages for a breach will be assessed with such scope as to afford compensation for any injury which may [489] naturally and proximately result in respect to that object, whether that injury be in gains prevented or losses sustained.² Where the grantee of a right of way through the grantor's land covenanted to maintain a gate placed at the terminus, and failed to replace it after it had been destroyed, the cost of rebuilding the gate was held not to measure the damages, but the actual injuries sustained by the covenantee upon his land; it was a continuing covenant, and intended for the protection of the farm.³ If machinery made to order proves insufficient for the purpose for which it was ordered, and varies from that contracted for, whereby the purchaser is prevented from manufacturing to the extent he would otherwise have done, he may recover the contract price of articles sold which he is prevented from manufacturing, less the expense he would have incurred if they had been manufactured, over and above the sum necessarily expended in manufacturing to the extent he has done.⁴ Where there was delay in manufacturing a loom re-

Cone, 121 Cal. 153, 159, 53 Pac. Rep. 637.

¹ Louisiana Molasses Co. v. Le Sasser, 52 La. Ann. 2070, 28 So. Rep. 217.

² Bryson v. McCone, 121 Cal. 153, 159, 53 Pac. Rep. 637; Watkins v. Junker, 4 Tex. Civ. App. 629, 23 S. W. Rep. 802.

³ Beach v. Crain, 2 N. Y. 86; Buck v. Rodgers, 39 Ind. 222; Hyde v. Mechanical Refrigerating Co., 144 Mass. 432, 11 N. E. Rep. 673; Beeman v. Banta, 118 N. Y. 538, 23 N. E. Rep. 837, 16 Am. St. 779.

On the failure to furnish a city with a full and ample supply of water for fire service the damages

are measured by the difference between the supply furnished and that contracted for. Damages sustained by individuals cannot be considered. Wiley v. Athol, 150 Mass. 426, 23 N. E. Rep. 311, 6 L. R. A. 342.

On the breach of a contract by a railway company to fence its right of way there may be a recovery for animals killed, damage done by trespassing animals, and for the loss of pasturage. Louisville, etc. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. Rep. 404.

⁴ Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. Rep. 952.

quired for a special purpose, as the manufacturer knew, and it was imperfect when delivered, the buyer being obliged to supply the defects and employ an expert to put the loom in working order, the manufacturer was liable for the loss of profits which would have been earned if the loom had been complete.¹ If in consequence of the insufficiency of an article which has been manufactured with knowledge of the place in and the use to which it is to be put damage is done to other property of the purchaser, the manufacturer is liable therefor. If interest is awarded on the amount which will restore the property to its former condition, there cannot be a recovery for lost profits.²

In a recent case it was understood between the parties to a contract for the manufacture of machinery that the order was given for the purpose of enabling the plaintiffs to organize, in accordance with an agreement they had entered into, a limited partnership of which they were to be the sole members. The machinery was not furnished as agreed and could not be obtained elsewhere, and the plaintiffs were disabled from turning over to the new company the property which they should have received for that purpose, and prevented from establishing such company and starting it under such favorable auspices and with such an equipment for the transaction of a profitable business as they could have done if the defendant had performed his contract. The court did not intimate that there might be a recovery of damages by the plaintiffs as members of the limited partnership, but held that the damages which they suffered by reason of the defendant's fault in preventing them from successfully establishing and fitting out a business to be conducted by them as such partnership might be recovered; in other words, the value of the articles contracted for were to be estimated with reference to their intended use in the business for which they were to be furnished.³ The plaintiff sued on a note given for work done and materials

¹ Crompton & K. Loom Works v. Hoffman, 5 Ont. L. R. 554 (divisional court, 1903), citing *Waters v. Towers*, 8 Ex. 401; *Cory v. Thames Iron Works, etc. Co.*, L. R. 3 Q. B. 181; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670.

² *Erie City Iron Works v. Barber*, 102 Pa. 156.

³ *Abbott v. Hapgood*, 150 Mass. 248, 23 N. E. Rep. 311, 5 L. R. A. 586; *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. Rep. 249, 35 Am. St. 326.

furnished in the construction of a sheet and galvanized iron roof upon a livery-stable belonging to the defendant. The latter pleaded that the roof was constructed in a negligent, unskilful and unworkmanlike manner, and of inferior materials, in consequence whereof it leaked, and the defendant's hay was wet and his wall damaged, and he was put to inconvenience in the necessary removal of his stock from one portion of his stable to another, for which he claimed damages. The court held these damages were not too remote; that the defendant was entitled to recover to their extent if he had no knowledge of such defects; but if he knew of them in time to protect himself at a trifling expense or by reasonable exertions, he could recover nothing for damages suffered in consequence of such leakage.¹ If the time for the completion of the work is extended by consent the contractor's liability for the consequences of defects in it continues during the extension and until the expiration of a reasonable time for remedying them.² In Michigan the recovery of lost profits on contracts of the nature herein considered is very much restricted. The cases establishing this limited liability are stated in detail and discussed elsewhere.³

The damages recoverable by the lessee of land on the breach of a contract to supply water for irrigating it are the sum of the difference between the rental value of the land with and without the water. Evidence as to the value of a possible crop that might be grown with the use of water, it was said, would be as purely speculative as could well be imagined; while the rental value of land in communities where for many years portions of the land are leased or occupied without the possibility of irrigation and other portions are leased or occupied with water for irrigation, fixes a standard for the estimation of damages in cases such as this as nearly accurate as it is possible to devise.⁴ In another court this rule has been modified in favor of the defendant by excluding from the recovery the necessary

¹ Haysler v. Owen, 61 Mo. 270; § 88; Gibson v. Carlin, 13 Lea, 440; Hensen v. Beebe, 111 Iowa, 534, 82 N. W. Rep. 942.

² Gibson v. Carlin, 13 Lea, 440.

³ § 63, note; McKinnon v. McEwan, 48 Mich. 106, 11 N. W. Rep. 828; Allis

v. McLean, 48 Mich. 428, 12 N. W. Rep. 640. The last case is overruled in part by Hutchinson Manuf. Co. v. Pinch, 91 Mich. 156, 51 N. W. Rep. 930, 30 Am. St. 463.

⁴ Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366.

outlay which would have been made in securing the crop, if the failure is entire. If trees, seed and labor have been lost, there should be a recovery therefor, but not for permanent improvements, or depreciation in the value of stock and implements, that resulting from their use in preparing and planting land which produced a partial crop.¹ On the breach of a contract for the construction of a motor railway to connect with the business portion of a city a tract of land which one of the parties to the contract had purchased with the view of platting and selling it for suburban residences, such contract having been made with knowledge that it was for the purpose of enhancing the value of such land, the damages are the difference between the value of the land on the day the road should have been completed, not less than the agreed purchase price, and what its value would have been on that day with the road completed and in operation;² such value may be testified to by opinions.³ Where the owner of a tract of land granted a railway company a right of way through it and gave it her note for \$500 in consideration of the operation and construction of the railroad over the right of way, on the abandonment of its contract the company was liable for the difference between the value of the land to its owner with the road in operation and the value of the land without the road in operation.⁴ On the breach of a contract to furnish material for an oyster-grower to spread over his oyster grounds, the latter may procure other

¹ Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

² Blagen v. Thompson, 23 Ore. 239, 31 Pac. Rep. 647, 18 L. R. A. 315, citing Mobile R. Co. v. Gilmer, 85 Ala. 422, 5 So. Rep. 138; Louisville R. Co. v. Sumner, 106 Ind. 55, 5 N. E. Rep. 404, 55 Am. Rep. 719; Watterson v. Allegheny Valley R. Co., 74 Pa. 208; Wilson v. Northampton, etc. R. Co., L. R. 9 Ch. 279; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Houston R. Co. v. Malloy, 64 Tex. 607.

³ Blagen v. Thompson, *supra*, and the case first cited in the next note.

⁴ Eckington & S. H. R. Co. v. McDevitt, 18 D. C. App. Cas. 497, citing

Dawson v. Pittsburg, 159 Pa. 317, 28 Atl. Rep. 171; Mewes v. Crescent Pipe Line Co., 170 Pa. 364, 32 Atl. Rep. 1082; Houston, etc. R. Co. v. Knapp, 51 Tex. 592; Topeka v. Martineau, 43 Kan. 387, 22 Pac. Rep. 419; Ferguson v. Stafford, 33 Ind. 162; Dwight v. Commissioners, 11 Cush. 201; Pike v. Chicago, 155 Ill. 656, 40 N. E. Rep. 567; Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314, 30 N. E. Rep. 298; Nevada & M. R. Co. v. De Lissa, 103 Mo. 125, 15 S. W. Rep. 366; Mayor v. Smith & S. Brick Co., 80 Md. 458, 31 Atl. Rep. 423; Benjamin v. Hilliard, 23 How. 149; Shepherd v. Baltimore & O. R. Co., 130 U. S. 426, 9 Sup. Ct. Rep. 598.

suitable material and charge the contractor with the excess of its cost over the contract price. Because of want of time and of suitable material, part of such grounds were not planted. The damages on this account were measured by the loss of the use of the land until it could be prepared for use, such loss being its fair rental value, if that was provable, otherwise interest on its market value in its unplanted condition, with the taxes for that time. If the plaintiff could show that the failure to plant the whole of his land so disarranged the ordinary and natural succession of his crops, otherwise disturbed the ordinary and natural course of his business as respects the use of his other property that he suffered special damages as a probable and direct result, which both parties ought to have foreseen, a further recovery might be allowed on that account, as also for expense reasonably incurred in preparation for the performance of the contract, and in reliance upon its performance. But damages could not be recovered on the basis of the difference between the market value of the planted and the unplanted land at the time fixed in the contract for its completion, and while the result of such planting was unknown. "To allow for any enhancement of value on that account is, practically, to speculate on the chances of catching a set [planting] and raising a profitable crop. Such consequences were too remote for consideration, and too uncertain, both with respect to their nature and to the cause from which they would proceed."¹ On the failure of a manufacturing plant to accomplish the result for which it was supplied there may be a recovery of the expense incurred and material lost in attempting to operate it in order to ascertain whether it would operate successfully; the expense incurred to preserve the plant and the material in it while necessary changes were being made, and fair compensation for the use of the plant while it could not be used because of the contractor's breach.² Where there was a failure to furnish gas to a newly-established glass factory which was built in reliance on the gas company's contract to supply gas for fuel, and an unsuccessful effort to operate the

¹ *Lewis v. Hartford Dredging Co.*, 139 U. S. 199, 11 Sup. Ct. Rep. 68 Conn. 221, 35 Atl. Rep. 1127, citing *Cohn v. Norton*, 57 Conn. 480, 494, 5 L. R. A. 572, 18 Atl. Rep. 595; *Howard v. Stillwell & Bierce Manuf.* Co., 169 Pa. 167, 32 Atl. Rep. 432.

² *Dixon-Woods Co. v. Phillips Glass*

factory was made, after which the business was suspended, it being impracticable to use other fuel or procure gas elsewhere, it was held that anticipated profits could not be recovered. The reason for so holding was that the manufacture of glass in Kansas was subject to so many contingencies that the realization of profits was a matter of speculation and conjecture. It was said that if the business had been an established one, or if other manufactories of a like kind existed in the state under similar conditions, there would be some basis for estimating profits. The plaintiff was entitled to recover the rental value of the idle factory, and, if it had no such value, interest on the money invested in the same, together with interest on any idle working capital which could not be used in consequence of the breach of the contract; the expenses necessarily and actually incurred in the attempt to operate the factory, including the cost of bringing skilled laborers from a distance, and the compensation due the officers of the company for their services.¹

§ 703. Damages for delay. For delay in the performance of particular work damages will be recoverable according to the injury.² Where it was paid for in advance, and no special damage was shown, interest on the amount paid was allowed as damages.³ For delay in constructing and putting up machinery in a flouring mill the employer was held entitled to recover such sum as the mill would have earned during the time of such delay, taking its fair ordinary earnings after deducting the expense of running it; but it should appear that the party claiming such damages was in a condition to work his mill by having grain to grind.⁴ In the absence of any special circumstances attending a contract for putting up mill ma-

¹ *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. Rep. 621, 54 Am. St. 598. See *Doud v. Duluth Milling Co.*, 55 Minn. 53, 56 N. W. Rep. 463, as to the recovery of anticipated profits for the breach of a contract to erect a cooper shop for a milling company.

² If the delay has been caused in part by the owner, the contractor must, as soon as such cause has ceased to operate, speedily finish the work, otherwise he will be liable for

the stipulated damages for every day of subsequent unreasonable delay. *Pittsburg Iron & Steel Engineering Co. v. National Tube Works Co.*, 184 Pa. 251, 39 Atl. Rep. 76.

³ *Edwards v. Sanborn*, 6 Mich. 348.

⁴ *Davis v. Talcott*, 14 Barb. 611, reversed on another point, 13 N. Y. 184. But see *Griffin v. Colver*, 16 N. Y. 489.

On the failure to complete the printing of a book within the time agreed there cannot be a recovery

chinery, anticipated profits resulting from grinding wheat into flour and selling the same cannot be recovered as damages for delay in putting it up.¹ The opinion of Justice Lamar contains the following language taken from a Pennsylvania case² of a similar nature: "It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract, and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting from such defect; but that is a very different thing from the uncertain, remote and speculative profits which may or may not be made in the business to be done." The same rule has been applied where there was delay in furnishing cars to a street railroad company which was obliged to change its motive power from horses to cable. The recovery of profits was denied because they were too speculative and uncertain.³ But in an English case tried before Kennedy, J., loss of profits resulting from delay in delivering fishing boats to fishermen was held recoverable.⁴ There can be no recovery for the loss of the use of a mill which has not been erected, though the person who was to manufacture a portion of the machinery therefor was apprised of the purpose of his customer to erect it.⁵

for profits lost on mere proof that there may have been a demand for the book. But if sales had been made and orders withdrawn in consequence of the delay, proof thereof would have been admissible. *Hill v. Parsons*, 110 Ill. 107.

¹ *Howard v. Stillwell & Bierce Manuf. Co.*, 139 U. S. 199, 208, 11 Sup. Ct. Rep. 500; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa, 524, 55 N. W. Rep. 518; *Hutchinson*

Manuf. Co. v. Pinch, 91 Mich. 156, 51 N. W. Rep. 930; *Williams v. Island City Milling Co.*, 25 Ore. 573, 37 Pac. Rep. 49.

² *Pennypacker v. Jones*, 106 Pa. 237, 242.

³ *Washington & G. R. Co. v. American Car Co.*, 5 D. C. App. Cas. 524.

⁴ *Steam Herring Fleet v. Richards*, 17 T. L. Rep. 731 (1901).

⁵ *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. Rep. 704.

[490] Where a person undertakes to erect a building or to put a mill or machinery in operation he ought to be holden to indemnify the other party against the loss of the use of either after the expiration of the time for performing the contract; and if it is defectively done, he should indemnify him for such loss of the use during the time necessarily spent in repairing and putting it in order.¹ In such cases the rental value during the delay is the general rule.² Such value may be recovered

¹ *Griffin v. Colver*, 16 N. Y. 489.

² *McConey v. Wallace*, 22 Mo. App. 377; *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. Rep. 251, 35 Am. St. 326; *McGrath v. Horgan*, 72 App. Div. 152, 76 N. Y. Supp. 412; *Ruff v. Rinaldo*, 55 N. Y. 664; *Freeman v. Clute*, 3 Barb. 424; *Wagner v. Corkhill*, 40 Barb. 175; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Willey v. Fredericks*, 10 Gray, 357; *Brown v. Foster*, 51 Pa. 165; *Hexter v. Knox*, 63 N. Y. 561; *Winne v. Kelley*, 34 Iowa, 339; *Clifford v. Richardson*, 18 Vt. 620; *Rogers v. Bemus*, 69 Pa. 432; *Fisher v. Goebel*, 40 Mo. 475; *St. Louis, etc. R. Co. v. Lurton*, 73 Ill. 118; *Sperry v. Fanning*, 80 id. 371; *Boyle v. Reeder*, 1 Ired. 607; *Korf v. Lull*, 70 Ill. 420; *Machine Co. v. Compress Co.*, 105 Tenn. 187, 58 S. W. Rep. 770; *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 246; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa, 524, 55 N. W. Rep. 518; *Simon v. Lanis*, 9 Ky. L. Rep. 59 (Ky. Super. Ct.); *Central Trust Co. v. Arctic Ice Machine Manuf. Co.*, 77 Md. 202, 235, 26 Atl. Rep. 493; *Cannon v. Hunt*, 113 Ga. 501, 36 S. E. Rep. 983; *Hutchinson Manuf. Co. v. Pinch*, 91 Mich. 156, 51 N. W. Rep. 930, overruling *Allis v. McLean*, 48 Mich. 428, 12 N. W. Rep. 640; *Covode v. Principaal*, 110 Mich. 672, 68 N. W. Rep. 987; *Dengler v. Auer*, 55 Mo. App. 548; *Johnson v. Slaymaker*, 18 Ohio Ct. Ct. 104; *Williams v. Island City Milling Co.*, 25 Ore. 573, 37 Pac. Rep. 49; *Washington & G. R. Co. v.*

American Car Co., 5 D. C. App. Cas. 524. See *Fort v. Orndoff*, 7 Heisk. 107; *Fletcher v. Tayleur*, 17 C. B. 21; *Taylor v. Maguire*, 12 Mo. 313.

A recovery for the failure to build a house within the time agreed cannot include damages for the possible time the contractee will be obliged to pay rent, nor for the apprehension that he may be compelled to make a less advantageous contract for the erection of his building; such damages are too remote. *Jaudes v. Fisher*, 5 Ky. L. Rep. 768 (Ky. Super. Ct.).

If there has been a recovery because of the loss of profits on a special contract, the damages for rental value must be limited to the machinery furnished beyond that necessary to fill such contract. *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. Rep. 1097.

In *Friedland v. McNeil*, 33 Mich. 40, it was held that delay in the completion of a contract to do only the mason work of a church will not authorize the recovery of the loss of pew rents as damages; such loss cannot be said to be the necessary, natural or probable result of such delay, since the completion of the contract does not put the building in condition for the renting of pews. *Cooley, J.*, said: "A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the

regardless of whether the contractee had any use for the building or not, or whether he could or could not have rented it.¹ But if the owner proves that the building had been leased for a stated rent, though that is less than its fair rental value, he

building might never be put in condition for renting of pews, and yet he be in no way responsible. It can never be said that the loss of rents is a necessary, natural or probable result of a particular default, when, had no default occurred, the necessary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages resulting from loss of rents must assume that the trustees had the ability and inclination to proceed at once to complete the church, and were only delayed by the contractor's default."

Blanchard v. Ely, 21 Wend. 342 (cited with approval by the supreme court of the United States in *Howard v. Stillwell & Bierce Manuf. Co.*, *supra*), is an authority opposed to the allowance of profits consisting of the earnings of a steamboat. A boat was delayed in its trips in consequence of being defectively constructed. The judge at the trial directed the jury not to allow as

damages for delays the profits which might have been made from the trips lost; in respect to which Cowen, J., said: "No common-law authority was cited at the bar, one way or the other, having any direct application to the measure of damages in such a case as this, nor am I aware that any exists." The direction of the judge below was approved. See *Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602.

In *Griffin v. Colver*, 16 N. Y. 489, Selden, J., said: "It is clear that whenever profits are rejected as an item of damages it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for the estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of *Blanchard v. Ely* must have proceeded upon this ground, and can, I apprehend,

¹ *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 249; *Covode v. Principaal*, 110 Mich. 672, 68 N.W. Rep. 987.

It is held in *Wagner v. Corkhill*, 40 Barb. 175, that if the house was not intended for the occupancy of the owner he must show that he had an opportunity to rent it, and could not because of the contractor's default. This case is said by the Michigan court in the case cited to be unsound. "If the fair rental value is the measure of damages in case of contemplated occupancy by the owner, it is clear that the same measure would bear no harder

upon the defaulting contractor in case the building is constructed to rent. And to hold that, in order to cover the rental value in such case, the owner should be required to show that he actually had an opportunity to rent the house if complete, would require such diligence as is not imposed in any analogous case. It would impose upon the owner the duty of offering something which he did not have. In homely phrase, it would be putting the cart before the horse. Until the house is ready for occupancy it could not be occupied, and could not well be offered for rent."

can recover only the amount the lessee was to pay.¹ Liability for the loss of rent does not exist unless the contractor had notice of the lease.² In the case of machinery the rental value is to be of like machines of equal capacity, and the cost of the real estate and buildings which were provided to be used in connection therewith cannot be considered.³ In Iowa a different and better rule has been applied. There was delay in furnishing machinery for a mill. The rule that the rental value was the measure of the contractor's liability was approved. It was observed that while it is true that the cost of the mill, the depreciation, or otherwise, of its machinery while in operation,

be supported upon no other. . . . In . . . (that case) . . . the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to construct, and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. . . . Had the defendants in the case of *Blanchard v. Ely* taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiff's contract. The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat or the use of machinery, etc., etc., are not only susceptible of more exact and definite proof, but, in a majority of cases, would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contin-

gencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that in estimating what would be the fair rent of a mill we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly, if not quite, as certain as the market value of commodities at a particular time and place." See *Western Gravel Road v. Cox*, 39 Ind. 260. Compare *Sikes v. Paine*, 10 Ired. 280, 51 Am. Dec. 389, and *Beverly v. Williams*, 4 Dev. & Batt. 236.

¹ *Consaul v. Sheldon*, 35 Neb. 247, 252, 52 N. W. Rep. 1104.

² *Reilly v. Connors*, 65 App. Div. 470, 72 N. Y. Supp. 834.

³ *Maryland Ice Co. v. Arctic Ice Machine Manuf. Co.*, 79 Md. 103, 29 Atl. Rep. 69.

and the profits that could be made with the mill, are proper to be considered in arriving at the rental value, neither constitutes the measure of damages. The parties must have contemplated that a failure to complete the mill in time would deprive the contractee of its use, and that the damages would be the value of that use. There was added to the value of the machinery in the building the rent paid for the latter, and the rental value of the mill was computed on the basis of the value of the mill as it was to be.¹ In fixing the rental value of machines the condition of the business in which they were to be used in the place agreed upon for their use, for the time immediately following that in which they were to be ready, and not the average annual value of their use, is to be considered, especially if the conditions which made the use of the machines under these circumstances specially valuable were known, or ought to have been known, to the contractor.² Such rental value for the time the machines were used prior to their acceptance, proper to be deducted from the total rental value for their use, is to be estimated not by the actual number of days they were in use, they being worked only a part of each day, but by the total product during that time, divided by the full capacity of the machines for a day.³ The right to recover the rental value rests upon the conclusion that the loss of [491] the use is the direct and inevitable result of the breach. The value of that use the injured party is entitled to recover; and it should be assessed on the same principle as the value of personal property which a vendor fails to deliver in fulfillment of his contract of sale. Where no special use, enhancing the value to the employer or vendee, was mutually contem- [492] plated when the contract was made, only the market or general value is recoverable. The enhanced value is not rejected merely because it is uncertain; it may be quite certain, as where an existing contract for renting or resale provides for it; still it is rejected because it is not a gain mutually contemplated to accrue from performance of the contract, nor the loss of it as an injury mutually contemplated to result from its breach. In the absence of such notice the defaulting party is only liable

¹ *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa, 524, 531, 55 N. W. Rep. 518.

² *Maryland Ice Co. v. Arctic Ice Machine Co.*, *supra*.

³ *Id.*

for the general rental value — that which would be received in the multitude of instances.¹ The damages recoverable must be such as may fairly be supposed to have entered into the contemplation of the parties when they contracted; that is, they must be such as might naturally be expected to follow the violation of the contract, be certain in their nature and in respect to the cause from which they proceed.² If expenses have been reasonably incurred in anticipation of the performance of the contract they may be recovered.³

This rule of rental value for delay, however, has been departed from where the delay would be indefinitely continuous, as where the execution of the contract has been abandoned; then the damages are measured by the difference between the value of the property as it would be if the contract had been performed and as it is in consequence of the failure to fulfill it. Where a railroad company was bound to build and perpetually maintain a side-track in front of certain lots owned by the covenantee, on a breach of this covenant by abandonment after the track had been laid, it was held that the proper [493] measure of damages was the difference in value of the plaintiff's lots with the side-track operated and not operated, together with interest thereon from the abandonment up to the date of trial, or not, at the discretion of the jury. This rule, say the court, "renders the ascertainment of the damages easy, final and certain; and limits them to what would surely be within the contemplation of the parties. Whereas, the annual rental value is more speculative and uncertain; is liable to great fluctuation from causes not within the scope of the contemplation of the parties, nor indeed within the range of their anticipations; besides, if the damages are apportionable, the measure of difference in annual rent would result in a multiplicity of suits; or, if not apportionable, then the re-

¹ Hadley v. Baxendale, 9 Ex. 341; Liljengren Furniture & L. Co. v. Mead, 42 Minn. 420, 44 N. W. Rep. 306; Consumers' Pure Ice Co. v. Jenkins, 58 Ill. App. 519. Compare Waters v. Towers, 8 Ex. 401; Fox v. Harding, 7 Cush. 501.

² Griffin v. Colver, 16 N. Y. 489.

If machines are ordered to be made

for sale in a foreign market, and the manufacturer has knowledge of that fact when he contracts to supply them, he is liable, on a breach of his obligation, for their value there. Alabama Iron Works v. Hurley, 86 Ala. 217, 5 So. Rep. 418.

³ Brownell v. Chapman, 84 Iowa, 504, 51 N. W. Rep. 249, 35 Am. St. 326.

sult must be surely speculative (as to future rents), or the plaintiff be barred by one recovery from another.”¹ Where the delay was the mutual fault of the parties, the employer was allowed, in lieu of damages claimed, the interest it would have paid on the notes it was to have given for the purchase price, but which it did not give, from the time the work was accepted until the time suit was brought.² Substantially the same rule was applied, in the absence of special circumstances, where there was delay in completing vessels — the contractor was liable for interest on the payments made prior to their delivery for the time of the delay. It was sought to impose liability for estimated expenses incurred and losses of profits, the purpose for which the vessels were intended being understood by both parties, and also damages for their loss in a hurricane, they being in a different place than they would have been but for the contractor’s default. All these claims were rejected as being conjectural and speculative.³

§ 704. **Same subject.** The damages allowable for delay or entire neglect to perform may include any actual loss which happens naturally and in the ordinary course of things, where the circumstances from which they so result may be supposed to have been mutually contemplated by the parties when they made the contract.⁴ Losses resulting from the failure of the employer to deliver property on an existing contract, of which the contractor was aware when he assumed his obligation, may be recovered.⁵ Where there is delay in the erection of machinery, or neglect to repair it when found defective, or it remains idle in consequence of failure to do some other work necessary to its operation, there may be a loss from the idleness of dependent machinery and of laborers;⁶ and in

¹ *Amsden v. Dubuque, etc. R. Co.*, 28 Iowa, 542.

² *Jeffrey Manuf. Co. v. Central Coal & Iron Co.*, 93 Fed. Rep. 408.

³ *De Ford v. Maryland Steel Co.*, 113 Fed. Rep. 72, 51 C. C. A. 59.

⁴ One who contracts to deliver machinery for a dredge at a fixed time with notice that the purchaser has a government contract for dredging and needs a dredge other than the one he owns to enable him to

perform his contract has such notice as makes him liable for the loss of profits under such contract resulting from delay in delivering the dredge. *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. Rep. 25. See *McLaren v. Fischer*, 45 App. Div. 13, 61 N. Y. Supp. 808.

⁵ *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. Rep. 1097.

⁶ *Hutchinson Manuf. Co. v. Pinch*,

case of the manufacture of part of a machine the expenditure incurred in making the other parts and the loss of profits.¹ So, also, such a breach of contract for particular work may result in the destruction of other property, or be detrimental to it, as by failure in building a fence or shelter. Compensation for such losses, when they occur, notwithstanding due vigilance and exertion of the injured party to prevent or reduce the injury, may be recovered.² The party who has broken his contract cannot escape liability because of the difficulty there may be in finding a perfect measure of damages.³ There cannot be a recovery for the value of material used and the loss caused by the inferior character of the product of a mill arising during the time it was operated for the purpose of testing it.⁴ The recovery of profits which might have been made in a new business cannot be sustained because it cannot be proven that they would have been realized.⁵ The contractor is not responsible where the injury is suffered, not directly from the delay or re-

91 Mich. 156, 51 N. W. Rep. 930, 30 Am. St. 463; *Brownell v. Chapman*, 84 Iowa, 504, 51 N. W. Rep. 251, 35 Am. St. 326; *Block-Pollak Iron Co. v. Cincinnati Corrugating Iron Co.*, 10 Ohio Dec. 51 (Cincinnati Super. Ct.); *Steam Herring Fleet v. Richards*, 17 T. L. Rep. 731; *Boyle v. Reeder*, 1 Ired. 607; *Saluda Manuf. Co. v. Pennington*, 2 Spear, 735; *Colton v. Good*, 11 Up. Can. Q. B. 153; *Florence Machine Co. v. Daggett*, 135 Mass. 582. See *Johnson v. Matthews*, 5 Kan. 118; *Walker v. Ellis*, 1 Sneed, 515.

¹ *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71, 24 N. W. Rep. 344 (loss of profits resulting from neglect of statutory duty to boom logs).

The profits that might have been made under a government contract if dredging machinery had been furnished according to the undertaking of the contractor are not so speculative as to preclude their being made the basis of recovery, such

contract contemplating the performance of specified work at a specified price. *Industrial Works v. Mitchell*, 114 Mich. 29, 72 N. W. Rep. 25.

² *Machine Co. v. Compress Co.*, 105 Tenn. 187, 58 S. W. Rep. 270; *Buck v. Rodgers*, 39 Ind. 222; *Haysler v. Owen*, 61 Mo. 270. See *Houser v. Pearce*, 13 Kan. 104.

³ *Holt Manuf. Co. v. Thornton*, 136 Cal. 232, 68 Pac. Rep. 708.

⁴ *Hutchinson Manuf. Co. v. Pinch*, 91 Mich. 156, 51 N. W. Rep. 930, 30 Am. St. 463.

⁵ *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519; *Central Trust Co. v. Arctic Ice Machine Manuf. Co.*, 77 Md. 202, 26 Atl. Rep. 493. See § 702.

The loss of profits resulting from a delay of two months in the construction of a railroad are not shown by proof of the profits made in the corresponding months of the following year. *Florida Northern R. Co. v. Southern Supply Co.*, 112 Ga. 1, 37 S. E. Rep. 130.

fusal to perform, but from some extraordinary or fortuitous cause having no relation to his breach of contract, except that it was contemporaneous.¹ A plaintiff had made a con- [494] tract with defendants to tow two boat-loads of coal by the first rise in the river; they refused to tow them when the rise came; the boats, remaining at their moorings, were struck by a raft set afloat by a sudden rise in the river and sunk without any neglect of the plaintiff. It was held that the defendants were not liable for the loss of the boats and coal. The contract was to tow the boats from Pittsburg to Oil City, and the plaintiff was unable to procure other tows. And it was also held that the jury had been correctly charged that there was a breach of contract which rendered the defendants liable for the difference in the value of coal at Pittsburg and Oil City at the time the boats would have arrived there if the contract had been performed, less the cost of getting it there; and that the same rule applied to the boats.² In *Calkins v. Baumgardner*³ the court, for failure to boat coal according to contract, held that the employer was entitled to recover not only the difference in the price of freight, but also for trouble and expense incurred in procuring other boats, and if all his efforts were ineffectual, and his supply was insufficient and much less than it would have been had the contract been fulfilled by the defendant, whereby, in consequence of deficient supply and increased price of coal, he sustained loss and injury in his business, such loss would be another element of damages for which claim might be made; and that if he incurred expenses on account of his expected receipt of this coal under the contract, which he would not otherwise have encountered, these might also be added in making up the amount of damages.⁴

¹ *Ashe v. De Rossett*, 5 Jones, 299, 72 Am. Dec. 552; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Michigan Central R. Co. v. Burrows*, 33 Mich. 6; *Denny v. New York Central R. Co.*, 13 Gray, 481, 74 Am. Dec. 645. Compare *Parmalee v. Wilks*, 22 Barb. 539.

² *McGovern v. Lewis*, 56 Pa. 231, 94 Am. Dec. 60.

³ 52 Pa. 461.

⁴ In *Smith v. Smith*, 45 Vt. 433, an

item of alleged damage from defendant's failure to complete a highway within the stipulated time was a deduction the plaintiff was obliged to make in the rent of a house on the line; held, conjectural and remote. Another item, for being necessitated by the same breach to build a winter road for his use, was allowed. See *Walrath v. Whittekind*, 26 Kan. 483.

In *Pittsburg Coal Co. v. Foster*¹ the plaintiff contracted to furnish the defendant, on the 1st of February, an engine to draw coal cars on a track of unusual width; the engine was not delivered until May; the defendant gave evidence that an [495] engine for such track could not be hired, and that he had to transport his coal by horses; held, that evidence of the difference in cost of transportation between horse power and by the engine during the plaintiff's delay was admissible on the question of damages. Agnew, J., said: "The true inquiry which arose under these circumstances was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively within the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendant's track by the 1st of February. The damages ordinarily recoverable are those necessarily following the breach which the party guilty of the breach must be presumed to know would be the probable consequence of his failure.² This rule is well expressed by Strong, J., in *Adams Express Co. v. Egbert*.³ They must be a proximate consequence of the breach, not merely remote or possible. There is no measure of losses of the latter kind. 'But, on the other hand,' he remarks, 'the loss of profits or advantages which must have resulted from a fulfillment of the contract may be compensated in damages when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for and have been in the contemplation of the parties when it was made.'⁴ . . . That the loss in this case was immediate and the necessary consequence of non-fulfillment is obvious. . . . The direct consequence of not getting it (the engine) was that they were obliged to continue transporting the coal as before by horses and mules until the engine was put there." But the offer to prove that the defendants could have mined and hauled one-third more coal with the engine than by the old mode, and to show the profits thence arising, was held too remote. "While it is obvious that F. must have known that the failure would compel the company to continue in the

¹ 59 Pa. 365.

² 2 Greenlf. Ev., § 253.

³ 56 Pa. 364.

⁴ *Fassler v. Love*, 48 Pa. 410, 411;
Fleming v. Beck, id. 312, 313; *Hadley v. Baxendale*, 9 Ex. 341.

use of the old mode of transportation, it cannot be fairly inferred that they would know that the possession of the engine would enable the company to mine more coal and also to haul more. This is a possible or remote consequence, but not [496] a necessary one."¹

¹In *Hazelton Coal Co. v. Buck Mountain Coal Co.*, 57 Pa. 301, the latter company covenanted to furnish for transportation over the other company's railroad all the coal they should mine to the amount of one million tons, guarantying that the quantity should not be less than six hundred thousand tons in eight years. The Hazelton Coal Co. covenanted to furnish transportation accordingly. The jury were charged, and it was held properly charged: "If the jury should find that the defendants failed to transport the coal offered to them under the contract, the damages would be the loss the plaintiffs suffered on the coal thus offered for transportation. This loss would be the difference between the cost of mining, preparing and transporting the coal to Penn Haven, and the price it would have brought there. This is the direct and immediate consequence of the defendants' breach of their contract. The defendants had the exclusive control of the transportation. The plaintiffs had no other route to Penn Haven to avail themselves of and to reduce the loss to the difference in cost of transportation. The plaintiffs being confined to this route, and yet denied it by the defendants' refusal to transport, the direct loss is the difference between the cost of the coal at Penn Haven and the price it would bring there, or in other words the profits. I say Penn Haven, because it is the terminus of the Hazelton road, and of the shipment under the contract. But the jury will remember . . . that the actual shipments did not end there, the coal being carried by min-

ing arrangements with other roads to markets further off, and there was probably no general market for the sale of coal at Penn Haven. The jury would, therefore, have a right to take the price of the coal in the market of sale, and to deduct from this the cost of transportation from Penn Haven, and the expense of putting the coal in the market, in order to find a fair price at Penn Haven, and from this deduct the cost of mining and preparing the coal and of transporting it to Penn Haven. But besides the coal actually mined and ready for transportation, if the defendants refused to furnish sufficient transportation, and thereby compelled the plaintiffs to desist from mining up to their reasonable productive capacity, this would be an injury for which damages may be allowed. If, by the defendants' breach of their contract and failure to furnish the necessary transportation, the plaintiffs became unable to mine because of the blocking up of their mines, so that the production must cease for the want of cars to take it away, the defendants cannot set up the consequences of their own breach as a defense, and resist a recovery, because the coal could not be mined and offered to them. The injury of the plaintiffs would be the loss they suffered on the reasonable amount of coal they were, in the course of mining, able, ready and willing to mine, and offer for transportation, had they not been prevented by the defendants' acts from doing so. To the extent of this breach of the defendants in failing to furnish cars beyond the number

A subcontractor who is prevented from performing by the neglect of his principal to do preliminary work may recover profits on the work he might have performed, but not for the loss of profits because of inability to do other independent work;¹ nor can there be a recovery for the loss of time of men employed to do the work, and also for the value of their serv-

they did furnish, if so found by the jury, the plaintiffs would be entitled to a fair and reasonable sum in damages—what the jury can properly find, on all the evidence, as a compensation for the reasonable amount of coal they were thus prevented from mining.” See *Laurent v. Vaughn*, 30 Vt. 90; *Haven v. Wakefield*, 39 Ill. 509; *Taylor v. Maguire*, 13 Mo. 517.

In *Prosser v. Jones*, 41 Iowa, 674, J. agreed to thresh the grain of P. whenever the latter should require it to be done, but failed to comply with the terms of the agreement. This appears to be the naked statement as to the contract; but it was alleged that when notice was given from time to time to defendants they promised to do the work, and the plaintiff, at their request, piled up and stacked a large part of his grain without binding it; that the rest was standing in shocks in the field and defendants directed that it should be left in that condition, to be threshed out in the shock; that the plaintiff, relying on these promises and directions, did not stack all of his grain; that he could not procure help to stack it; that he attempted to procure others to thresh it, but could not, for the reason that there was no other machine in the neighborhood, and that by reason of these matters plaintiff's wheat was greatly injured, for which he demanded damages. The claim for these special or consequential damages was stricken out of the petition, because the plaintiff sought to recover on the original contract and not on the sub-

sequent promises; and because the latter added nothing to his rights upon the contract. *Beck, J.*, said: “The defendants undertook to do the threshing within a time fixed after notice to them. The contract cannot be interpreted so that it may be inferred that damages of this kind were within the contemplation of the parties when it was executed. The law does not hold one liable for all the consequences that may follow the breach of his contract; if it were so his liability would be without a limit, for it would continue as far as the consequences of his act could be traced. But the law wisely limits liability to the direct and immediate effects of the breach of a contract. The losses and expenses set up in the petition are not of this character. They resulted remotely from the fact that defendants failed to thresh the grain, and are not the natural and proximate consequences of the defendants' breach of the contract. Such damages are not recoverable.”

According to the general rules on which consequential damages are allowed, the damages here sought to be recovered were not remote. They were manifestly within the contemplation of the parties. *Smeed v. Foord*, 1 E. & E. 602 (see *ante*, § 666), is a case in which such losses were held recoverable for breach of contract to furnish a machine to thresh grain in the field. See *Houser v. Pearce*, 13 Kan. 104.

¹ *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. Rep. 168.

ices. This would be allowing double damages.¹ A principal contractor who neglects to furnish material to his subcontractor is liable for the loss of time thereby occasioned.² One who delays the performance of his contract to harvest grain is liable for the loss of that which shells out if it could have been saved if harvested in time. The fact that much of that lost was shelled out by the wind does not absolve the contractor. The question whether the high winds which caused the shelling out of the grain were within the contemplation of the parties when they contracted is for the jury. In an action to recover for the breach of such contract all the damages sustained may be recovered by the lessee of the land, although the lessor was entitled to an undivided portion of the grain, the contract having been made with the lessee.³ In consequence of a subcontractor's delay in performing the principal contractor lost the use of a large sum of money which the employer retained under the contract because the work was not done within the stipulated time; he was obliged to perform a large portion of the work at an increased expense, to retain the services of a number of employees, which would not otherwise have been needed, and to give his own time and service to the completion of the work. None of these items of damage were too remote, neither were they speculative or uncertain.⁴ A contractor is not exempted from liability for the usual measure of damages where he abandons his contract because of a stipulation therein authorizing the owner to finish the work and deduct the cost from the contract price.⁵ If a government contractor secures an extension of time he must respond for the additional expense of engineering and inspection thereby made necessary.⁶ Under a contract stipulating that in case of its annulment the contractor shall be charged with all extra expense, he is liable for all expenses which would not have been incurred by the employer if the contract had been complied with.⁷

¹ *Id.*⁵ *McGrath v. Horgan*, 72 App. Div.² *Perine v. Standfield*, 107 Mich. 553, 65 N. W. Rep. 541.

152, 76 N. Y. Supp. 412.

³ *Holt Manuf. Co. v. Thornton*, 136 Cal. 232, 68 Pac. Rep. 708.⁶ *Saterlee v. United States*, 30 Ct. of Cls. 31, 49.⁴ *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261.⁷ *McLaughlin v. United States*, 37 Ct. of Cls. 150.

§ 705. Consequential damages for defective work. A party was employed to dress two pairs of burr mill stones in a mill at \$16 a pair. There was no special contract as to the [497] profits to be derived from the mill. On these facts it was held that there was no error in saying to the jury that they should estimate the immediate loss and not the remote consequences of the work, with reference to any circumstances attending it; nor was there evidence of any special facts brought to the employee's notice to show that his contract was made in view of such consequences as the loss of custom.¹ [498] Agnew, J., followed this ruling by these observations: "A very small part of the machinery of a mill or factory may be so essential to its running that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever supposed that the blacksmith, millwright or mechanic who undertakes to repair or replace it, and whose compensation may be a few dollars, or even a few cents, is, by his implied contract to do his work in a workmanlike manner, to be held liable for the large losses of the mill being idle? But few men could be found to work at a risk so great for a compensation so inadequate. But where by the terms of a special contract, or the facts brought into view at the time of his employment, the attention of the party is called to the fact that the risk is to be his, and he enters upon the duty with this consequence in his mind, he may be held to another measure of compensation." If machinery is supplied and essential repairs are made upon the plant of a cotton compress company in such a way as to cause an explosion, the contractor is liable for the resulting damage and must return the money paid on the contract, the payment having been made with the understanding that the employer waived no rights thereby.²

If a person engages in the business of searching public records, examining titles to real estate and making abstracts thereof for compensation, the law implies that he assumes to possess the requisite knowledge and skill, and undertakes to use due and ordinary care in the performance of his duty; and

¹ Fleming v. Beck, 48 Pa. 309.

² Machine Co. v. Compress Co., 105 Tenn. 187, 58 S. W. Rep. 270.

for failure in either of these respects, resulting in damages, the party injured is entitled to recover. Where a party was employed to examine the records and make an abstract of the title to real estate, and he omitted to note the fact of a judgment and sale of the land for taxes, of which the employer who purchased the land was ignorant until the time for redeeming had expired, and was consequently obliged to pay out money to remove the cloud upon his title, it was held he was entitled to recover of the person making the abstract the sum so paid to remove the cloud.¹ For the failure to deliver a chattel mortgage and cause it to be recorded, the party in default is liable for the damages resulting from the loss of the lien upon the property mortgaged. The sum realized on its sale on execution is not conclusive as to its value against a stranger to the writ.² If manufactured articles are not up to the required standard as to quality the employer cannot show that because of their defect and the sale of them he has been unable to sell other goods of that kind. The consequence is too remote.³ He may, however, recover the cost of putting the article in shape to fill a contract of which the contractor had knowledge when he undertook to manufacture it.⁴ On the breach of a contract to furnish a specified quantity of steam daily as required for the purpose of a book bindery, the damages are not measured by the binder's loss of materials resulting from the insufficiency of the supply nor the wages paid his employees when they were idle, in the absence of proof that he was unable to obtain steam elsewhere or was prevented from filling contracts for work.⁵ One who has furnished unsuitable material for a building may be liable for the damages resulting from the blowing off of its roof.⁶ The damages resulting from the neglect of a contractor, who undertook to bore an artesian well, to draw out the casing furnished

¹Chase v. Heaney, 70 Ill. 268; Smith v. Holmes, 54 Mich. 104, 19 N. W. Rep. 767. See § 679; Appleby v. State, 45 N. J. L. 161.

²Stott v. Harrison, 73 Ind. 17.

³Loudy v. Clarke, 45 Minn. 477, 48 N. W. Rep. 25; De Loach Mill Manuf. Co. v. Bonner, 64 Ark. 510, 43 S. W. Rep. 504, citing the text.

⁴Eagle Tube Co. v. Edward Barr Co., 16 Daly, 212, 10 N. Y. Supp. 113.

⁵Russell v. Giblin, 16 Daly, 258, 10 N. Y. Supp. 315; Manhattan Stamping Works v. Koehler, 45 Hun, 150.

⁶Block-Pollak Iron Co. v. Cincinnati Corrugating Iron Co., 10 Ohio Dec. 51.

by the employer, are limited to the value of the casing lost; increased expenses of the latter in watering his cattle, caused by the casing obstructing the flow of water, are too remote and uncertain.¹

Where negligent workmanship resulted in the fall of a portion of the brick walls of a building the subcontractor was liable to his principal for the necessary expense of repairing and rebuilding them, the value of the property destroyed, the sum it cost to remove the debris, and for the liability the principal contractor incurred to the employer because of the consequent delay in completing the contract and the extra expense caused by doing it an unpropitious season.² In a late case the defendant undertook to embroider draperies made of material especially manufactured for the purpose for the plaintiff's customers, the plaintiff being engaged in decorating and furnishing houses. The material could not be duplicated and had no market value. At the time it was received by the defendant he knew of its exceptional character and of the contract between the plaintiff and his customer. For spoiling the material the defendant was answerable for its value, the labor of the plaintiff and the profits he would have received if he had executed his contract with the customer.³

SECTION 2.

CONTRACTOR AGAINST EMPLOYER.

[499] § 706. Contract price; rights in insurance money.

The contract price, if there is one,⁴ or, if not, the reasonable value of what has been done, is the measure of recovery where a contract for particular work has been performed. To avoid liability for such price because of the defective performance of the contract, the employer must seek to recoup his damages and prove them.⁵ Liability under the contract is not affected

¹ *Elmendorf v. Classen*, 92 Tex. 472, 49 S. W. Rep. 1043.

² *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261.

³ *Boughton v. Petigny*, 72 App. Div. 76, 73 N. Y. Supp. 139, 76 id. 125.

⁴ *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. Rep. 817; *Chicago Training*

School v. Davies, 64 Ill. App. 503, and local cases cited; *Kick v. Doerste*, 45 Mo. App. 134; *City & Suburban R. Co. v. Basshor*, 82 Md. 397, 33 Atl. Rep. 635; *Laird v. Laird's Estate*, 127 Mich. 24, 86 N. W. Rep. 436.

⁵ *Sheppard v. Dowling*, 103 Ala. 563, 15 So. Rep. 846.

by payment made by strangers to it.¹ If the employer has furnished means for accomplishing the work at a price stipulated in the contract and this appears from the complaint, the contractor's recovery may be reduced to the extent of the agreed price without resorting to a plea of set-off.² If, while a building is being constructed, the owner directs or requests the contractor not to do certain work or furnish articles required by the written contract and the latter consents thereto, and does not do the work or furnish such articles, the owner is entitled to be credited with the reasonable cost or value of the work or articles omitted.³ If the owner, under a building contract, fails to insure the structure during the process of its erection for the protection of both parties as agreed upon, but insures it in his own name and for his own protection, and the building be partly constructed, then destroyed by fire, and the builder nevertheless completes his contract, the owner making some payments thereon before and some after the fire, the builder is not by reason of the facts interested in the insurance money or entitled to hold the owner as his trustee thereof, but has a legal right to an accounting, charging the owner with one building and the damages for the breach of the contract to insure, crediting such owner with payments made whether before or after the fire.⁴ Under a contract providing for payment as fast as the work is done and approved by the employer, his approval is a prerequisite only to the right to receive payments in advance of a full performance of the contract.⁵ If a specific price is fixed for each item of labor or materials furnished the contractor is entitled to interest upon his claim from the time of demanding payment.⁶

§ 707. **Demands for extra work.** Such demands are a common and prominent feature of the claims made under and in connection with contracts of this sort. The principal contest in respect to them is whether the work in question is extra, and whether it has been done under such circumstances that

¹ *Miller v. Ward*, 2 Conn. 494.

St. Clara Female Academy, 101 Wis. 468, 78 N. W. Rep. 173.

² *O'Brien v. Anniston Pipe Works*, 93 Ala. 582, 9 So. Rep. 415.

⁵ *Johnson v. Henry*, 127 Mich. 548, 86 N. W. Rep. 1027.

³ *Lindemann v. Dennis*, 65 Mo. App. 511.

⁶ *Sweeny v. New York*, 173 N. Y.

⁴ *Per Marshall, J., in McAlpine v.*

414, 66 N. E. Rep. 101.

the employer is responsible for it. He cannot be made a debtor for such work without his consent, nor, in the absence of a waiver or an estoppel, without substantial compliance with the terms of the contract. He should be informed that the work or material for which he is sought to be made liable, before it was done or furnished, would constitute a claim of this nature, and knowing this, it should be established as a fact that the [503] contractor had his authority for it.¹ It is also essential

¹ Springdale Cemetery Ass'n v. Smith, 32 Ill. 252; Western Union R. Co. v. Smith, 75 Ill. 496; Chicago, etc. R. Co. v. Vosburg, 45 Ill. 311; Hart v. Norton, 1 McCord, 22; Wilmot v. Smith, 3 C. & P. 353; Jones v. Woodbury, 11 B. Mon. 169; Miller v. McCaffrey, 9 Pa. 245; Lovelock v. King, 1 M. & Rob. 60; Bartholomew v. Jackson, 20 Johns. 28, 11 Am. Dec. 237; Dobson v. Hudson, 1 C. B. (N. S.) 652; Bailey v. Woods, 17 N. H. 365; Wildey v. School District, 25 Mich. 419; Wheeden v. Fiske, 50 N. H. 125; 2 Par. on Cont. 57; 2 Add. on Cont., § 870; Turner v. Grand Rapids, 20 Mich. 390; Hollinsead v. Mactier, 13 Wend. 276; Goldsmith v. Hand, 26 Ohio St. 101; Hasbrouck v. Milwaukee, 21 Wis. 217; In re Wood, 51 Barb. 275; Slusser v. Burlington, 47 Iowa, 300; Abercrombie v. Vandiver, 126 Ala. 513, 28 So. Rep. 491; Heard v. Dooly County, 101 Ga. 619, 28 S. E. Rep. 986; Eldridge v. Fuhr, 59 Mo. App. 44; Atlantic & D. R. Co. v. Delaware Construction Co., 98 Va. 503, 511, 37 S. E. Rep. 13; Coorsen v. Ziehl, 103 Wis. 381, 79 N.W. Rep. 562.

Jones v. Woodbury, 11 B. Mon. 167, is very instructive on this subject. J. employed W., a carpenter, to build for him a frame house, the different apartments and dimensions of which were exhibited in a ground plan, and W. agreed to do the work for \$600 or \$650, to be paid by the conveyance of a certain lot estimated at \$800; [500] the excess to be paid in carpenter work. The house was, in fact,

built by W. and finished with the most costly work, and he made a claim therefor of upwards of \$3,000. Marshall, C. J., said: "Such an extraordinary excess above the contract can only be justified by the facts, to be established with reasonable certainty: 1st. That in the execution of the work there were corresponding departures from the original design, either in the plan and dimensions of the house, and the quantity of materials and labor, or in the quality of the materials and finish, or style of work, or in some or all of these particulars; and 2d. That these departures were directed by the employer, or assented to by him understandingly, with a knowledge, or at least with reason to believe, that they would greatly increase the cost of the building to him. When the builder has undertaken the erection of a house for another for a specified price, without specification as to the manner or style of the work, it is his duty, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to apprise the employer of the difference in the cost. The employer may not know, and is not presumed to know, the gradations of price, pertaining to the different modes or styles of finish. He relies and has a right to rely upon the undertaker of the work for information on this subject. And the latter, having undertaken to complete the house for a fixed price,

that the work which is claimed for as extra should be so; for if it was in truth covered by the contract there would be no ground for asking compensation for it beyond that provided therein;¹ and a promise to pay for it would be without con-

cannot increase it *ad libitum*, merely on the ground that he was allowed to proceed with and complete the work according to his own judgment or taste, or that certain modes of work proposed by him pleased the fancy and met the appropriation of the employer. *Prima facie*, the employer had a right to suppose, unless apprised of the contrary, that every proposition as to the different portions of the work is made under the contract for the whole, and is intended merely to present to him a choice of modes within that contract. And to get rid of this inference the undertaker must show either that he apprised the employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that it was of such a character as necessarily to carry this information to him. And as to costly work done in his absence and in a manner not previously approved by him, it is not sufficient to show that upon his return he was pleased with its appearance and did not order it to be removed or pulled down. The general principle applicable to the case of a special contract for erecting a house, when in the progress of the work there have been alterations and additions not originally contemplated nor expressly provided for, seems to be that so far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be

paid for as if there were no contract. But the safety of employers and the good faith proper to be observed in all cases requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate further that extra work, either in quantity or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such work than the contract price [501] bears to the measure and value price of the work contracted to be done. So that if the contract price was a fourth or fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths or four-fifths of its price according to measure and value. . . . And we do not perceive how the verdict as to the amount can be sustained on any other principle than that of allowing for the work without reference to the contract price.

"The principal witness for the plaintiff, who was employed as his foreman in erecting the house, and who professes to be 'an *architect*,' and says that none but an 'architect' can understand the merits and value of the work done, referring to its earliest stage and certainly to a period when no extra work was done, states that the ground plan being before the parties, he was requested to draw a front view of the house, not departing from the ground plan, on which he says was written,

¹ Sharpe v. San Paulo R. Co., L. R. 8 Ch. 597, 608; Tharsis Sulphur & Copper Co. v. McElroy, 3 App. Cas. 1040; Cannon v. Wildman, 22 Conn. 472, 491.

sideration.¹ For all work done beyond the contract under prior direction or subsequent consent there is an undoubted liability.² But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them

in the handwriting of the defendant, the statement that the work was to be done in a neat, plain and workmanlike manner; that he accordingly drew a front view, preserving the dimensions of the ground plan; that the plaintiff exhibited this drawing to the defendant, as presenting '*the front view of his house,*' without any intimation that it was a departure from the original plan or contract, or would require an increased expenditure, and that the defendant was much pleased with it. This drawing presents a very handsome front, and was, as we understand, substantially followed, though perhaps with some additional ornaments in the erection and completion of the building. But we cannot say, from the copy of it which accompanies the record, that it furnishes any information or definite idea as to the precise nature of the workmanship, or as to the cost, or that its approval by the defendant necessarily implied that he intended or was willing to give up his original contract, in order to have such a house as was represented in this drawing, without regard to the cost. The witness seemed to consider the approbation or adoption of this drawing as the plan for the front of the house as a total departure from the original plan in the

style and manner of workmanship, and said that the presentation of it as the front view of the house, under the circumstances above stated, did not imply the intention or impose an obligation on the part of the undertaker to construct the house according to this plan at the contract price, and that he knew of no custom among carpenters to that effect. One or two other witnesses concurred with him as to not knowing of such a custom. But several of the defendant's witnesses deposed that they understood such to be the custom. And the defendant's counsel asked for an instruction to the effect that if the jury believed the front view was presented to the defendant under the circumstances above stated, and that there was such a custom as that stated by defendant's witness, the law presumed the intention and understanding of the parties to have been in accordance with such custom; which instruction the court refused to give. And this refusal is complained of as erroneous.

"Independently of any custom on the subject, reason and good faith indicate the inference as a [502] matter of fact that when the undertaker of a house by special contract presents to his employer a drawing of his house, without intimating that it differs from the one which he ex-

¹ Sweany v. Hunter, 1 Murph. 181.

² Preston v. Syracuse, 158 N. Y. 356, 53 N. E. Rep. 39; Horgan v. Mayor, 160 N. Y. 516, 55 N. E. Rep. 204; Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683, 22 S. W. Rep. 1097; Fletcher v. Gillespie, 3 Bing. 687; Thornton v.

Place, 1 M. & R. 218; Erskine v. Johnson, 23 Neb. 261, 36 N. W. Rep. 510; Badders v. Davis, 88 Ala. 367, 6 So. Rep. 834; Leverone v. Arancio, 179 Mass. 439, 61 N. E. Rep. 45. As to ratification by officers of the federal government, see Ford v. United States, 17 Ct. of Cls. 60.

as extra work, unless their character be such that he must be aware that they will increase the expense and cannot therefore be done for the contract price.¹

The rate of compensation for extra work and materials should

pected and intended to build under the contract, the employer has a right to infer that it presents the plan of his house as it is to be built under the contract unless there be some circumstance in the plan itself or attending its presentation by which he is or should be clearly apprised that this is not to be expected. The existence of a custom in conformity with this natural and just inference might raise it to the dignity of a presumption of law. But the instruction in the form in which it was asked and without qualification would have excluded from the jury the inquiry whether by the plan itself or some other circumstance the defendant was not apprised that a house built according to that plan must cost more than the contract price; and whether, in fact, he did not approve or adopt the plan with that expectation. It might also have prevented the jury from giving due weight to subsequent facts or acts of the defendant tending to prove that he was aware in the progress of the work that there was a departure from the original design and estimate which must considerably enhance the cost, and that with this knowledge he approved of or directed these departures, and therefore should, to that extent, be bound to pay their reasonable value. We cannot say, therefore, that the court erred in refusing this instruction as asked. The law requires and intends to enforce good faith on both sides of such a transaction; and will no more hold the builder to the con-

tract price, when by the authority or consent of the employer he has made alterations or additions which the latter knew would greatly increase the cost, than it will hold the employer to the full 'measure and value price' for such departures from the plan originally contemplated as he may have been drawn into the approval of, without knowing that they were departures, or without knowing that they would add materially to the cost. It was not necessary, however, that he should have actually or expressly directed the departures from the original plan. If he knowingly and understandingly assented or approved them when proposed, and thus caused additional expense and labor, not comprised in the original design and estimate, he made himself justly liable to pay an additional sum therefor. . . . But on the other hand, it is not sufficient that he approved or assented to certain additions or alterations or departures proposed for his acceptance, and in some instances evidently with the design of captivating his fancy. He must, in order to make him liable on the ground of such approval or consent, have been apprised, either by direct communication of the fact or by the nature of the proposition, that the work proposed would be attended with increased cost to him."

In *Dubois v. Delaware & H. Canal*, 13 Wend. 334, the plaintiff had entered into an agreement for excavating a section of a canal; he was to receive a given price per cubic yard

¹ *Lovelock v. King*, 1 M. & R. 60.

doubtless be that fixed by the contract so far as it can be made to apply; otherwise it will be determined as though no contract had been made,¹ as where they have been performed and furnished as the result of fraud.² If the work resulting from a change in the plans and specifications involves a substantially different undertaking from that originally contemplated, it is not within the contract, and the latter does not govern the compensation which may be recovered.³ But it has been laid down that "it is only where the alterations are so great that it is impossible to follow the original contract, that it will be deemed to have been wholly abandoned, so that the contractor can recover on a *quantum meruit*. So long as it can be traced it is binding upon both of the parties, and when once shown to have existed the burden is upon the party who claims its abandonment, and thereby seeks to lay down another measure of the value of the work than that agreed upon by both parties to the contract."⁴ If the performance of extra work prolongs the time required to complete the contract and makes its execution more difficult and expensive, a rate of compensation in excess of that fixed by the contract may be recovered.⁵ The contract may require deviations and extra work to be ordered in writing, still it will not place the employer under any disability to orally contract afterwards for new work, or for changes

for ordinary excavation, but no price was stated for hard-pan. During the progress of the work a large quantity of the latter was excavated, a fair remuneration for which would exceed the highest price specified in the contract for any species of work. While the work was being done, the parties treated the excavation of hard-pan as not included in the contract; and after it was completed the employer conceded that the contractor was entitled to compensation for such work beyond the price fixed for ordinary excavation; it was held that the contractor was entitled to recover on a *quantum meruit*, and so much as he could show the work was worth.

¹ Wheeden v. Fiske, 50 N. H. 125; Thornton v. Place, 1 M. & R. 218;

Fletcher v. Gillespie, 3 Bing. 637; Ellis v. Hamlin, 3 Taunt. 52; Goldsmith v. Hand, 26 Ohio St. 101; Holinsead v. Mactier, 13 Wend. 276; Jones v. Woodbury, 11 B. Mon. 169. See McCormick v. Connolly, 2 Bay. 401; Wright v. Wright, 1 Litt. 179.

² Bush v. Brooks, 70 Mich. 446, 38 N. W. Rep. 562.

³ Cook County v. Harms, 108 Ill. 151; Elgin v. Joslyn, 136 Ill. 525, 26 N. E. Rep. 1090; Smith v. Salt Lake City, 83 Fed. Rep. 784; Delafield v. Westfield, 77 Hun, 124, 28 N. Y. Supp. 440; Rhodes v. Clute, 17 Utah, 137, 53 Pac. Rep. 990.

⁴ Hood v. Smiley, 5 Wyo. 70, 36 Pac. Rep. 856.

⁵ Harrison County v. Byrne, 67 Ind. 21.

of the contract.¹ But it may operate to restrict the authority of an architect or other agent of the employer,² and the failure to order such work in the way prescribed in the contract may release the sureties of the contractor in the absence of their consent to the deviation therefrom.³ Money paid a contractor upon the principal contract cannot be set off against a claim for extra work.⁴ Notwithstanding such contract is not fully performed and the balance unpaid is not recoverable, a recovery for extra work is not defeated.⁵ If there is a deviation from the contract the recovery for the work consequently performed cannot exceed the extra cost of doing it. The contractor has the *onus* of showing that the expense was increased and the amount of the increase.⁶ On the breach of the employer's contract to furnish the use of a lot adjoining that on which a building was to be erected for the purpose of storing material on the latter lot, which the contractor was to use in the new building, the measure of the latter's recovery on being required to remove the material, in consequence of which he was unable to use it, was the cost of removing and obtaining a new place to store it, not the value of the material he might otherwise have used.⁷ If because of delay in making payments the contractor is obliged to borrow money, interest paid thereon is not an extra expense.⁸

§ 708. Recovery on part performance of severable contract. Where a special contract has been entered into and the contractor has not fully performed his part, his right of recovery will depend on its nature as to being entire [504] or severable, the cause of short or imperfect performance on

¹ *Ford v. United States*, 17 Ct. of Cls. 60; *Escott v. White*, 10 Bush, 169; *McLeod v. Genius*, 31 Neb. 1, 47 N. W. Rep. 473; *Cunningham v. Fourth Baptist Church*, 159 Pa. 620, 28 Atl. Rep. 490; *Barlow v. United States*, 35 Ct. of Cls. 514; *Lewis v. Yagel*, 77 Hun, 337, 28 N. Y. Supp. 833; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. Rep. 650; *Moore v. Carter*, 146 Pa. 492, 23 Atl. Rep. 243.

² *Thayer v. Vermont Central R. Co.*, 24 Vt. 440; *Herrick v. Belknap*, 27 id. 673.

³ *Beers v. Wolf*, 116 Mo. 179, 22 S. W. Rep. 620; *Eldridge v. Fuhr*, 59 Mo. App. 44.

⁴ *Woodward v. Fuller*, 80 N. Y. 315.

⁵ *Griffin v. Miner*, 54 N. Y. Super. Ct. 46.

⁶ *Nason Manuf. Co. v. Stephens*, 127 N. Y. 602, 28 N. E. Rep. 411.

⁷ *Gallagher v. Hirsh*, 45 App. Div. 467, 61 N. Y. Supp. 609.

⁸ *McLaughlin v. United States*, 36 Ct. of Cls. 138, 37 id. 150.

his part, and the conduct of the employer. If the contract is severable so that for part performance an instalment or portion of the compensation is expressly or by construction made payable before the residue of the work is done, an action may be brought therefor when due, and the right to recover it will not be otherwise affected by subsequent defaults or infractions of the contract than by reduction by recoupment or counter-claim.¹

A more liberal rule is adopted in some states than in others in determining whether contracts are severable. Thus, it has been laid down in Vermont that where one party contracts to do a job of work, and another to pay a stipulated price for it, and the labor is capable of a just division and apportionment, these stipulations will be considered independent, and full performance not a condition precedent to a right of action unless it be so expressly stipulated or inferable by strong implication. In such cases the party performing in part will recover the stipulated price *pro tanto*, deducting damages sustained by the other from the failure to perform the entire contract.² And so in Virginia and Texas it has been ruled that covenants, though dependent in form, will be construed as mutual and independent when it is necessary to effect justice between the parties. A party having covenanted to do two things, one of which he has done, will be allowed to maintain an action for the part done as upon an independent cov- [505] enant.³ And in North Carolina it was held that where a contract for the performance of work is divided into three

¹ Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. Rep. 1013; Goldsmith v. Hand, 26 Ohio St. 101; Sickels v. Pattison, 14 Wend. 257, 28 Am. Dec. 527; Lord v. Belknap, 1 Cush. 279; Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324; Ricker v. Fairbanks, 40 Me. 43; Snook v. Fries, 19 Barb. 313. But see Cox v. Western Pacific R. Co., 44 Cal. 18.

² Booth v. Tyson, 15 Vt. 515. See Snook v. Fries, 19 Barb. 313; Ricker v. Fairbanks, 40 Me. 43.

³ Todd v. Summers, 2 Gratt. 167, 41 Am. Dec. 379. In this case a

parol agreement was made in April, 1838, by which S. agreed to sell to T. his interest in a piece of land. T., in return, agreed to make 50 M. good staves for S. (but S. to saw the timber) by Christmas, and 25 M. more by May following. T. had been put in possession of the land and continued to hold it. S. was held entitled to recover for T.'s failure to make the staves, though S. had not sawed the timber, T. having the right to recoup damages against S. for his failure to saw it. Carroll v. Welch, 26 Tex. 147.

separate and distinct parts, there is no reason why the plaintiff should not recover for work done on the first two, according to it, though the third part was not finished.¹ So in Georgia it was held that if A. contract with B. to repair different parts of a machine and two frames for spindles, the one not being dependent at all for its use upon the completion of the other, and the former is repaired and received by the owner, he cannot make the failure to deliver the others an excuse for not paying for that which is finished and accepted.² In Pennsylvania, also, a like view has been declared: "A mutual or dependent covenant, which goes but to a part of the condition on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. Its non-performance will not necessarily bar the entire right of the plaintiff. So, too, a covenant which is in form entire, but in truth embraces a variety of acts more or less essential to the whole performance, may be so discharged as to sustain an averment of performance though a literal compliance cannot be alleged."³ But a contract which has for its object the cutting and peeling of the timber on certain land, the curing of the bark and loading it on the cars, the trimming and cutting the timber into log lengths and its delivery on or before a fixed date is a single undertaking, the price being entire, notwithstanding, for convenience, payments were to be made and apportioned to the several items of work as it progressed, and a condition for the reservation of ten per centum of the contract price until the work was completed.⁴

In New York a contract had been made by the plaintiff to make for the defendant three or four models of a mowing machine without delay; no price had been agreed on, nor when the models should be paid for. It was held that the contract was entire for three models, and the plaintiff having made and delivered one only was not entitled to recover for it although it had been accepted.⁵ And in *Stevens v. Beard*⁶ it

¹ *Brewer v. Tyson*, 5 Jones, 173.

Ct. 465, following *Quigley v. De Haas*, 82 Pa. 267.

² *Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602.

³ *Sharpe v. Johnson*, 41 How. Pr. 400. See *Cunningham v. Jones*, 4 Abb. Pr. 433.

⁴ *Danville Bridge Co. v. Pomroy*, 15 Pa. 159; *Chambers v. Jaynes*, 4 id. 39.

⁵ 4 Wend. 604.

⁶ *Shires v. O'Connor*, 4 Pa. Super.

was held that, where one party agreed to saw by a given time three hundred thousand feet of boards at a stipulated price per thousand, and failed to saw the whole quantity, that though he had sawed one hundred and forty-four thousand feet, which had been received by the other party, compensation for sawing this quantity could not be set off against the claim for damages for the omission to saw the residue. Sutherland, J., said: "The plaintiff claims damages for the neglect or refusal of the defendant to saw the one hundred and fifty-six thousand feet of boards, parcel of the three hundred thousand which he had agreed to saw. The defendant admits the violation of his contract, and that so far as the one hundred and fifty-six thousand are concerned, the plaintiff had sustained damage by his non-performance, at least to the amount of \$100. But then he says, I performed the residue of the contract and sawed for him one hundred and forty-four thousand feet, my services in doing which were worth to him \$2 per thousand feet by his own admission; and in estimating his damage, in consequence of my partial non-performance, the benefit received by him for my partial performance is to be taken into account, and to be deducted. This reasoning must be fallacious. The fallacy, I apprehend, is this: The action, though in form it alleges an entire breach of the contract, is in fact for the omission of the defendant to saw the one hundred and fifty-six thousand feet, and the claim of damages is confined to that. The defendant has the benefit of his partial performance; having been accepted by the plaintiff, it is *pro tanto* an answer to his action, and leaves the parties in the same condition as though the contract had been to saw one hundred and fifty-six thousand feet and had been entirely unperformed. The defendant cannot in this indirect manner recover for services which by the established principles of law he cannot recover for directly." The following case seems to be decided on the opposite view of the law. The plaintiff voluntarily and without cause abandoned a contract to build a house before its completion and sued to recover the contract price. The defendant presented in offset a claim for work done and expense incurred by himself to complete the job, and for damages for the non-completion thereof by the plaintiff, and this set-off or counter-claim was allowed by the ref-

eree. And it was held that thereby the defendant received an equivalent for the performance of the contract, and that the plaintiff was, therefore, entitled to recover the contract price.¹ Where material is delivered to be made into garments, the work to be paid for when delivered, the workman is entitled to recover for his services whenever any part of the material is made into garments.² Whether a particular contract is entire or severable depends upon the intention of the parties to be determined from the language employed and the subject-matter. Under a contract which bound the plaintiff to mine all the ore in a given territory, free from foreign substance and satisfactory to a party named, there being no limit of time nor any requirement as to the quantity to be mined in a given period, and the defendant's obligation was merely to permit the plaintiff to mine the ore and pay a monthly specified sum for each ton delivered the previous month, the fact that in mining several thousand tons a small quantity of the ore was not up to the standard, did not give the defendant the right to forbid the plaintiff from continuing work under the contract, which was severable and not entire.³

A contract which was entire when made may be severed by the subsequent acts of the parties; payments made or sums promised absolutely on it may be retained or collected, though the work has not been done which, by the contract, was a condition precedent.⁴ In *Hayden v. Madison* a contract [507] to build a road was let, one-half the price to be paid when it was completed and the other half a year afterwards. The larger part of the work was done, but it was not finished. The employer made the first payment with knowledge of these facts. In a suit brought afterwards for the contract price and on a *quantum meruit*, for as much as was done, it was held that making the payment was a waiver of the terms of the special contract, and the plaintiff was entitled to recover on the latter count; that, to ascertain the sum to be recovered, the contract price should be taken as the true value of the whole work

¹ *Austin v. Austin*, 47 Vt. 311.

⁴ *Walker v. Millard*, 29 N. Y. 375.

² *Labowitz v. Frankfort*, 4 N. Y. Misc. 275, 23 N. Y. Supp. 1038.

See *Meyer v. Hallock*, 2 Robert. 284.

³ *Worthington v. Gwin*, 119 Ala. 44, 24 So. Rep. 739, 43 L. R. A. 332.

⁵ 7 Me. 76.

agreed to be done. In *Williams v. Colby*¹ it was held that the defendant, having voluntarily made payments after the completion of the work contracted for, could recover nothing back, though it was found that the work was imperfectly done; such payments were a waiver of all claims for damages to the extent thereof. In Texas it was held that where a party employs a mechanic to do a certain job of work and pays him in advance, and the work is suspended for want of materials, or other cause, at the instance or by the default of the employer, the right of the mechanic is not to retain the full price, but to reconvene for the damages actually sustained by the failure of the employer to perform his part of the contract.²

§ 709. Demands for part performance of entire contract.

If a contract which is entire, after part performance, is rescinded by the mutual consent and act of the parties as to the residue, or further performance is prevented by law or act of God without the fault of either party, the contractor may [508] recover on a *quantum meruit* for what he has done.³ In such case neither party is in fault, and therefore is not responsible to the other for failing to fulfill. In a recovery on a *quantum meruit* there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he recovers such part of the entire amount as is equal to the part he has performed of the whole contract. It often occurs that a partial rescission results from deviation from the original plan and contract made by deliberate and explicit direction of the employer, or with his consent or acquiescence, and by such departures other work is substituted with other prices agreed to or implied. In such cases the

¹ 44 Vt. 40.

² *Hood v. Raines*, 19 Tex. 400. See *Hansbrough v. Peck*, 5 Wall. 497; *Wells v. Selwood*, 61 Barb. 238.

³ *Hall v. Ripley*, 10 Pa. 231; *Hoagland v. Moore*, 2 Blackf. 167; *Alego v. Alego*, 10 S. & R. 235; *Moulton v. Trask*, 9 Met. 577; *Melville v. De Wolf*, 4 El. & Bl. 844, 82 Eng. C. L. 844; *Bannister v. Reed*, 6 Ill. 100; *Wright v. Haskell*, 45 Me. 492; *Canada v. Canada*, 6 Cush. 18; *Webster v. Entfield*, 10 Ill. 298; *Selby v.*

Hutchinson, 9 id. 319; *Leonard v. Dyer*, 26 Conn. 177, 68 Am. Dec. 382; *Green v. Haley*, 5 R. I. 260; *Derby v. Johnson*, 21 Vt. 17; *Jones v. Mial*, 89 N. C. 89; *Schillo v. McEwen*, 90 Ill. 77; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. Rep. 531; *Von Dorn v. Mengedoht*, 41 Neb. 525, 59 N. W. Rep. 800; *Theobald v. Burleigh*, 66 N. H. 574, 23 Atl. Rep. 367; *Heine v. Meyer*, 61 N. Y. 171; *Jones v. Judd*, 4 N. Y. 411; *North v. Mallory*, 94 Md. 305, 51 Atl. Rep. 89.

omission of the particular work excluded by the substitution is not a violation of but is dispensed with by modifying the contract, and may involve a reasonable but indefinite extension of time. The contractor may then be entitled to recover the contract price, with such increase or subject to such diminution as is produced by the change of plan, on a *quantum meruit*.¹ The action may be brought on the contract when the contractor can show that he has substantially performed his part, except as he can allege and prove the legal excuse of being prevented by the employer, the act of God, or the law, but not otherwise.² It would be illogical and contrary to

¹ *Goldsmith v. Hand*, 26 Ohio St. 100; *Delaware & H. Canal Co. v. Du-bois*, 15 Wend. 87; *Wheeden v. Fiske*, 50 N. H. 125; *Bailey v. Woods*, 17 id. 365; *Hart v. Lauman*, 29 Barb. 410; *De Boom v. Priestly*, 1 Cal. 206; *Wright v. Wright*, 1 Litt. 179; *Morford v. Ambrose*, 3 J. J. Marsh. 688; *Allen v. McNew*, 8 Humph. 46; *Charleston Ice Manuf. Co. v. Joyce*, 63 Fed. Rep. 916, 11 C. C. A. 496.

² In *Smith v. Gugerty*, 4 Barb. 614, Strong, J., discusses the meaning of a *substantial* compliance with the contract. He says: "No builder ever does or can comply with every minute requisition; a brick, a stone, a nail, a shingle or board may have some slight defect which might have been almost, and perhaps entirely, imperceptible, until it has been fixed in its place, and it had become impossible to remove it; or it may happen that a minute portion of mortar among a large mass may not have been mixed precisely in the required proportions, and the difficulty may not be discovered until it is too late to change it. Such things will constantly occur, unless men should become more perfect in their powers of perception and discrimination than they are at present. If there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builders should

be entitled to receive the reward of his labor, although he may not (as the architect employed in this case certified) have in every instance complied with its terms 'literally in every punctilio.' A substantial compliance, without any intentional variation, should in all cases be considered as a full performance of a condition, whether precedent or subsequent." See *Estep v. Fenton*, 66 Ill. 467; *Taylor v. Beck*, 13 id. 376.

In *Crane v. Knubel*, 61 N. Y. 645, it was held that where, by the terms of a contract, the performance of certain specified work is a condition precedent to payment, a failure upon the part of the contractor to perform in any particular, if wilful and without excuse, will prevent a recovery for the work done. In such case the comparative extent of the default will not be inquired into. (*Van Clief v. Van Vechten*, 130 N. Y. 571, 579, 29 N. E. Rep. 1017; *Haist v. Bell*, 24 App. Div. 252, 48 N. Y. Supp. 405.) H. and the defendant entered into a contract under seal, by which H. contracted to do the carpenter work on two buildings for defendant; an instalment was to be paid H. when a certain part of the work was done. He gave the plaintiff an order on the defendant, to be paid when the work was done; the defendant accepted it accordingly. Before the

[509] the case stated to allow a recovery except upon proof of performance of the precedent condition. To recover for part performance on any other explanation or excuse for not having fully executed the contract requires a different declaration, a *quantum meruit* count. Nor can general *assumpsit* be maintained for work done under a special contract which is still unperformed and not rescinded; the principle is that where there is an express promise none can be implied.¹ This prin-

completion of the work so specified H. abandoned the contract. Defendant thereafter, on presentation of the order, promised to pay it. The order was not for the whole amount of the instalment, and the residue was more than sufficient to pay for the completion of the work. In an action to recover the amount of the order it was held that, the promise being without consideration, the performance of the condition precedent was not thereby waived: nor was the defendant estopped from alleging non-performance, and the plaintiff could not maintain his action.

In *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442, it appeared that the work sued for on the special contract had not been quite performed; that it would cost a little over \$200 to complete it. The court held the contract not substantially fulfilled, intimating that a substantial performance only ignored those defects which were such trifles as the law did not notice; one member of the court, however, advanced the opinion that a substantial compliance with the contract might have been certified. See *Chambers v. Jaynes*, 4 Pa. 39; *Cornell v. Vanartsdalen*, id. 364; *Lewis v. Yagel*, 77 Hun, 337, 28 N. Y. Supp. 833; *Shires v. O'Connor*, 4 Pa. Super. Ct. 465; *White v. Braddock Borough School District*, 159 Pa. 201, 28 Atl. Rep. 136; *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. Rep. 811; *Hulst v. Benevolent Hall Ass'n*, 9 S. D. 144, 68 N. W. Rep. 200; *Oberlies*

v. Bullinger, 132 N. Y. 598, 30 N. E. Rep. 999; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. Rep. 845, 9 L. R. A. 52; *Rose v. O'Riley*, 111 Mass. 57; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. Rep. 635; *Crouch v. Gutmann*, 134 N. Y. 45, 51, 31 N. E. Rep. 271; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359, 79 N. W. Rep. 564.

The doctrine of substantial performance has not been adopted in England or in Canada. In *Sherlock v. Powell*, 26 Ont. App. 407, 410, it is said, quoting from *Hudson on Building Contracts* (2d ed.), vol. 1, p. 201: Where the contract is entire, and completion is a condition precedent to payment, no English case has yet decided that any allegation of substantial performance will enable the builder to recover, unless there is some act of the employers, such as acceptance, waiver, or prevention, or evidence from which a contract can be implied to pay for the work as performed and according to value, although it is not entirely completed. See *Lucas v. Borough of Drummoine*, 16 N. S. W. L. R. (law) 55.

¹ *Jennings v. Camp*, 13 Johns. 94, 7 Am. Dec. 367; *Lawrence v. Simons*, 4 Barb. 354; *Raymond v. Bearnard*, 12 Johns. 274, 7 Am. Dec. 317; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Chambers v. King*, 8 Mo. 517; *Shepard v. Palmer*, 6 Conn. 94; *Dermott v. Jones*, 2 Wall. 1; *Clark v. Smith*, 14 Johns. 326; *Cutter v. Powell*, 2 Smith's Lead. Cas. 17 *et seq.*

ciple is generally followed and strictly enforced where the special contract has been intentionally or fraudulently violated or abandoned by the contractor.¹ An exception [510] has been admitted and recovery for part performance allowed on a *quantum meruit* where the employer, notwithstanding a failure to fulfill in point of time, has permitted the contractor, without objection, to proceed with the work;² or, knowing of the breach by delay or imperfect work, has voluntarily appropriated and derived a benefit from it.³ If the builder has

Jones v. Mial, 89 N. C. 89; Hulst v. Benevolent Hall Ass'n, 9 S. D. 144, 68 N. W. Rep. 200; Lowell v. Earle, 127 Mass. 546; Gillis v. Cobe, 177 Mass. 584, 592, 59 N. E. Rep. 455; Tribune Ass'n v. Eisner & M. Co., 70 App. Div. 172, 75 N. Y. Supp. 100; North v. Mal-lory, 94 Md. 305, 51 Atl. Rep. 89.

¹ Elliott v. Caldwell, 43 Minn. 357, 45 N. W. Rep. 845, 9 L. R. A. 52; Dermott v. Jones, 2 Wall. 1; Sinclair v. Tallmage, 35 Barb. 602; Smith v. Gugerty, 4 id. 614; Gleason v. Smith, 9 Cush. 484, 57 Am. Dec. 62; Gilman v. Hall, 11 Vt. 510, 34 Am. Dec. 700; Snow v. Ware, 13 Met. 42; Walker v. Orange, 16 Gray, 193; Veazie v. Bangor, 51 Me. 509; Merrill v. Ithaca, etc. R. Co., 16 Wend. 582; Sumpter v. Hedges, [1893] 1 Q. B. 673; Munro v. Butt, 8 El. & B. 738; Whittaker v. Dunn, 3 T. L. Rep. 602; Sherlock v. Powell, 26 Ont. App. 407; Homer v. Shaw, 177 Mass. 1, 58 N. E. Rep. 160; McGrath v. Horgan, 72 App. Div. 152, 76 N. Y. Supp. 412.

² Phillips, etc. Const. Co. v. Seymour, 91 U. S. 646; Gallagher v. Nichols, 16 Abb. Pr. (N. S.) 337; Sinclair v. Tallmage, 35 Barb. 602; Merrill v. Ithaca, etc. R. Co., 16 Wend. 586; Ladue v. Seymour, 24 id. 60; Van Buren v. Digges, 11 How. 461; Wolfe v. Parham, 18 Ala. 441; Simpson v. McDonald, 2 Ark. 570; Farmer v. Francis, 12 Ired. 282; Hayden v. Madison, 7 Me. 76; Laycock v. Moon, 97 Wis. 59, 72 N. W. Rep. 372; Danforth v. Freeman, 69 N. H. 466, 43 Atl.

Rep. 621; Johnson v. Slaymaker, 18 Ohio Ct. Ct. 104; Schaefer v. Gildea, 3 Colo. 15.

³ Keith v. Ridge, 146 Mo. 90, 47 S. W. Rep. 904; Freeman v. Aylor, 62 Mo. App. 613; The Lucille Manor, 70 Fed. Rep. 233; Bell v. Teague, 85 Ala. 211, 3 So. Rep. 861; Dixon v. Gravely, 117 N. C. 84, 23 S. E. Rep. 39; Harris County v. Campbell, 68 Tex. 22, 3 S. W. Rep. 243; Taylor v. Williams, 6 Wis. 363; Hughes v. Eschback, 7 D. C. 66; Morford v. Mastin, 6 T. B. Mon. 609, 17 Am. Dec. 168; Veazie v. Bangor, 51 Me. 509; Dermott v. Jones, 23 How. 220, 2 Wall. 1; Williams v. Porter, 51 Mo. 441; Coweta Falls Manuf. Co. v. Rogers, 19 Ga. 416, 65 Am. Dec. 602; Denmead v. Coburn, 15 Md. 29; Bishop v. Price, 24 Wis. 480; Hyde v. Booraem, 16 Pet. 169; Clayton v. Blake, 4 Ired. 497; Jewett v. Weston, 11 Me. 346; Norris v. School District, 12 Me. 293, 28 Am. Dec. 182; Newman v. McGregor, 5 Ohio, 349, 24 Am. Dec. 293; Barker v. Rutland & W. R. Co., 27 Vt. 766; Elliott v. Wilkinson, 8 Yerg. 411; Horn v. Batchelder, 41 N. H. 86; Bertrand v. Byrd, 5 Ark. 651; Cardell v. Bridge, 9 Allen, 355; Hawkins v. Gilbert, 19 Ala. 54; Conery v. Noyes, 17 La. Ann. 201; English v. Wilson, 34 Ala. 201; Allen v. McKibbin, 5 Mich. 449; McKinney v. Springer, 3 Ind. 59; McClure v. Secrist, 5 Ind. 31; Barkalow v. Pfeffer, 38 Ind. 214; B. & O. R. Co. v. Lafferty, 2 W. Va. 104; Smith v. Gugerty, 4 Barb. 614; Tay-

done a large and valuable part of the work he undertook, but yet has failed to complete the whole, or any specific part, within the time limited by his contract, the other party, when that time arrives, has the option of abandoning the contract [511] for such failure or of permitting the party in default to go on. If he abandons it and notifies the other party, the failing contractor cannot recover on the contract, because he cannot make or prove the necessary allegations on his part. But if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable for the contract price of the work, less such damages as he has sustained from the contractor's failure to fulfill the contract within the stipulated time.¹ Similar considerations will raise a duty to pay for work done in good faith towards the fulfillment of a contract, notwithstanding deviations from it, where the employer is aware of such departures and does not object to them or accepts the work after it is done and derives a benefit from it. He is liable to pay the contract price if the contract can, or so far as it can, be applied to the work, deducting therefrom such damages as will compensate the employer for the defects in the work or materials, or for his disappointment in not having the work done in the very manner stipulated for; and so far as the contract cannot be traced in or applied to the work it will be estimated without regard to it; but the employer should not lose by the violation of the contract nor the contractor gain by it. On the whole, the employer should have such deduction made from the contract price as will be equal

lor v. Merryweather, 15 Ala. 735; 8 Vt. 205; Hennessey v. Farrell, 4 Escott v. White, 10 Bush, 169; Porter v. Woods, 3 Humph. 56, 39 Am. Dec. 153; Hayward v. Leonard, 7 Pick. 181; Lord v. Belknap, 1 Cush. 279; Adlard v. Muldoon, 45 Ill. 193; Van Buskirk v. Murden, 22 Ill. 446, 74 Am. Dec. 163; Austin v. Austin, 47 Vt. 311; Merrow v. Huntoon, 25 id. 9; Bassett v. Sanborn, 9 Cush. 58; Cullen v. Sears, 112 Mass. 299; Jewell v. Schroepel, 4 Cow. 564; Eddy v. Clement, 38 Vt. 486; Dyer v. Jones, 8 Vt. 205; Hennessey v. Farrell, 4 Cush. 267; Walker v. Orange, 16 Gray, 193.

If the special contract has been performed or is at an end by an act of the employer, the contractor can recover for what he has done in general *assumpsit*. Bassett v. Sanborn, 8 Cush. 58, 66, 67; Western v. Sharp, 14 B. Mon. 177; Escott v. White, 10 Bush, 160.

¹Phillips, etc. Const. Co. v. Seymour, 91 U. S. 646.

to the difference between the value of the work agreed to be done and the work actually done.¹

§ 710. **Same subject.** The inquiry is not what, under other circumstances, the contractor would be entitled to recover, but what is he entitled to in reference to the contract price and the damages sustained by the employer in consequence of the want of a strict performance on the part of the plaintiff.² The employer may introduce evidence of the amount necessarily expended by him in getting the work completed,³

¹Farmer v. Francis, 12 Ired. 282; Danforth v. Freeman, 69 N. H. 466, 43 Atl. Rep. 621; Johnson v. Slaymaker, 18 Ohio Ct. Ct. 104; McGrath v. Horgan, 72 App. Div. 152, 76 N. Y. Supp. 412.

The question discussed in the text has been passed upon in New Jersey for the first time in a comparatively late case, and the conclusion reached that "when a contract for erecting a building has not been so performed that a recovery can be had thereon, a recovery in *assumpsit* upon the common counts for work and materials furnished in the erection will only be permitted when the owner has actually accepted the building erected. The view that assumes acceptance from the mere fact that the edifice adds value to the land on which it stands," in the judgment of the writer of the opinion, "unduly restrains the force of the contract of the parties and deprives the owner of the right to reject an edifice not in substantial conformity with its terms. If thereby any apparent injustice seems done to the builder in retaining the materials put upon the property, it is the result of his own default, to which he must submit. Such acceptance by the owner may be express or implied from his conduct. It seems well settled that mere occupancy of the building by the owner, while appropriate, is neither presumptive nor conclusive evidence of acceptance. The reason

is obvious. The building belongs to the owner of the land on which it stands. As was said by Lord Campbell in *Munro v. Butt*, 8 El. & Bl. 738, the owner cannot be appropriately said to take possession of the building, for he has not been out of possession of that which is thus affixed to his own land." *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373; *Mackinson v. Conlon*, 55 N. J. L. 564, 27 Atl. Rep. 930; *Feeney v. Bardsley*, 66 N. J. L. 239, 49 Atl. Rep. 443.

²*Rice v. Partello*, 88 Ill. App. 52; *Dobbins v. Higgins*, 78 Ill. 440; *Chicago v. Sexton*, 115 Ill. 230, 241, 2 N. E. Rep. 263; *Muller v. Gillick*, 66 Mo. App. 500; *Ladue v. Seymour*, 24 Wend. 60.

³*Clark v. Russell*, 110 Mass. 133; *Colton v. Good*, 11 Up. Can. Q. B. 153; *Lamoreaux v. Rolfe*, 36 N. H. 33; *Sheldon v. Leahy*, 111 Mich. 29, 69 N. W. Rep. 76; *Heman v. Compton Hill Imp. Co.*, 58 Mo. App. 480.

After the breach of such a contract evidence of a subsequent agreement between the plaintiff and third persons, and the amount to be paid for the performance of the same services, but which agreement is not carried out, is not competent as tending to show the amount of damages; otherwise if the services had been performed under such agreement. The court say, by Eastman, J.: "The value of property may be shown by actual sales of the property itself, or of similar property situated under

[512] or of what it would cost to complete it.¹ And where a reduction of the contract price is sought by evidence that the work was not properly done, it is not competent for the contractor to prove in answer that it would have been worth more than that price to have done it in a workmanlike manner.² Nor is the amount saved to the employer by letting a new contract to complete the work the test of the amount equitably due the prior contractor for work done and material furnished under a contract he has failed to complete.³

Where there are damages to the employer, growing out of the non-performance of the contract, which do not enter into the contract price, he may recoup them in the contractor's action upon a *quantum meruit*.⁴ Thus, where a plaintiff had entered into a contract with a railroad company to construct for them a swinging draw-bridge over a river, in accordance with a submitted plan and tracings, for a stipulated price, in an action for the price the company set up alleged defective construction of the bridge, and consequent delays and expenses, and claimed by way of recoupment the resulting dam- [513] ages. On the trial the deposition of a witness was offered, to whom interrogatories had been put inquiring whether the structure and arrangement of the bridge caused any injury or damage, hindrance or delay to the company in operating the road, and whether hindrance or delay was caused

like circumstances. Such is the settled rule in this state. *Whipple v. Walpole*, 10 N. H. 130; *Beard v. Kirk*, 11 N. H. 397; *White v. Concord Railroad*, 30 N. H. 188. So an offer to sell property by the owner may be evidence against him as tending to show that the property was worth no more. *Hersey v. Ins. Co.*, 27 N. H. 149. It is in the nature of an admission on his part as to its value. Upon the like principle it is competent to show the price paid for doing certain or similar labor, as tending to prove the value of the labor. And, as against a party an offer by him to perform the work would be admissible as showing what it was worth. But the evidence used upon the trial

in this case does not fall within this principle. It does not appear that the work was ever performed, . . . or that the contract . . . was ever carried into effect. The evidence was not used against the party making the contract, but in his favor." *Lamoreaux v. Rolfe*, *supra*.

¹ *Gonzales College v. McHugh*, 21 Tex. 256.

² *Williams v. Keech*, 4 Hill, 168.

³ *Michigan Paving Co. v. Detroit*, 34 Mich. 201.

⁴ *Allen v. McKibbin*, 5 Mich. 449; *Sheldon v. Leahy*, 111 Mich. 29, 69 N. W. Rep. 76; *Heman v. Compton Hill Imp. Co.*, 58 Mo. App. 480; *Muller v. Gillick*, 66 Mo. App. 500.

by the imperfect construction of the bridge to any vessel navigating the river, and whether the structure or working of the bridge rendered it liable to be injured or destroyed by vessels navigating the river, and what number of hands were required to work the draw-bridge, and what number would be needed if it had been properly constructed; and it was held that the interrogatories were proper and pertinent in themselves; that the objection that they related to speculative damages did not apply to the first and last, in which the damages would be capable of actual estimation, and that the facts sought would at least have furnished elements to the jury for a just estimate of the damages to be recouped from the contractor's demand.¹ The right to recover on a *quantum meruit* for a *bona fide* part performance is not precluded by the fact that by the contract under which the work was done payment was to be made otherwise than in money, if the employer has refused to make compensation in the mode provided.²

On the completion of the work, or such part of it as the contractor performs, if the employer may reject it without giving up his own property on which the labor has been bestowed, and thus decline any benefit from it, his omission to exercise that privilege, and his reception, use and appropriation of the work, afford undoubted ground of recovery for it on reason and authority. If the work has not been done in conformity to the contract the employer is not obliged to receive it, and if he does not he incurs no liability for it. And where he signifies his rejection of work which has been done for him

¹ Railroad Co. v. Smith, 21 Wall. 255.

² Bassett v. Sanborn, 9 Cush. 58.

In Barker v. Rutland & W. R. Co., 27 Vt. 766, the contractor was to receive in payment a certain proportion of the defendant's stock. Upon finishing his work he demanded his pay, claiming that his contract had been performed; this was denied by the defendant, and on that account payment was refused. The market price of the stock at this time was thirty-three per cent. of its par value. It being determined that the plaintiff

was entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of the contract, but upon equitable grounds, his recovery of that part of his claim which was made payable in stock, it was held, should be limited to the market value of the stock at the time of the demand. But see Roberts v. Wilkinson, 34 Mich. 129; Clark v. Fairchild, 22 Wend. 576; Mitchell v. Gile, 12 N. H. 390; Fitch v. Casey, 2 G. Greene, 300; Weart v. Hoagland, 22 N. J. L. 517; Harrison v. Lake, 14 M. & W. 139.

upon his own property under a special contract, but not in accordance therewith, and gives the contractor permission to take to himself or retain the property upon which the work has been done, on paying for it, there is no acceptance by a voluntary appropriation of the insufficient work; and where such a rejection is practicable, there ought to be no liability if the employer avails himself of this method of avoiding it. Such a rejection is not always practicable; when it is not,—when the employer must receive the benefit as the work progresses, and in advance of any deviations from the contract, and he acts promptly to make and enforce his objection when there is defective work or delay, there is no ground of voluntary acceptance for holding him liable otherwise than by the terms of the special contract. On the other hand, the want of objection and apparent acquiescence where there is knowledge of the actual character of the work would be a fraud on the contractor if he were thus encouraged to proceed, and still be at the hazard of losing all compensation except on terms of showing a punctilious performance of the contract. It is not the duty, however, of the employer to watch the progress of work under a special contract to see that it is in all respects conformable to its requirements, unless this duty is imposed by the contract. Hence, in many cases, erections on the employers' land are contracted for, or work on his materials, and no inspection is made or required to be made before the work is offered for acceptance as complete; then objections may be freely made. The employer may retain and take the benefit of the work, because it is done on his land or materials. He is not required to abandon his property in order to reject the work. It has often been held that if objections are made at that time by the employer, indicating that he is not satisfied with the work, or even keeps silent, and there is no intention in fact to waive objections, he may use and derive benefits [515] from the work without having such use construed as an acceptance by which he becomes liable to pay for it upon an implied *assumpsit*.¹ In some states and particularly in New York, formerly, the employer had the right to insist on a strict performance of a building contract by which a building is to

¹ *Zottman v. San Francisco*, 20 Cal. 96. See note 1, p. 2161.

be erected on the employer's land, and might successfully resist the collection of any compensation until the performance of the condition precedent, or an intentional waiver of objections, however beneficial the actual performance may have been. The mere occupation of a building in such a case was not a waiver of strict performance of the contract for its erection. The employer was entitled to retain, without compensation, the benefit of a partial performance, where, from the nature of the contract, he must receive such benefit in advance of a full performance, and was by the contract under no obligation to pay until the performance was complete.¹ The rule has been relaxed in New York, so that where a builder has in good faith intended to comply with his contract, and has substantially done so, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of the defects.² This is substantially the rule of the Minnesota court.³ The principle does not extend to a case in which the defect runs through the whole building, or is of such a nature that the object of the parties to have a specified amount of work done in a particular way is defeated.⁴

§ 711. **Same subject.** It is necessary in California, in order that this doctrine of liability upon an implied contract may be applied, not only that there be no restrictions imposed by law upon the party sought to be charged against making, in direct terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept the work, and where such election will or may influence the conduct of the other party with reference to the work itself.⁵ But there is generally a more liberal consideration of the equitable rights of the con-

¹ *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Brown v. Weber*, 38 N. Y. 187; *Adlard v. Muldoon*, 45 Ill. 193; *Bozarth v. Dudley*, 44 N. J. L. 304, 43 Am. Rep. 373, quoted from *supra*, § 709, n.; *Robinson v. Bullock*, 66 Ala. 548.

² *Woodward v. Fuller*, 80 N. Y. 312; *Johnson v. De Peyster*, 50 id. 666; *Glacius v. Black*, id. 145, 10 Am. Rep. 449; *Phillips v. Gallant*, 62 N. Y. 264;

Heckman v. Pinkney, 81 id. 211; *Morton v. Harrison*, 52 N. Y. Super. Ct. 305; *Nolan v. Whitney*, 88 N. Y. 648; *McGrath v. Horgan*, 72 App. Div. 152, 76 N. Y. Supp. 412.

³ *Leeds v. Little*, 42 Minn. 414, 44 N. W. Rep. 309.

⁴ *Phillips v. Gallant*, 62 N. Y. 264; *Woodward v. Fuller*, 80 id. 312.

⁵ *Zottman v. San Francisco*, 20 Cal. 96.

tractor where he has in good faith endeavored to comply with his contract, and his labor has added value to his employer's property, and a benefit necessarily accrues to him. Independently of any election to accept, the honesty of the contractor's efforts towards full performance, the beneficial character of the work, and the impossibility of the employer declining and rejecting it so that the contractor may make it useful to himself, have induced the courts to adopt the rule of awarding compensation to the contractor to the extent that the employer is thus benefited. As early as 1828 this rule was acted upon in Massachusetts, and it has been repeatedly approved in later cases there as well as elsewhere. It was thus stated as a question on which there were many conflicting opinions: "Whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet, nevertheless, the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them, so as in all events he shall lose nothing by the breach of the contract."¹

The sole ground upon which a contractor is entitled to anything under this rule is that if he were not paid something the defendant would profit at his expense, although his claim is without merit as far as rights under the contract are concerned. Hence the amount which may be recovered is the amount by which, were no payment made, the defendant would

¹ Hayward v. Leonard, 7 Pick. 181; 299; Atkins v. Barnstable, 97 id. 428; Smith v. First Cong. Meeting House, 8 id. 178; Bassett v. Sanborn, 9 Cush. 58; Snow v. Ware, 13 Met. 24; Cardell v. Bridge, 9 Allen, 355; Walker v. Orange, 16 Gray, 193; Morse v. Potter, 4 id. 292; Powell v. Howard, 109 Mass. 192; Cullen v. Sears, 112 id. 650; Clark v. Russell, 110 id. 133; Fitzgerald v. Allen, 128 id. 232; Gillis v. Cobe, 177 id. 584, 59 N. E. Rep. 455; Lyman v. Lincoln, 38 Neb. 794, 803, 57 N. W. Rep. 531; Norwood v. Lathrop, 178 Mass. 208, 59 N. E. Rep. 650.

profit at the plaintiff's expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. This value the plaintiff must prove before he can recover. If the contract is a beneficial one to the landowner the contractor is not entitled to recover any margin of the benefit which the former secured by the making of the contract; but the contractor is entitled to the value of the building as it is in the light of the landowner's right to have the building built, and properly built, for the contract price. If, for example, the landowner secured by his contract the erection for \$2,000 of a building worth \$3,000, and the plaintiff, in erecting the building, fails to comply with the contract in matters going to the essence of the contract, and the building, erected as it is erected, is worth \$2,500, the plaintiff is not entitled to recover \$2,500; all that he is entitled to recover is twenty-five thirtieths of \$2,000.¹ The additional value of the land to the owner by reason of the labor and materials performed and furnished may, at least in many cases, be ascertained by deducting from the contract price what the house was worth less to the defendant by reason of the deviations from the contract.²

The doctrine is firmly established in Vermont that where a contract has been substantially, though not strictly, performed; where the party failing to perform according to its terms has

¹ *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. Rep. 455. The action was for work done and materials furnished in the construction of a building which the plaintiff had contracted to build but failed to construct to the satisfaction of the architect, whose approval was required by his contract, which also required the plaintiff to ram the cinder filling on which the concrete floor of the building was laid. When certain heavy tanks for which the building had been designed were put in place there was so great a sinking of the floor that the damage caused thereby was greater than the value of the work and materials furnished by the plaintiff. The cause of the

sinking of the floor was not shown. Held, that in order to recover, the plaintiff must show that the building as it existed had a market value and added to the value of the defendant's land; that the burden was not upon the defendant to show that the sinking of the floor was due to the failure of the plaintiff to perform his contract, and that the plaintiff could not recover the value of his work and materials diminished by such damages as the defendant could prove in recoupment. Three judges dissented.

² *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. Rep. 650, and local cases cited.

not been guilty of a voluntary abandonment or wilful departure therefrom, has acted in good faith, intending to perform according to the stipulations, and has failed in a strict compliance with its provisions; and when, from the nature of the contract and of the labor performed, the parties cannot rescind, and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other, in such cases the party failing to perform strictly may recover of the other as upon a *quantum meruit* for such sum only as the contract, as performed, has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work. The rule is treated as a relaxation [517] from the strictness of the ancient law, standing upon the solid ground of necessity and equity, but to be guarded with care, lest in its application it should tend to impair the obligation and faithful performance of agreements. The contractor must have intended in good faith to fulfill the terms of the contract; its spirit must be faithfully observed, though the very letter of it fail. A voluntary abandonment or a wilful departure from its stipulations is not allowed. The principle applies only in cases where the contract cannot be rescinded, and where, from its nature, the labor performed under it must inure to the benefit of the employer, and it would be inequitable for him to retain it without making compensation. The party failing to perform can only recover such a sum as his labor has benefited the other. Had he strictly and literally kept his agreement he would have been entitled to the contract price. Failing in this — 1st, he must deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; — or, where that is impossible or unreasonable, such sum as will fully compensate him for the imperfection in the work, and the insufficiency of the materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed; 2d, he must also deduct from the contract price whatever additional damages his breach may have occasioned [518] to the other.¹

¹ Kelly v. Bradford, 33 Vt. 35. See Cummings, 26 id. 436; Hubbard v. Brackett v. Morse, 23 id. 554; Kettle Belden, 27 id. 645; Barker v. Troy & v. Harvey, 21 id. 301; Morrison v. R. R., 27 id. 780; Swift v. Harriman,

The substantial performance which is mentioned as requisite to bring a case within this equitable principle is not that near approach to perfect and complete fulfillment of the contract which is necessary to entitle the contractor to recover on it. In one case the contractor was reported to deserve about half price and was allowed to recover.¹ In another he agreed to build a stone wall four and a half feet high, and more than half of it was less; but it was held that the contract was substantially performed for the purpose of that remedy;² and in a later case a written contract was made to construct a road and bridge for the defendant, which specified in detail the length, width and mode of construction of both, and required that the whole work should be done in a thorough, workman-like manner, and be completed to the satisfaction and acceptance of the defendant's selectmen by a specified date, at which time, in consideration of such completion, the defendants agreed to pay for the same. By this contract the road was to be built sixteen feet wide and upon a line marked out; as built it varied from that line in some places two or three feet, and in others it was not so wide in the rock cuts as it was stipulated to be. There was a defect in the bridge, in the interlocking of the long timbers or chords; they were not put together with

30 id. 607; Eddy v. Clement, 38 id. 486.

In *Dyer v. Jones*, 8 Vt. 205, Redfield, J., said: "Where, from the nature of the contract, it is impossible to put the parties in *statu quo*, as where A. builds a house or wall on B.'s land, or, as in the present case, where labor has been performed on the plaintiff's land by defendant, from which the plaintiff will and must derive some benefit, and which cannot be transferred to defendant, the party really entitled to it, it has been held that the party performing the labor might recover so much *only* as the labor is worth to the party who *must* have the *benefit* of it. This rule is adopted *ex necessitate*, to prevent one party gaining an unconscionable advantage over the other. The failure to perform

the contract strictly according to its terms may have been rather the misfortune than the fault of the party, but it forever precludes a recovery *upon the contract*, for a strict performance is a condition precedent to any right of action. But the laborer is entitled to his own labor or its product, where it is in a shape that he can carry it away. In this case he cannot. Hence the rule has been adopted that the laborer may recover as on a *quantum meruit*, or in strictness what the labor is worth to the defendant, and no more. Otherwise the party benefited would owe no equivalent, and the party laboring would be without all remedy."

¹ *Dyer v. Jones*, 8 Vt. 205.

² *Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 700.

sufficient strength and thoroughness of workmanship to bear the strain that was to come upon them. As to this the court say: "This defect [in the bridge] would not at first be apparent. After the bridge had been used and subjected to severe tests by the drawing of heavy loads of stone over it, the defect began to appear. In the outset a slight additional expense would have probably remedied the insufficiency, but after the arch, by use for some six months, had become depressed to a level, the expense of restoring it, and making it as safe and durable as the contract required, was much more. It seems to [519] us that the failure in this point, clearly not from design, but rather the misjudgment and misfortune of the plaintiffs, should not subject them to a total loss of their labor. So severe a rule would hardly be consistent with a reasonable regard for the infirmity of human nature, and for that liability to mistake and failure which attends upon the best efforts of wise and skilful men. The defects in the making of the road seem to have been of still less significance: a divergence from the exact line staked out by the selectmen, but not thereby appearing to work any actual inconvenience; insufficiency in the construction of a bank wall; imperfections in making the road narrower than the contract required in some places, and not bringing it to the exact grade specified. But since the plaintiffs claimed the road as completed, it has been used by the public, and these defects do not seem to have impaired its use or convenience, or to have occasioned actual damage to any one."¹

The principle enunciated in these cases has been applied in Connecticut. It is there held by a majority of the court that, if the result of a builder's labor is a structure adapted to the purpose for which it was designed, and the employer is in the use and enjoyment of it, and it cannot be made to conform to the contract otherwise than by the expenditure of a sum which would deprive the contractor of all compensation for his labor, a deduction may be made from the contract price to the amount of the diminution in value of the building, and not the amount it would cost to make it conform to the contract.²

¹ Kelly v. Bradford, 33 Vt. 35.

² Pinches v. Swedish Lutheran Church, 55 Conn. 183, 10 Atl. Rep. 264.

Principles more or less liberal have been declared in other states in favor of defaulting contractors who have performed in part, and from whose work the employer in fact derived a benefit, and recoveries permitted on a *quantum meruit* for a beneficial performance which was not sufficient to support an action upon the contract, either on the ground of voluntary appropriation, or the benefit the employer must necessarily derive from the work as done.¹

§ 712. **Certificate of architect, engineer, etc.** In important contracts for the erection of buildings and the construction of roads it is very common to provide for evidence of their due progress and full performance in the certificate of an architect, engineer or other person. When such a certificate is a [520] condition precedent to payment² it must be produced, and is the exclusive evidence in an action upon the contract,³ unless

¹Veazie v. Bangor, 51 Me. 509; Horn v. Batchelder, 41 N. H. 86; Bertrand v. Byrd, 5 Ark. 651; Jackson v. Jones, 23 id. 158; Newman v. McGregor, 5 Ohio, 349, 24 Am. Dec. 293; Goldsmith v. Hand, 26 Ohio St. 101; Gonzales College v. McHugh, 21 Tex. 256; Carroll v. Welch, 26 Tex. 147; Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Houston, etc. R. Co. v. Mitchell, 38 Tex. 85; Allen v. McKibbin, 5 Mich. 449; Clayton v. Blake, 4 Ired. 497; Elliott v. Wilkinson, 8 Yerg. 411; Porter v. Woods, 3 Humph. 56, 39 Am. Dec. 153; Harwood v. Tappan, 2 Spear, 536; Williams v. Porter, 51 Mo. 441; Yeats v. Ballentine, 56 id. 530; Estep v. Fenton, 66 Ill. 467; Lighthall v. Caldwell, 56 id. 108; Congregational Society v. Hubble, 62 id. 161; Blakeslee v. Holt, 42 Conn. 226; Phelps v. Beebe, 71 Mich. 554, 39 N. W. Rep. 761; Mehurin v. Stone, 37 Ohio St. 49; Kane v. Stone Co., 39 id. 1; Gove v. Island City Mercantile & M. Co., 16 Ore. 93, 17 Pac. Rep. 740; Walworth v. Finnegan, 33 Ark. 751; Keeler v. Herr, 157 Ill. 57, 41 N. E. Rep. 750, 54 Ill. App. 468; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. Rep. 271; Moore v. Car-

ter, 146 Pa. 492, 23 Atl. Rep. 243; Linch v. Paris Lumber & Grain Elevator Co., 80 Tex. 23, 15 S. W. Rep. 208; Leeds v. Little, 42 Minn. 414, 44 N. W. Rep. 309; Aetna Steel & Iron Works v. Kossuth County, 79 Iowa, 40, 44 N. W. Rep. 215; Arndt v. Keller, 96 Wis. 274, 71 N. W. Rep. 651; Ashland Lime, Salt & Cement Co. v. Shores, 105 Wis. 122, 133, 81 N. W. Rep. 136; Bush v. Finucane, 8 Colo. 192, 6 Pac. Rep. 514; Decker v. School District, — Mo. App. —, 74 S. W. Rep. 390.

² If the contract does not go so far as to negative recovery if the architect refuses to give his certificate, the failure to secure it will not bar a recovery under the rule in Massachusetts stated in § 711. Gillis v. Cobe, 177 Mass. 584, 590, 59 N. E. Rep. 455.

³ Michaelis v. Wolf, 136 Ill. 68, 26 N. E. Rep. 384; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. Rep. 1058, 43 Am. St. 267; International Cement Co. v. Beifeld, 173 Ill. 179, 50 N. E. Rep. 716; Vincent v. Stiles, 77 Ill. App. 200; McNamara v. Harrison, 81 Iowa, 486, 46 N. W. Rep. 976; Guthat v. Gow, 95 Mich. 527, 55

its absence is excused by proof of the architect's sickness, death, or refusal to act;¹ and so when made it is conclusive between the parties,² if, on its production, it is not impeached for fraud, or mistake,³ or bad faith.⁴ The mistake which will

N. W. Rep. 442; Bradner v. Roffsell, 57 N. J. L. 412, 31 Atl. Rep. 387; Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. Rep. 185; Wendt v. Vogel, 87 Wis. 462, 58 N. W. Rep. 764; McAlpine v. Trustees St. Clara Female Academy, 101 Wis. 468, 78 N. W. Rep. 173; John Pritzlaff Hardware Co. v. Berghoefer, 103 Wis. 359, 79 N. W. Rep. 564; Mundy v. Louisville & N. R. Co., 67 Fed. Rep. 633, 14 C. C. A. 583; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; President, etc. v. Pennsylvania Coal Co., 50 N. Y. 250; Smith v. Briggs, 3 Denio, 73; Hennessey v. Farrell, 4 Cush. 267.

¹ Michaelis v. Wolf, 136 Ill. 68, 26 N. E. Rep. 384; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. Rep. 1058, 43 Am. St. 267; Linch v. Paris Lumber & Grain Elevator Co., 80 Tex. 23, 15 S. W. Rep. 208; Frost v. Rand, 51 Ill. App. 276; Neagle v. Herbert, 73 Ill. App. 17; Bird v. St. John's Episcopal Church, 154 Ind. 138, 56 N. E. Rep. 129; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. Rep. 271; MacKnight Flintic Stone Co. v. Mayor, 160 N. Y. 72, 54 N. E. Rep. 661; Pittsburg Terra-Cotta Lumber Co. v. Sharp, 190 Pa. 256, 42 Atl. Rep. 685, 7 Pa. Dist. Rep. 544; Mitchell v. Dougherty, 90 Fed. Rep. 639, 33 C. C. A. 205; Young v. Ballarat & Ballarat East Water Commissioners, 5 Vict. L. R. 503; Nolan v. Whitney, 88 N. Y. 648.

⁴ Mack v. Sloteman, 21 Fed. Rep. 109; Ogden v. United States, 60 Fed. Rep. 725, 9 C. C. A. 251; Chicago, etc. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. Rep. 290; Kennedy v. United States, 24 Ct. of Cls. 139. See Mundy v. Louisville & N. R. Co., 67 Fed. Rep. 633, 14 C. C. A. 583.

A condition requiring a certificate

If the architect named in the contract has died and another been substituted, the certificate of the latter is necessary. Beecher v. Schuback, 4 N. Y. Misc. 54, 23 N. Y. Supp. 604.

² Davis v. Gibson, 70 Ill. App. 273; Williams v. Chicago, etc. R. Co., 153 Mo. 487, 54 S. W. Rep. 689; Eldridge v. Fuhr, 59 Mo. App. 44; Mackler v. Mississippi, etc. R. Co., 62 Mo. App. 677; Gay v. Haskins, 8 N. Y. Misc. 626, 30 N. Y. Supp. 191; Burns v. Furby, 4 N. Z. L. R. (Sup. Ct.) 110; Walker v. Orange, 16 Gray, 193; McMahon v. New York & E. R. Co., 20 N. Y. 463; Haight v. Vermont Central R. Co., 27 Vt. 700; Koeltz v. Bleckman, 46 Mo. 320; Thomas v. Fleury, 26 N. Y. 26; Merrill v. Gore, 29 Me. 346.

³ Williams v. Chicago, etc. R. Co., 153 Mo. 487, 54 S. W. Rep. 689; Bradner v. Roffsell, 57 N. J. L. 32, 29 Atl. Rep. 317, 57 N. J. L. 412, 31 Atl. Rep. 387; Condon v. South Side R. Co., 14 Gratt. 302; Wyckoff v. Meyers, 44 N. Y. 143; Baltimore & O. R. Co. v. Polly, 14 Gratt. 447; Board of Education v. Shaw, 15 Kan. 33; Haight v. Vermont Central R. Co., 27 Vt. 700; Woodruff v. Hough, 91 U. S. 596. See Bledsoe v. Gonzales County, 31 Tex. 636.

The certificate will be vitiated by fraud though it is not shown that the party who would benefit by it

is not annulled because the architect was a member of the board of directors of one of the contracting parties and a stockholder thereof. Chicago Athletic Ass'n v. Eddy Electric Manuf. Co., 77 Ill. App. 204; Ranger v. Great Western R. Co., 5 H. of L. Cas. 72.

avoid the effect of the certificate must be one which clearly shows that the person who was authorized to make it was misled, deluded or so far misapprehended the facts that he did not exercise his real judgment.¹ If the person for whom the work is done approves it the necessity for a certificate by the individual designated is superseded.² And if the contract leaves it optional with the contractor whether there shall be an inspection, or requires it only if he shall so request, he may bring suit without having his work certified.³ Any act of the owner which prevents the contractor from obtaining the certificate relieves him from that duty.⁴ The production of the certificate is unnecessary where the owner proceeds under the contract to complete the work, the adjustment of the expense of doing that being covered by the contract.⁵ And so if the contract, without the knowledge of the contractor at the time he became such, required the architect to give the employer a bond stipulating that the cost of the building shall not exceed a certain sum, such bond having been given.⁶

has colluded with the architect. *Chism v. Schipper*, 51 N. J. L. 1, 16 Atl. Rep. 316. But it is held in *Victoria* that the contractor cannot recover damages from the employer for matters within the contract unless the certificate was refused by the engineer in collusion with the employer. *Young v. Ballarat & Ballarat East Water Commissioners*, 5 Vict. L. R. 503 (law).

If the architect proceeded upon a wrong interpretation of the contract or excluded from his calculations a factor of which the contractor was entitled to the benefit, relief will be granted notwithstanding a condition in the contract that his decision shall be final; such condition applies only to his measurement in point of fact, and not to the principle of law on which it is made. *Collins v. United States*, 34 Ct. of Cls. 294, 332.

¹ *McAuley v. Carter*, 22 Ill. 57; *Davis v. Gibson*, 70 Ill. App. 273; *Mack v. Sloteman*, 21 Fed. Rep. 109; *Boston Waterpower Co. v. Gray*, 6

Met. 131. See *Cook County v. Harms*, 108 Ill. 151.

The mistake which will excuse the production of the certificate is not a mere error in judgment as to the quality of the work or the responsibility for defects therein, upon conflicting evidence which may be overthrown by a preponderance of evidence before the jury, but an unintentional misapprehension or ignorance of some material fact, which must be clearly shown and be so gross and palpable that it is equivalent in its effects to dishonest, fraudulent, or arbitrary action. *Wendt v. Vogel*, 87 Wis. 462, 58 N. W. Rep. 764.

² *Kane v. Stone Co.*, 39 Ohio St. 1.

³ *Sherman v. Mayor*, 1 N. Y. 316.

⁴ *Haunroth v. Peters*, 50 Ill. App. 366; *Fitts v. Reinhart*, 102 Iowa, 311, 71 N. W. Rep. 227.

⁵ *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. Rep. 185.

⁶ *Long v. Pierce County*, 22 Wash. 330, 61 Pac. Rep. 142.

The measurements or estimates, to be conclusive, must be made in accordance with the contract. If required to be made for the purpose of periodical payments during the progress of the work, the meaning is that they shall be accurate and final, not mere approximate or conjectural estimates.¹ Where by the terms of a contract for the repair of a building it is stipulated that the articles shall be of the best quality, and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of inferior materials will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications. The provision for acceptance is an additional safeguard against defects not discernible by an unskilled person.² In New York it has been decided that under a contract for the construction of a railroad by which all measurements are to be made and the amount of labor to be determined by the [521] employer's engineer, whose decision is final, the contractor is entitled to notice and an opportunity to be present, and that he is not concluded by measurements made *ex parte*.³ In Illinois and Missouri notice is not necessary unless the contract requires it;⁴ if required, it must be given.⁵ If a certificate is wrongfully refused the contractor is entitled to interest for the time he is deprived of his money.⁶

§ 713. **Liability of employer for stopping work.** Where the contractor's performance is stopped by the fault or direction of the employer he can recover not only a *quantum meruit* for what he has done, but also damages for being prevented from completing the work by bringing his action on the contract.⁷ Where payment is due at a specified time after the

¹ Haight v. Vermont Central R. Co., 27 Vt. 700.

² Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Spink v. Mueller, 77 Mo. App. 85.

³ McMahon v. New York & E. R. Co., 20 N. Y. 463.

⁴ McAuley v. Carter, 22 Ill. 53; Eldridge v. Fuhr, 59 Mo. App. 44.

⁵ Haunroth v. Peters, 50 Ill. App. 366.

⁶ Pawley v. Turnbull, 3 Giff. 70; Ranger v. Great Western R. Co., 3 Ry. Cas. 298, 336; Young v. Ballarat & Ballarat East Water Commissioners, 5 Vict. L. R. 503 (law).

⁷ Chicago v. Tilley, 103 U. S. 146; Black v. Woodrow, 39 Md. 194; Wil-

work is finished the damages include interest from the time the work would have been done if the employer had not interfered or from some other time, the decisions not being in accord.¹ If the action is on a *quantum meruit* the measure of damages will be, according to some authorities, what the work is worth, not necessarily the contract price,² though there are

son v. Bauman, 80 Ill. 493; Whitfield v. Zellnar, 24 Miss. 663; Orange, etc. R. Co. v. Placide, 35 Md. 315; Myers v. York, etc. R. Co., 2 Curt. C. C. 28; Clark v. Franklin, 7 Leigh, 1; Goodrich v. Hubbard, 51 Mich. 62; Atkinson v. Morse, 63 id. 276; United States v. Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81; Cox v. McLaughlin, 54 Cal. 605; Tennessee & C. R. Co. v. Danforth, 112 Ala. 80, 20 So. Rep. 502; Thompson v. Gaffey, 52 Neb. 317, 72 N. W. Rep. 314; Hardiman v. Mayor, 21 App. Div. 614, 47 N. Y. Supp. 786; Jones v. Judd, 4 N. Y. 411; Heine v. Meyer, 61 N. Y. 171, 20 Am. Rep. 475; Kendall Bank Note Co. v. Commissioners of Sinking Fund, 79 Va. 563; Merriman v. McCormick Harvesting Machine Co., 96 Wis. 600, 71 N. W. Rep. 1050, citing the text; Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. Rep. 825.

As to what constitutes a termination of the contract, see Palm v. Ohio & M. R. Co., 18 Ill. 219; Cox v. McLaughlin, 54 Cal. 605; Moore v. Taylor, 42 Hun, 45.

¹ Bassett v. Sanborn, 9 Cush. 58; Sullivan v. McMillan, 37 Fla. 134, 19 So. Rep. 340, 53 Am. St. 239; O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. Rep. 251; Allen v. Murray, 87 Wis. 41, 48, 57 N. W. Rep. 979.

The government is not liable to a contractor for interest which he paid upon loans necessitated by its action in suspending work upon his contract. Myerle v. United States, 31 Ct. of Cls. 105, 137, 33 id. 1.

Where the assessor assesses damages as of the date of the writ inter-

est may be allowed from that date. Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. Rep. 825.

Interest on profits is not to be allowed until they were ascertained by verdict. Swanson v. Andrus, 83 Minn. 505, 86 N. W. Rep. 465.

In Alabama a subcontractor may recover interest from the time of his principal's refusal to permit performance. Peck-Hammond Co. v. Heifner, — Ala. —, 33 So. Rep. 807.

² Kearney v. Doyle, 22 Mich. 294; Cox v. Western Pacific R. Co., 47 Cal. 87; Clark v. Mayor, 4 N. Y. 338, 53 Am. Dec. 379; Derby v. Johnson, 21 Vt. 17; United States v. Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81; Hemminger v. Western Assur. Co., 95 Mich. 355, 54 N. W. Rep. 949; Shulters v. Searls, 48 Mich. 550, 12 N. W. Rep. 697; Thompson v. Gaffey, 52 Neb. 317, 72 N. W. Rep. 314; Caldwell v. Myers, 2 S. D. 506, 51 N. W. Rep. 210; Collins v. United States, 34 Ct. of Cls. 294, 327; Davis v. Tubbs, 7 S. D. 488, 64 N. W. Rep. 534; Wilson v. Borden, — N. J. L. —, 54 Atl. Rep. 815.

In an action on the *quantum meruit* the plaintiff may prove as the basis of damages what he has fairly and reasonably expended in the performance of, or under, the contract. Simmons v. Ocean Causeway, 21 App. Div. 30, 47 N. Y. Supp. 360.

In Marquis v. Lauretson, 76 Iowa, 23, 40 N. W. Rep. 73, it is held that an architect who prepares plans and specifications and agrees to audit and settle accounts and to whom one-third of the contract price for

well considered adjudications which hold that the recovery cannot exceed the value of the services at such price.¹ The New Jersey supreme court favors the latter rule when that which is done or left undone under the contract can be measured so as to ascertain its price at the rate specified in the contract; "but generally when it can be determined what, according to the contract, the plaintiff would receive for that which he has done and what profit he would have realized by doing that which, without fault, he has been prevented from doing, then these sums become the legal, as they are the just, measure of his damages. He is to lose nothing, but, on the other hand, he is to gain nothing by the breach of the contract, except as the abrogation of a losing bargain may save him from additional loss."² In Ohio the equities of the particular case determine which rule shall be applied. It is said in a recent case³ that whether the recovery should be confined to the contract or be on a *quantum meruit* must depend upon whether the act of the defendant in terminating the contract works a loss or not to the plaintiff. If it works no loss, but is in fact a benefit, as in *Doolittle v. McCullough*,⁴ there are no considerations of justice requiring that he be compensated in a greater sum for what he did than is stipulated in the contract. The real test in all cases of the plaintiff's right to recover as upon a *quantum meruit* for part performance of a contract wrongfully terminated by the defendant depends upon the consideration whether the defendant is thereby enriched at the loss and expense of the plaintiff; if so, then the law adds a legal to the moral obligation, and enforces it. And while the action is not on the contract itself, yet it is so far kept in view as to preclude a recovery by the plaintiff where he would necessarily

his services is to be paid when the plans, etc., are ready, and the balance in two equal instalments, may recover the reasonable value of his services, though it is more than one-third of the whole sum, if the building is not completed. *Contra*, *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. Rep. 548.

¹ *Noyes v. Pugin*, *supra*; *Doolittle v. McCullough*, 12 Ohio St. 360; *Western v. Sharp*, 14 B. Mon. 177; *McClair*

v. Austin, 17 Colo. 576, 31 Pac. Rep. 225; *Masterton v. Mayor*, 7 Hill, 61; *Hardiman v. Mayor*, 21 App. Div. 614, 47 N. Y. Supp. 786; *Hoyle v. Stellwagen*, 28 Ind. App. 681, 63 N. E. Rep. 780.

² *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. Rep. 912.

³ *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182, 48 N. E. Rep. 888.

⁴ 12 Ohio St. 306.

have lost more by performing the contract for the consideration agreed upon than he did by being prevented from doing so.

In cases where, in the progress of particular work, periodical measurements or inspections are provided for and made for the purpose of partial payments, the sums thus ascertained to be payable are the measure of the compensation to be recovered for the work so measured or inspected, if the employer afterwards breaks the contract by stopping the work and they have not been made. The contractor in such an event may recover the percentage stipulated to be reserved until the completion of the undertaking, and it becomes immediately payable. When the contract is annulled or repudiated by the employer and the contractor is prevented from going on to a completion of the work, the amount so reserved becomes part of the arrears of the periodical payments, to which he is as much entitled as if he had been permitted to finish the entire contract. It is released from the conditions under which it was retained by the employer's act, and the contractor is entitled to include it as an amount expressly admitted to be due. He also is concluded by these settlements by reason of their being closed as distinct and separate portions of the contract, and he cannot open them again to prove and recover the actual value of the work.¹ But so far as other work has [522] been performed, which remains unadjusted between the parties, the contractor is at large upon his *quantum meruit* and may prove its actual value. Here the rates of compensation stipulated by the contract are no longer binding upon the parties. They constitute but an element in the proof proper to go to the jury as *prima facie* evidence of value, leaving it still open to the parties to show that the average standard of prices agreed on ought to be more or less according to the difficulties and value of this particular portion of the work in comparison with other portions.² If the expense of doing the work for which a recovery is sought was increased by the wrongful act of the employer, the recovery should allow therefor.³

¹ Chicago v. Sexton, 115 Ill. 230, 2 N. E. Rep. 263; Dobbins v. Higgins, 78 Ill. 440.

² Rodemer v. Hazlehurst, 9 Gill, 288.

³ Vicksburg Water Supply Co. v. Gorman, 70 Miss. 360, 380, 11 So. Rep. 680; Kelly v. United States, 31 Ct. of Cls. 361; Collins v. United States, 34

Permitting the work to be stopped by an injunction at the suit of a third person,¹ as well as by omission to perform some precedent or concurrent condition, is such a prevention by the employer as gives a right to damages for loss of the profits on that part of the contract which the contractor is thus prevented from executing.² But in the absence of any interfer-

Ct. of Cls. 294, 327; *King v. Des Moines*, 99 Iowa, 432, 68 N. W. Rep. 708.

In *Langford v. United States*, 95 Fed. Rep. 983, the contractor was obliged to suspend work and discharge his men because of the delay of the employer in furnishing material. He was entitled to recover because of the increased price paid laborers, their expenses in travel, for material lost by the delay, for his own extra traveling expenses, for expenditures made to preserve the plant from damage by the elements, and for interest on delayed payments.

The right to recover the value of the plaintiff's services and the value of the use of his plant was denied, notwithstanding the case of *Kelly v. United States*, 31 Ct. of Cls. 361, in which it was ruled that where a contractor lost his time in waiting for the defendant to procure and prepare a site for a building, he might recover the reasonable value of his services. The court said: I am unable to agree in this view of the law. There can be no recovery for time or for services except in cases where services are performed. In this case there was testimony tending to show that the value of the plaintiff's services as a superintendent in the construction of buildings and in the carrying on of other work was \$20 per day, but the testimony does not show that this was the plaintiff's business. The plaintiff's business is that of a contractor, and he testified that by the delay in

question he was prevented from bidding upon and obtaining other contracts, whereby he might have made large profits. Now, it is obvious that the loss of such profits is too remote and uncertain to be made the basis for recovery. It cannot be known that the plaintiff would have secured other contracts, nor that he would have made a profit on such contracts had he secured them. But this strictness as to recovery for loss of time is not everywhere recognized, and is in disregard of the fundamental idea of compensation for the loss sustained, assuming that the value of the time lost can be proven with the required certainty. *Graves v. Glass*, 86 Iowa, 261, 53 N. W. Rep. 231.

¹*Doolittle v. Nash*, 48 Vt. 441; *Whitfield v. Zellnar*, 24 Miss. 664.

²*Grand Rapids, etc. R. Co. v. Van Dusen*, 29 Mich. 431; *Thorp v. Ross*, 4 Keyes, 546; *Kugler v. Wiseman*, 20 Ohio, 361; *Allamon v. Mayor*, 43 Barb. 33; *Christian County v. Overholt*, 18 Ill. 223; *Palm v. Ohio & M. R. Co.*, 18 Ill. 217; *Goodrich v. Hubbard*, 51 Mich. 62, 16 N. W. Rep. 232; *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. Rep. 711; *McMaster v. State*, 108 N. Y. 542, 15 N. E. Rep. 417; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277; *Sullivan v. McMillan*, 26 Fla. 543, 8 So. Rep. 450; *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. Rep. 502; *San Francisco Bridge Co. v. Dunbarton Land & Imp. Co.*, 119 Cal. 272, 51 Pac. Rep. 335; *Suter v. Sacra*, 21 Ky. L. Rep. 758, 52 S. W. Rep. 1054; *Rayburn v. Comstock*, 80

ence by the employer with the contractor, any refusal to be bound by the contract, consent to the abandonment of it, or such like conduct, the mere failure to pay an instalment due, though a breach of the contract giving the right to sue therefor, and recover the sum due,¹ is not such a breach as authorizes the abandonment of the work and the bringing of a suit to recover the profits which would have been earned had the contract been fully performed. To justify such recovery the contractor must show a willingness to complete the contract, and a refusal of the employer to be further bound by it, or his abandonment of it.²

The profits which are permitted to be recovered are those which are the direct and immediate fruits of the contract.³ These are part and parcel of it — entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed, perhaps, the only inducement to it.⁴ In an action upon the contract against the employer for preventing complete performance the contractor is entitled to recover the contract price for the work actually done, and, in the absence of other damages,⁵ [523]

Mich. 448, 45 N. W. Rep. 378; Corbett v. Anderson, 85 Wis. 218, 54 N. W. Rep. 727; Thompson v. Brown, 106 Iowa, 367, 76 N. W. Rep. 819. See Markowitz v. Greenwall Theatrical Circuit Co., 75 S. W. Rep. 74 (Tex. Ct. of Civ. App.).

¹ Canal Co. v. Gordon, 6 Wall. 561; Pigeon v. United States, 27 Ct. of Cls. 167, and cases cited in next note.

² Wharton v. Winch, 140 N. Y. 287, 35 N. E. Rep. 589; Keeler v. Clifford, 165 Ill. 544, 46 N. E. Rep. 248; Cox v. McLaughlin, 54 Cal. 605; Bethel v. Salem Imp. Co., 93 Va. 354, 25 S. E. Rep. 304, 57 Am. St. 808, 33 L. R. A. 602; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. Rep. 1013; Jones v. New York, 57 App. Div. 403, 68 N. Y. Supp. 228. *Contra*, s. c., 47 App. Div. 39, 62 N. Y. Supp. 284.

³ There cannot be a recovery of the loss of profits of collateral contracts or enterprises. O'Connor v. Smith, 84 Tex. 232, 19 S. W. Rep. 168; Langford v. United States, 95 Fed. Rep. 933.

⁴ Masterton v. Mayor, 7 Hill, 61; Lawrence v. Wardwell, 6 Barb. 423; Thompson v. Jackson, 14 B. Mon. 114; Smith v. O'Donnell, 8 Lea, 468; United States v. Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81; O'Connor v. Smith, 84 Tex. 232, 19 S. W. Rep. 168.

⁵ An action for money paid will lie upon a special contract by which the plaintiffs, at the request of the defendants, detained their laborers and paid them wages while waiting for material which the defendants were to furnish. Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 541.

the difference between that price and what it would cost to perform the contract as to the residue.¹ The same rule applies where work has not been begun, except that loss of time is not

- ¹ *Danforth v. Tennessee & C. R. Co.*, 93 Ala. 614, 11 So. Rep. 60; *Hoyle Stellwagen*, 28 Ind. App. 681, 684, 63 N.E. Rep. 780, quoting the text; *Philadelphia, etc. R. Co. v. Howard*, 13 How. 307; *Heine v. Meyer*, 61 N. Y. 171; *Jones v. Judd*, 4 id. 412; *Preble v. Bottom*, 27 Vt. 249; *Masterton v. Mayor*, 7 Hill, 61; *New York & Hudson River R. Co. v. Story*, 6 Barb. 419, 6 N. Y. 85; *Clark v. Mayor*, 4 id. 338, 53 Am. Dec. 379; *Cunningham v. Dorsey*, 6 Cal. 19; *Burrell v. New York & S. Salt Co.*, 14 Mich. 34; *George v. Cahawba, etc. R. Co.*, 8 Ala. 234; *Morrison v. Galloway*, 2 Harr. & J. 461; *Friedlander v. Pugh*, 43 Miss. 111, 5 Am. Rep. 478; *Collyer v. Moulton*, 9 R. I. 90; *United States v. Speed*, 8 Wall. 77; *Allen v. Thrall*, 36 Vt. 711; *Derby v. Johnson*, 21 Vt. 17; *Thorp v. Ross*, 4 Keyes, 546; *Hale v. Trout*, 35 Cal. 229; *Morrison v. Lovejoy*, 6 Minn. 319; *Durkee v. Mott*, 8 Barb. 423; *Cincinnati, etc. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. Rep. 784, 14 id. 706; *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. Rep. 378; *Woodworth v. McLean*, 97 Mo. 325, 11 S. W. Rep. 43; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. Rep. 875; *Glaspie v. Glassow*, 28 Minn. 158, 9 N. W. Rep. 669; *Pevey v. Schulenberg & B. L. Co.*, 33 Minn. 45, 21 N. W. Rep. 844; *Crescent Manuf. Co. v. N. O. Nelson Manuf. Co.*, 100 Mo. 325, 13 S. W. Rep. 503; *Nilson v. Morse*, 52 Wis. 240, 9 N. W. Rep. 1; *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. Rep. 408; *Cameron v. White*, 74 Wis. 425, 43 N. W. Rep. 408, 5 L. R. A. 493; *Boyd v. Meighan*, 48 N. J. L. 404, 4 Atl. Rep. 778; *Smith v. O'Donnell*, 8 Lea, 468; *Porter v. Burkett*, 65 Tex. 383; *Hambly v. Delaware, etc. R. Co.*, 21 Fed. Rep. 541; *Gibney v. Turner*, 52 Ark. 117, 12 S. W. Rep. 201 (the cost of the work is measured by the market value of the materials on hand for use, the amount that would have been paid for other material and labor, and what the contractor might have gained by saving his time in not completing the contract); *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283, 28 Pac. Rep. 527, quoting the text; *Bonifay v. Hassell*, 100 Ala. 269, 14 So. Rep. 46; *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. Rep. 502; *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. Rep. 625; *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. Rep. 582; *Blood v. Herring*, 23 Ky. L. Rep. 1725, 61 S. W. Rep. 273; *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. Rep. 964; *Bush v. Baltimore & C. Construction Co.*, 88 Md. 665, 41 Atl. Rep. 1092; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. Rep. 477; *Greenwood v. Davis*, 106 Mich. 230, 64 N. W. Rep. 26; *Fell v. Newberry*, 106 Mich. 542, 64 N. W. Rep. 474; *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N. W. Rep. 976; *Silberstein v. Duluth News-Tribune Co.*, 68 Minn. 430, 71 N. W. Rep. 622; *Hammond v. Besson*, 112 Mo. 190, 20 S. W. Rep. 474; *Chapman v. Kansas City, etc. R. Co.*, 146 Mo. 481, 48 S. W. Rep. 646; *Gabriel v. Atkinsville Pressed Brick Co.*, 57 Mo. App. 520, 528, quoting the text; *Brandt v. Schuchmann*, 60 Mo. App. 70; *Kreamer v. Irwin*, 46 Neb. 827, 65 N. W. Rep. 885; *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. Rep. 775; *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. Rep. 456; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. Rep. 912; *Ryan v. Remmey*, 57 N. J. L. 474, 31 Atl. Rep. 766; *Benner v. Phoenix Towing*

an element of damage.¹ The recovery of such profits as were reasonably certain to have been realized is not improper because the plans for the work were subject to alteration at the will of the employer, which alteration, if made, might essen-

& Transportation Co., 80 Hun, 412, 30 N. Y. Supp. 290; *Miller v. Hahn*, 23 App. Div. 48, 48 N. Y. Supp. 346; *Gallagher v. Hirsh*, 45 App. Div. 467, 61 N. Y. Supp. 609; *Toledo v. Libbie*, 19 Ohio Ct. Ct. 704; *Feaster v. Richland Cotton Mills*, 51 S. C. 143, 28 S. E. Rep. 301; *O'Connor v. Smith*, 84 Tex. 232, 19 S. W. Rep. 168; *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. Rep. 586; *Kendall Bank Note Co. v. Commissioners of Sinking Fund*, 79 Va. 563; *Ramsey v. Holmes Electric Protective Co.*, 85 Wis. 174, 55 N. W. Rep. 391; *Corbett v. Anderson*, 85 Wis. 218, 54 N. W. Rep. 727; *Allen v. Murray*, 87 Wis. 41, 57 N. W. Rep. 979; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. Rep. 992; *Walsh v. Myers*, 92 Wis. 397, 66 N. W. Rep. 250; *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. Rep. 752; *Ferris v. United States*, 27 Ct. of Cls. 542; *Stout v. United States*, 27 Ct. of Cls. 385; *Chicago & S. R. Co. v. Yawger*, 24 Ind. App. 460, 56 N. E. Rep. 50; *Railway Co. v. Beard*, 56 Ark. 309, 19 S. W. Rep. 923, 60 Ark. 151, 29 S. W. Rep. 146; *Hawley v. Corey*, 9 Utah, 175, 33 Pac. Rep. 695, citing the text; *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. Rep. 825; *Baker v. State*, 77 App. Div. 528, 78 N. Y. Supp. 922; *Wilson v. Borden*, — N. J. L. —, 54 Atl. Rep. 815.

In an action against a railroad company to recover damages on account of their preventing the performance by the plaintiff of a con-

tract for the construction of their roadway, the difference between the amount of the principal contract and of the subcontract entered into by the plaintiff with other persons for the performance of the same work does not constitute the measure of damages. *Story v. New York & Hudson River R. Co.*, 6 N. Y. 85; *Master-ton v. Mayor*, 7 Hill, 61.

The contract price may be recovered if there is no certain mode of ascertaining the damages to be less. *Baldwin v. Bennett*, 4 Cal. 392; *Danley v. Williams*, 16 Wis. 581; *Sprague v. Morgan*, 7 Ala. 952; *Manuel v. Campbell*, 3 Ark. 324; *Ashcraft v. Allen*, 4 Ired. 98; *Heyn v. Philips*, 37 Cal. 529; *Lake Shore, etc. R. Co. v. Richards*, 126 Ill. 448, 18 N. E. Rep. 794. See *Thorp v. Ross*, 4 Keyes, 546.

On the breach of a contract to give all the ferrying required by a railroad company at a certain point, if the party bound to perform has kept his contract to keep sufficient boats and appliances to do the work, the profits on all the business diverted from the ferry company constitute the measure of damages. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389, 39 Am. Rep. 519.

If delivery is made of an article manufactured to order, and afterwards the contractor is prevented from performing, he can recover the full value of his labor and materials, although the employer did not use

¹ *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. Rep. 801; *Hammond v. Beeson*, 112 Mo. 190, 198, 20 S. W. Rep. 474; *Hawley v. Corey*, 9 Utah, 175, 183, 33 Pac. Rep. 695, quoting the

text; *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. Rep. 465; *Peck-Hammond Co. v. Heifner*, — Ala. —, 33 So. Rep. 807.

tially change the expense of performing the contract, if there is no evidence to show that such alteration was very liable to be made.¹

A contractor whose performance of his contract has been

all of the latter. *Ellithorpe Air-brake Co. v. Sire*, 41 Fed. Rep. 662.

If the article has been manufactured and remains at the factory because the contractee will not receive it, the damages, in the absence of proof of loss of profits, are the cost of storage and insurance. *Id.*

Where the plaintiff agreed to furnish and set up a second-hand motor, to be as good as new, for a stipulated price, and bought a motor in an outside market, changed and refitted it to make it meet the contract, and had it ready to set up when the contract was repudiated, it was proper to receive evidence of the actual sum paid for the motor, and the materials and labor necessary to refit and set it up as a basis for ascertaining the profits that would have been made. If the plaintiff made a profit on the motor by doing these things because it had thereby obtained a market value, including a profit on the expenditures made, the defendant should have shown the fact in mitigation of damages. *Silberstein v. Duluth News-Tribune Co.*, 68 Minn. 430, 71 N. W. Rep. 622.

Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. Rep. 825, was an action for the breach of an agreement to keep the plaintiff and his shop employed for a year in producing forgings for bicycles from materials to be furnished by the defendant. The contract provided that the prices to be paid for the manufacture of the forgings should be determined from time to time by the mutual agreement of the parties; but they had agreed upon the prices to

be paid for certain kinds of the forgings which were the principal parts of a bicycle, and there was evidence that the making of these forgings was expected to be the principal work done. Expert testimony was to the effect that on the facts shown it was possible to estimate what would have been the profits of the work, and the plaintiff testified to what the profits would have been. Under these facts it was proper to add to the allowance for profits the cost of remaining idle, and it was a fair inference that the pieces on which the prices were fixed by agreement were to be made in large quantities. In answering the defendant's objection to the recovery of profits, based on the indefiniteness of the contract respecting the character of the forgings which might be ordered, the court said: "The general answer is that in estimating the worth of the contract of which the plaintiff has been deprived, we are to consider not what legally might have happened had the defendant done as it agreed; or, to put it a little differently, we are to consider commercial, not legal, possibilities. It is absurd to imagine the defendant in performing the contract employing a lawyer's acumen to find out in what way it could deprive the plaintiff of profit instead of employing business intelligence to decide how it could best make profit for itself."

In *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. Rep. 155, 202 Pa. 616, 51 Atl. Rep. 1098, a borough which had contracted with a water company to supply the borough with

¹ *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 500, 29 Atl. Rep. 964.

illegally stopped may recover for work necessarily done or expense reasonably incurred in preparation for its performance, although he would not have recovered for it if there had been a full performance. If the contractor has derived any benefit from such work or expense its value must be deducted from the cost thereof.¹ This right of recovery is distinct from the right to recover profits; when these are recovered the former is included.² In order to recover for the loss of material prepared for use in the performance of the contract it must be shown that it was worthless for other purposes.³ But if the defendant desires the benefit of any appropriation or conversion of his property by the plaintiff to his own use he must plead it by way of recoupment or counter-claim.⁴ On stopping the performance of a contract to drill a well which could not be pumped dry, payment to be made at a specified price per foot, the contractor cannot recover the cost of previous unsuccessful efforts.⁵ After the contract has been breached the con-

water, after the company had laid its pipes, erected and maintained water-works of its own. It was proper in considering the injuries sustained by the company to take account of the water rents collected by the borough, less the amount it would cost the water company to put such sum into its treasury.

¹ *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. Rep. 625; *Kenwood Bridge Co. v. Dunderdale*, 50 Ill. App. 581; *Courier-Journal Co. v. Millen*, 20 Ky. L. Rep. 1811, 50 S. W. Rep. 46; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. Rep. 263; *Hammond v. Beeson*, 112 Mo. 190, 199, 20 S. W. Rep. 474; *Pond v. Harris*, 113 Mass. 114; *Hutt v. Hickey*, 67 N. H. 411, 29 Atl. Rep. 456; *Ferris v. United States*, 28 Ct. of Cls. 332; *Collins v. United States*, 34 Ct. of Cls. 294, 327; *Worthington v. Gwin*, 119 Ala. 44, 24 So. Rep. 739, 43 L. R. A. 382; *O'Connell v. Rosso*, 56 Ark. 603, 610, 20 S. W. Rep. 531; *Graves v. Glass*, 86 Iowa, 261, 53 N. W. Rep. 231; *Brent v. Parker*, 23 Fla. 200; *Glaspie v. Glassow*, 28 Minn. 153, 9 N. W. Rep. 669; *United States v.*

Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Mandia v. McMahon*, 17 Ont. App. 34; *O'Connell v. Main, etc. Hotel Co.*, 90 Cal. 515, 27 Pac. Rep. 373. See *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. Rep. 18, 957.

In New Jersey the contractor cannot sue on the common counts to recover for work done preparatory to the performance of the contract; his remedy is to sue on the contract and recover the profits lost. *Ryan v. Remmey*, 57 N. J. L. 474, 31 Atl. Rep. 766.

² *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *Allen v. Murray*, 87 Wis. 41, 48, 57 N. W. Rep. 979; *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283, 28 Pac. Rep. 527; *Worthington v. Gwin*, *supra*; *Hawley v. Corey*, 9 Utah, 175, 33 Pac. Rep. 695; *Railway Co. v. Beard*, 56 Ark. 309, 19 S. W. Rep. 923.

³ *Miller v. Hahn*, 23 App. Div. 48, 48 N. Y. Supp. 346.

⁴ *Conway v. Mitchell*, 97 Wis. 290, 299, 72 N. W. Rep. 752.

⁵ *Reynolds v. Levi*, 122 Mich. 115, 80 N. W. Rep. 999; *Vicksburg Water*

tractor is not justified in proceeding under it and thus increasing the damages; by so doing he acts in bad faith toward his employer.¹ Where the general rule applies and the work entered upon has been stopped by the employer, if the contractor subsequent to his employment makes a contract with a third party for materials necessary to be used in executing the work, and prior to the abandonment of the contract such party has bestowed labor upon them, the contractor may recover for their loss and the profits which would have been made on them.² "In addition to the actual loss and outlay incurred in making preparations for the contract, the loss necessarily incurred by the plaintiff during the time that he remained idle after the termination of the contract is an element of actual expense, and the delinquent defendant is not entitled to have the jury scrutinize too closely the items of expense caused by his own faithlessness, or to receive the advantage of a part performance of his contract without making a reasonable compensation therefor."³ Although a contractor may have agreed to make no claim for damages or extra compensation for any hindrance or delay, or if the work should be suspended, and the employer may have reserved the right to dissolve the contract, and the contractor has bound himself to discontinue the work upon five days' notice, if the latter on the suspension of the work is requested to keep his men and teams in readiness to resume when required, and he so keeps them until notified not to do so any longer, he is entitled to recover the sum due, including the reserved percentage, and also the expenses incurred in so keeping the men and teams.⁴

Supply Co. v. Gorman, 70 Miss. 360, 379, 11 So. Rep. 680.

¹ Lanahan v. Heaver, 79 Md. 413, 29 Atl. Rep. 1036; Heaver v. Lanahan, 74 Md. 493, 22 Atl. Rep. 263, 20 L. R. A. 126; Grand Rapids School Furniture Co. v. Robinson, 10 Ohio Ct. Ct. 93; Ault v. Dustin, 100 Tenn. 366, 45 S. W. Rep. 981; Tufts v. Weinfeld, 88 Wis. 647, 59 N. W. Rep. 504, 981; Davis v. Bronson, 2 N. D. 300, 50 N. W. Rep. 836, 16 L. R. A. 655; Gibbons v. Eente, 51 Minn. 499, 53 N. W. Rep. 756, 22 L. R. A. 80.

² Smith v. Flanders, 129 Mass. 322; Southern Pacific Co. v. American Well Works, 172 Ill. 9, 49 N. E. Rep. 575.

³ Cederberg v. Robison, 100 Cal. 93, 34 Pac. Rep. 625; Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. Rep. 825.

⁴ Curnan v. Delaware & O. R. Co., 138 N. Y. 480, 34 N. E. Rep. 201.

If men and teams were hired, and not maintained, the contractor cannot recover for the hire and cost of maintenance; if the teams were

The right to recover the profits which would have resulted from a full performance is subject to variation where the execution of the contract will require a large number of acts and series of years. In such a case accidents and contingencies may intervene to vary results; capital, machinery and implements must be supplied and kept. In estimating damages all these matters ought to be considered, and in calculating profits allowance should be made for the labor, skill, supervision and care of the contractor and his time. It cannot be assumed that he and his machinery and implements will remain idle for years after the contract is terminated. The value of these advantages must be deducted.¹ In estimating profits if it is shown that the cost of doing the work would depend upon the management of it and the season, the jury may consider these matters; they do not render the profits conjectural and speculative as a matter of law.²

In some cases the rule which makes it the duty of one who has been prevented from rendering personal service to obtain other employment is applied to contractors who undertake to produce a stipulated result, and it is held that reasonable diligence must be exercised to that end; the burden of proving that other employment has or might have been obtained being upon the defendant.³ The weight of authority, however, is

owned by him the value of their use or hire can alone be considered; these being allowed, there cannot be a recovery for the loss of the time of the men and teams. *O'Connor v. Smith*, 84 Tex. 232, 238, 19 S. W. Rep. 168.

¹ *McMaster v. State*, 108 N. Y. 542, 556, 15 N. E. Rep. 417; *United States v. Speed*, 8 Wall. 77; *Moore v. United States*, 17 Ct. of Cls. 17; *Danforth v. Tennessee & C. R. Co.*, 93 Ala. 614, 11 So. Rep. 60.

In a recent case the contract was for the erection of a bridge. The right to recover for the profits which would have been made was considered. The court (*Blodgett, J.*) assumed that there should be a reasonable deduction for a release from

care, trouble, risk and responsibility attending a full execution of the contract, and deducted thirty per cent. It also refused to allow for the loss of material purchased, there being no evidence to show that it could not be adapted to other bridges; and also for patterns and expenses in submitting plans and specifications, telegraphing, traveling expenses, etc., incurred in obtaining the contract. *Insley v. Shepard*, 31 Fed. Rep. 869.

² *Greenwood v. Davis*, 106 Mich. 230, 64 N. W. Rep. 26.

³ *Ryan v. Miller*, 153 Ill. 138, 38 N. E. Rep. 642; *Bonifay v. Hassell*, 100 Ala. 269, 14 So. Rep. 46; *Cincinnati, etc. R. Co. v. Lutes*, 112 Ind. 276, 11 N. E. Rep. 784, 14 id. 706; *Peck v.*

opposed to the application of that rule to contractors,¹ except in cases in which performance of the contract would require an unusual period of time.² The reason for the distinction made by some courts between the duty of an employee who works for wages and a contractor is thus stated in a Pennsylvania case: In the former case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the latter case, the loss of the party is the loss of the benefit of the contract. The damage may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independent of and totally disconnected from it and from the party occasioning it. To plead the doctrine of avoidable consequences to such a case would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.³ If the contractor secures other employment from which he realizes as much as he would have made if his performance of the contract with the defendant had not been stopped, his recovery cannot exceed a nominal

Kansas City Metal Roofing & C. Co.,
— Mo. App. —, 70 S. W. Rep. 169;
Porter v. Burkett, 65 Tex. 383.

In an action to recover the profits lost by the discharge of canal boats the sum to be deducted from the contract price on account of their earnings from other employment was the gross sum received. If the same expense was incurred therein as would have been incurred in performing the contract with the defendant, such gross sum would represent the amount to be deducted, but if other expense was reasonably incurred, that should first be deducted from such gross sum. *Dunn v. Allen*, 59 App. Div. 561, 67 N. Y. Supp. 218.

A deduction may be made from the profits recoverable for the value of the contractor's time during the period he would have been engaged in the performance of the contract

if he found other employment of equal advantage; but the release from worry and vexation involved in such performance cannot be considered in mitigation of damages. *Joske v. Pleasants*, 15 Tex. Civ. App. 433, 39 S. W. Rep. 586.

¹ *Nilson v. Morse*, 52 Wis. 240, 255, 9 N. W. Rep. 1; *Cameron v. White*, 74 Wis. 425, 432, 43 N. W. Rep. 155; *Crescent Manuf. Co. v. N. O. Nelson Manuf. Co.*, 100 Mo. 325, 13 S. W. Rep. 503; *Wolf v. Studebaker*, 65 Pa. 459; *Watson v. Gray's Harbor Brick Co.*, 28 Pac. Rep. 527, 3 Wash. 283; *Sullivan v. McMillan*, 37 Fla. 134, 19 So. Rep. 340, 53 Am. St. 239; *Allen v. Murray*, 87 Wis. 41, 57 N. W. Rep. 979. Compare *Savage v. Drs. K. & K. Medical & S. Ass'n*, 59 Mich. 400, 26 N. W. Rep. 652.

² Cases cited in note 1, p. 2185.

³ *Wolf v. Studebaker*, *Watson v. Gray's Harbor Brick Co.*, *supra*.

sum.¹ In so far as the damages sustained are made good by an award in condemnation proceedings, the employer's liability is diminished.²

The general rule under which the loss of profits is recovered is not applicable to certain contracts and therefore does not govern the damages recoverable on the prevention of their performance. Where the contractor was not allowed to proceed with the drilling of a well after the necessary abandonment of one which he had partially drilled on account of a broken drill which could not be withdrawn, he was entitled to recover for labor done and loss of time and material, the contract price being conditioned upon the depth of the well.³ Where such service was to be paid for at the rate of ninety cents per foot if a sufficient supply of water was obtained, the contractor was entitled to recover that sum for each foot actually drilled on being prevented from completing the well.⁴

§ 714. **Same subject.** Where a party was prevented from completing his contract in proper season by the neglect of the employer to furnish the necessary material, and for that reason was entitled to abandon it, but did not; and afterwards, on being furnished with the material, completed the contract, it was presumed that he proceeded under it; that it therefore furnished the measure of compensation, and he could not recover extra pay by showing that the work was worth more on account of the state of the weather or because the ground was frozen.⁵ If any damages from that cause could be ascertained with the requisite certainty, they were recoverable on account of the employer's breach.⁶ The Indiana court assents to the doctrine that a contractor who proceeds without explicit notice or a new agreement to the completion of work specifically contracted for will be presumed to have done so

¹ *Frazier v. Clark*, 88 Ky. 260, 10 S. W. Rep. 806; *Petrie v. Lane*, 58 Mich. 527, 25 N. W. Rep. 504.

² *Lanahan v. Heaver*, 79 Md. 413, 29 Atl. Rep. 1036, 20 L. R. A. 759.

³ *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. Rep. 819.

⁴ *Olson v. Nonenmacher*, 63 Minn. 425, 65 N. W. Rep. 642; *Gabriel v. Akinsville Pressed Brick Co.*, 57 Mo.

App. 520; *Wiegel v. Boone*, 64 Ark. 228, 41 S. W. Rep. 763.

⁵ *Western Union R. Co. v. Smith*, 75 Ill. 496; *Bush v. Chapman*, 2 Greene, 549; *Shaw v. Turnpike*, 3 P. & W. 445. Compare the Illinois case with *Toby v. Price*, 75 Ill. 645.

⁶ *Western Union R. Co. v. Smith*, *supra*.

under the special contract; but where the execution of such contract is dependent upon something essential, which is to be performed by the employer, and his default results in damage to the contractor, the former is liable therefor although the latter may not abandon the contract. While the contract is to be regarded as furnishing the exclusive measure of compensation for the work done, the actual damages which result from the default of the employer should not fall on the contractor. If he in good faith enters upon the performance of the contract and incurs expense, the employer having notice of that fact, and either by an order or negligently failing to perform an essential part devolving upon him suspends the execution of the contract, upon the resumption and completion of the work it will be implied that all loss necessarily occasioned by such suspension shall fall upon him. The contractor may not acquiesce in the suspension and upon the completion of the work claim the contract price and damages for that which may have occurred with his acquiescence. If, however, notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held that the loss must fall upon the contractor in case of a voluntary resumption of the contract.¹ In the case before the court the contractor recovered for damage to tools and interest for the period of delay on all moneys invested in materials which he furnished in pursuance of the contract and in the cost of the labor used in furnishing them.

[524] In a New York case² it was held that under the right reserved by the employer to make alterations he was not entitled to stop the work. The court approved the action of the referee in allowing more than the contract price for the part

¹ Per Mitchell, J., in *Louisville & N. R. Co. v. Hollerbach*, 105 Ind. 137, 144, 5 N. E. Rep. 28, referring to *Tobey v. Price*, 75 Ill. 645; *Figh v. United States*, 8 Ct. of Cls. 319; *Harvey v. United States*, id. 501; *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81; *United States v. Speed*, 8 Wall. 77; *Koon v. Greenman*, 7

Wend. 121; *Merrill v. Ithaca, etc. R. Co.*, 16 id. 586; *Railroad Co. v. Howard*, 13 How. 307, 344.

² *Clark v. Mayor*, 3 Barb. 288. See *Baker v. State*, 77 App. Div. 528, 78 N. Y. Supp. 922, as to the distinction between the abandonment and suspension of a work entered upon by the state.

done, it appearing that it was worth less than that price to do what remained. But on appeal it was held that under such reservation to make alterations in the form or dimensions of the work the contractor is bound by any alteration made in pursuance of the agreement; that he could recover no more than the contract price for the work done before the alteration, although it was more expensive than the portion dispensed with thereby.¹ Where the subcontractor upon a public work was stopped by a law of a general and public character, it was held that no damages could be recovered in respect to the unfinished part; that he was entitled to recover the contract price for the part performed, and that this was not subject to reduction by proof that such part was less expensive than the part which remained to be done when the work was interrupted, although the contract price was uniform for the whole.²

¹ S. C., 4 N. Y. 338, 53 Am. Dec. 379.

² Jones v. Judd, 4 N. Y. 412. See Grand Rapids, etc. R. Co. v. Van Dusen, 29 Mich. 431.

In *Rittenhouse v. Mayor*, 25 Md. 336, a contract had been made by the municipal corporation with the plaintiff for the material and mason work for an almshouse. After the buildings had been commenced and some work done an ordinance was passed reciting that the site was unhealthy and unsuitable, and declaring that the public good required the building to be discontinued and the site abandoned, and that another more suitable be selected. It repealed the ordinance under which the contract had been made, and directed the committee having charge of the work to settle with the contractor as far as it could be done on fair and equitable terms. No settlement having been made, the contractor brought suit, and claimed in his bill of particulars: 1. His actual outlays in the preliminary steps for executing the contract. 2. An indemnity against his liabilities to those with whom he had contracted to enable him to fulfill his contract with the

city. 3. Damages equivalent to the profits which he would have realized on the contract if he had been permitted to execute it. It was held that the contractor was not entitled to claim any damages on account of profits he might have realized under the contract if he had been permitted to go on with the work. And evidence offered to support the third item was properly rejected, as well as the evidence to support the second item for indemnity against loss on account of subsidiary contracts, the evidence as to the latter being vague, and there being no proof offered of any damage actually incurred. But he was entitled to recover on the first item any damages which he had actually sustained by reason of the contract while the same was operative and in force. There was proof offered that the contractor had been for fifteen years engaged in the manufacture of brick near the city of Baltimore, and that at the date of the contract he had on hand sixty thousand brick of his own manufacture, which were of ready sale in the market, but which he retained in hand in consequence

This view is not everywhere acquiesced in. In a case in the court of claims it appeared that after congress had authorized the construction of a building bids were invited and the plaintiff secured a contract for some of the material specified, and that while he was engaged in prosecuting his work the contract was annulled by statute. His right to recover, upon the portion of the contract remaining unperformed, the profits he would have made thereon, less reasonable deduction for the less time engaged and for release from the care, trouble, risk and responsibility attending the execution of the contract was sustained.¹ Future profits cannot be recovered where the contract gives the employer the right to determine how much shall be done under it and to stop the work at any time.²

[525] In ascertaining what it would cost to complete the contract after the employer has stopped the work, with a view to measuring the damages by the difference between such cost and the contract price, it is competent to prove any circumstance which should diminish such cost. Thus, where the work was of such character that it had to be done out of doors, and would hence be retarded and made more expensive by bad

of the contract, and to enable him to supply brick necessary for the work. He was allowed to recover damages in respect to decrease in the market value of the brick before notice for the abandonment of the work.

In *Kugler v. Wiseman*, 20 Ohio, 361, the contractor undertook to do certain work by the first of August. After the work had been commenced the employer requested a suspension, which took place. The work was resumed a month later at the employer's request, and upon his promise to pay, over and above the contract price, the additional cost of the work in consequence of any increase in the price of wages and materials. The work being finished in January following, suit was brought, not on the contract, but for work and labor. It was held that the contract might be put in evidence by the plaintiff, and that, in order to arrive at the

increased cost of the work in consequence of an advance in the price of labor and material, it was proper to inquire of a witness generally the difference in the price thereof in the spring and summer and the fall and winter months, although the question was not limited to the particular year in which the work was done. Inquiry may be made as to the difference in the price generally, and then ascertain whether the difference in this particular year varied from others.

¹ *Stout v. United States*, 26 Ct. of Cls. 385.

² *Beers v. North Milwaukee Town Site Co.*, 93 Wis. 569, 67 N. W. Rep. 936; *Merriman v. McCormick Harvesting Machine Co.*, 96 Wis. 600, 71 N. W. Rep. 1050. See *Wakeford v. Commissioner of Railways*, 2 N. S. W. L. R. 258; *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. Rep. 465.

weather, it was held competent to show that the season after the employer had stopped the work, and when, otherwise, the contractor would have done it, was pleasant and exceptionally favorable.¹

In Georgia the rule of computing the damages on the basis of profits that the contractor could have made if he had been permitted to finish his contract is not adopted, unless, perhaps, where the case is one which admits of very precise and certain proof of what such profits would be.² The general rule is well

¹ *Burrell v. New York & S. Salt Co.*, 14 Mich. 34. But see *Masterton v. Mayor*, 7 Hill, 61.

² *Vischer v. Talbotton Branch R. Co.*, 34 Ga. 536. In this case the question was what is the measure of damages against a railroad company for fraudulently hindering a contractor from completing its road. Walker, J., said: "Much was said as to the proper measure of damages in the case; and it is claimed, especially, that the court erred in ruling out Mr. Hull's testimony, introduced for the purpose of showing the amount of damages complainants sustained, or rather what amount of profits they would have made if they had completed the work according to the stipulations of the alleged contract. The jury having found the facts against the complainants renders it unnecessary to decide what would have been the proper measure of damages in case the finding had been otherwise. Mr. Hull, from a profile of the projected road, makes a calculation of the quantity of work to be done, an approximation rather, and says: 'Under ordinarily favorable circumstances some profit should be made on each of the items of work at the price proposed.' He enumerates various circumstances which it would be necessary to include 'in order to estimate accurately the cost;' and adds, 'then, the weather would greatly affect the result, so that no exact calculation

could be made until the job is finished.' 'A good deal would depend on whether the hands would be able to work; much would depend on whether they were well or sick, or runaway. If they were sick or runaway most of the time, the contractor would make nothing.' 'Railroad contractors, when experienced, do get frequently mistaken as to underground work, and they sometimes find it for their interest to abandon a contract, and do sometimes abandon them.' The proposition of complainants is to ascertain by this sort of testimony how much money defendant shall pay them. In *Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 417, 65 Am. Dec. 602, this court decides that 'prospective profits which are speculative and conjectural are usually too remote and uncertain to enter into the estimate of damages to be allowed for breach of contract.' In delivering the opinion in this case Lumpkin, C. J., says: 'We are inclined to think that this whole testimony as to the gains which the plaintiff would have derived from this contract, had he not been prevented from realizing them by the delinquency of the defendant, should have been rejected as too contingent and speculative, and too dependent upon the fluctuation of the markets, the chances of business, and other casualties, to enter into a safe or reasonable estimate of damages. And in lieu thereof a

expressed in a recent Maryland case: The profits which are recoverable must be free from speculation and must be sufficiently certain to be capable of adequate proof. They must not depend on the chances of trade, but upon market value and other facts susceptible of proof. And the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to estimate the extent of his injury, excluding all such elements of injury as are incapable of being ascertained by the usual rules of evidence.¹

[526] If the employment of a contractor is to construct articles out of his own materials, and he is prevented by the employer from proceeding in the execution of his contract, he cannot recover under the common count for work and labor done and material furnished or unfinished articles not delivered, the property in which never vested in the employer.² The defendant may show in defense that the performance would cost more than the contract price.³ So the contractor may enhance the damages by showing that expenses have been incurred in preparations for performance.⁴ A part

calculation should have been made of the loss actually sustained by the hire of hands, the interest on the investment, and solid *data* like these, as the *criteria* of loss by the detention of the machinery.' P. 420. We are aware that this case is not, in its facts, like the one at bar, but how much alike in the uncertainty of the evidence by which the amount of damages is to be ascertained. Again, in the *Water Lot Co. v. Van Leonard*, 30 Ga. 561, this court decides: 'That the measure of damages was the interest on the investment for the time the machinery was not employed for want of water,' caused by the failure of the 'other party to perform his contract; and affirm the case in the 19th Ga. We are aware that some cases hold that the proper measure of damages is the difference between the price to be paid and the actual cost of performing the contract. There may be cases where this may be the correct rule, but the cases al-

ready cited show the strong tendency of this court to discard 'speculative profits' and be controlled by 'solid *data*' in estimating the amount of damages to which a party may be entitled for a breach of contract. We do not intend to be understood as laying down a rule for ascertaining the amount of damages a party, for the breach of contract of this kind, would be entitled to. It will be time enough to do so when the case before us shall make it necessary."

¹ *Lanahan v. Heaver*, 79 Md. 413, 421, 29 Atl. Rep. 1036, 20 L. R. A. 759. See *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 501, 29 Atl. Rep. 964, for evidence showing a loss of profits.

² *Allen v. Thrall*, 36 Vt. 711.

³ *Durkee v. Mott*, 8 Barb. 423.

⁴ *Id.*; *United States v. Speed*, 8 Wall. 77; *Thompson v. Jackson*, 11 B. Mon. 114.

The recovery of such expenses must not exceed disbursements made

performance should be considered with reference to the scope of the entire contract when the employer in his own wrong or in the exercise of a right reserved puts an end to the contract. Thus, the plaintiffs agreed in August to deliver to the defendant as ordered, monthly, throughout a year, logs averaging a certain diameter, he to have the option to determine the contract, and then to pay them the cost of the logs cut and ready for delivery or afloat, and which they have on hand in view of their contract; the defendant terminated the contract in October, the plaintiffs having on hand some logs afloat and others cut in the woods, but not removed; these were measured and found to be nearly all of less than the specified average diameter; but it was held that, in the absence of evidence that they had acted unreasonably or in bad faith, he was liable for the cost of all the logs, and not merely of such as would average of the specified diameter.¹

SECTION 3.

SALVAGE.

§ 715. **Requisites of salvage service.** A salvage claim is in the nature of a *quantum meruit*; but certain facts must exist to give it validity: First, a marine peril to the property to be rescued; second, voluntary service not owed to the property as a matter of duty;² third, success in saving the property, or some portion of it, from the impending peril.³ These requisites distinguish salvage service from that which is compensated on the *quantum meruit* at common law. Hence, a right to com-

necessary by the contract. *Railway Co. v. Beard*, 55 Ark. 309, 19 S. W. Rep. 923.

¹ *Wolf v. Boston Veneer Box Co.*, 109 Mass. 68.

² See *The C. P. Minch*, 61 Fed. Rep. 511, and cases cited.

³ *The Burlington*, 73 Fed. Rep. 258; *The Connemara*, 108 U. S. 352, 2 Sup. Ct. Rep. 754; *Murphy v. Ship Suliote*, 5 Fed. Rep. 99; *The Clarita*, 23 Wall. 1.

The peril need not be great. *The Leipsic*, 5 Fed. Rep. 108. A situation of actual apprehension, though not

of real danger, is sufficient. *The Plymouth Rock*, 9 id. 413.

A raft of timber is subject to the admiralty jurisdiction on a claim for salvage. *Muntz v. A Raft of Timber*, 15 id. 555. See § 720.

A marine peril exists where the winds and waves were the proximate cause of the disaster, though the miscalculation of the master of the vessel was the remote cause. *Inter-Island Steam Navigation Co. v. 1206 Bags of Sugar*, 9 Hawaiiia, 323.

compensation may exist for service in saving a vessel, though it does not constitute a claim for salvage. Thus, where valuable services were rendered, upon the employment of the owners, to a vessel in imminent peril by one having great skill in rescuing wrecked vessels and unusual means adapted to such exigencies, but under circumstances which prevented him from being compensated on the principles of salvage, it was held that he was entitled to recover a very liberal allowance for his services, to be measured as well by the extent of his skill and means as by the time and number of men employed.¹ So compensation for meritorious services in relieving a vessel aground, or otherwise in distress or danger, or even in attempting to do so, may be allowed upon a bill for salvage although a case for salvage compensation is not made out.² The later cases favor the extension of the rule of awarding compensation upon salvage principles so as to include towage when it is rendered to a disabled vessel, not with a view merely to expedite her passage from one place of safety to another, but with the obvious purpose of relief from some circumstances of danger, either present or reasonably to be apprehended.³ Cases of corporation salvors, at one time held not to be within the rule,⁴ are not an exception.⁵ Salvage may be awarded as against the cargo though the salving vessel and the schooner from which the cargo was salvaged were owned by the same persons, and both vessels were under general orders to assist each other.⁶

The law of salvage, so far as it allows the recovery of boun-

¹ *Sturgis v. Law*, 3 Sandf. 451.

² *The Sailor's Bride*, 1 Brown's Adm. 68; *The Williams*, id. 208; *The Clarion*, id. 74; *George v. The Arctic Bee*, 232; *The J. F. Farlan*, 8 Blatchf. 207; *The Barnegat*, 55 Fed. Rep. 92.

³ But see *Murray v. United States*, 55 Fed. Rep. 829, 5 C. C. A. 283, affirming 52 Fed. Rep. 172.

⁴ *Compagnie Commerciale de Transport A Vapeur Francaise v. Charente Steamship Co.*, 9 C. C. A. 292, 60 Fed. Rep. 921; *The R. R. Rhodes*, 82 Fed. Rep. 751, 27 C. C. A. 258; *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 94 Fed. Rep. 214, 36 C. C. A. 201; *United*

States v. Morgan, 99 Fed. Rep. 570, 39 C. C. A. 653; *The Catalina*, 105 Fed. Rep. 633, 44 C. C. A. 638; *The Hekla*, 62 Fed. Rep. 941; *The Beaconsfield*, 67 Fed. Rep. 144; *The Stratton Audley*, 3 Bene. 241; *The J. F. Farlan*, id. 206. See s. c., 8 Blatch. 207.

⁵ Per Brown, J., in *The Plymouth Rock*, 9 Fed. Rep. 413; *The Camanche*, 8 Wall. 448; *The Birdie*, 7 Blatch. 238.

Towing a disabled vessel on the high seas is always a salvage service. *The Great Northern*, 72 Fed. Rep. 678.

⁶ *Inter-Island Steam Navigation Co. v. 1206 Bags of Sugar*, 9 Hawaii, 323.

ties and rewards for perilous service, in addition to the actual value of such service, cannot be applied in state courts, being a matter of exclusive admiralty jurisdiction. But such courts may consider the peril of the service rendered both to life and property, and the value of the property saved, in arriving at the value of the service, the compensation to be paid therefor not being agreed upon.¹

§ 716. A specific amount may be fixed by agreement. An agreement for a specific sum dependent upon success does not alter the nature of the service, but only furnishes a rule of compensation. The fairness or unfairness of such an agreement cannot be affected by considering subsequent events.² And a person hired to assist with knowledge that his [529] employer is operating under such a contract is also limited in the amount of his recovery by the contract price; and the fact that he is uninformed as to the terms of the contract will not subject the property or the owners to an additional liability.³ Until quite recently the admiralty courts have set aside contracts made for what they have considered exorbitant considerations with a free hand on the theory that, being made when the property salvaged was in peril, they should be closely scrutinized.⁴ Without going so far as to say that the cases which have set aside salvage contracts and declared that they are to be closely scrutinized, and will not be upheld when it appears that the price agreed upon is unreasonable or exorbitant, the supreme court of the United States is "unable to assent to the general proposition laid down in some of them that salvage contracts are within the discretion of the court and will be set aside in all cases where, after the service is performed, the stip-

¹ *Anthanissen v. Dart*, 94 Ga. 543, 20 S. E. Rep. 124.

² *The Silver Spray's Boilers*, 1 Brown, 349; *The Solway Prince*, [1896] Prob. Div. 120; *The Strathgarry* [1895], Prob. 264.

³ *The Silver Spray's Boilers*, *supra*; *The Marquette*, 1 Brown, 364.

⁴ *The Leipsic*, 5 Fed. Rep. 108; *The C. & C. Brooks*, 17 id. 548; *Scott v. Four Hundred Tons of Coal*, 39 id. 285; *The Tornado*, 109 U. S. 110, 3 Sup. Ct. Rep. 378; *Wilder's Co. v.*

The Lurline, 11 Hawaiia, 83, 94; *Two Hundred Tons of Coal*, 7 Bene. 343; *The A. D. Patchin*, 1 Blatch. 414; *Williams v. The Jenny Lind*, 1 Newb. 443; *Cowell v. The Brothers*, Bee, 136; *Schultz v. The Nancy*, id. 139. See *Post v. Jones*, 19 How. 150; *The Clandeboye*, 17 C. C. A. 300, 70 Fed. Rep. 631; *The Sirius*, 57 Fed. Rep. 851, 6 C. C. A. 614, reversing 53 Fed. Rep. 611; *The Elmbank*, 69 Fed. Rep. 104, 16 C. C. A. 164; *The Altair*, [1897] Prob. Div. 105.

ulated compensation appears to be unreasonable. If such were the law, contracts for salvage services would be of no practical value, and salvors would be forced to rely upon the liberality of the courts."¹ Where the salvor, however, has not taken advantage of his power to make an unreasonable bargain, courts of admiralty will enforce contracts made for salvage service.² In such cases the vessel-owners will be bound for the sum named without any deduction in respect of the salvage of the cargo.³ To defeat a salvage suit on the ground of a special contract, nothing short of a contract to pay a given sum for the services to be rendered, or a binding agreement to pay at all events, whether successful or unsuccessful in the enterprise, will have that effect.⁴ If supervening circumstances make the

¹ *The Elfrida*, 172 U. S. 186, 196, 19 Sup. Ct. Rep. 146; *Elphicke v. White Line Towing Co.*, 106 Fed. Rep. 945, 46 C. C. A. 56.

² *The Thornley*, 98 Fed. Rep. 735, 39 C. C. A. 248; *The Sir William Armstrong*, 53 Fed. Rep. 145; *The Sirius*, id. 611; *The Albert*, 56 id. 721; *The J. G. Paint*, 1 Bene. 545; *The Prinz Heinrich*, 13 Prob. Div. 31; *Harley v. Four Hundred Sixty-seven Bars of R. Iron*, 1 Sawyer, 1; *The Independence*, 2 Curt. 357; *The Emulus*, 1 Sumn. 207; *Bearse v. Pigs of Copper*, 1 Story, 314; *The True Blue*, 2 W. Rob. 176; *The Henry*, 2 Eng. L. & Eq. 564. See *Gould v. United States*, 1 Ct. of Cls. 183; *Bondies v. Sherwood*, 22 How. 214.

"We do not say that, to impugn a salvage contract, such duress must be shown as would require a court of law to set aside an ordinary contract; but where no such circumstances exist as amount to a moral compulsion the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. The presumptions are in favor of the validity of the contract, although in passing upon the question of compulsion the fact that the contract was made at sea,

or under circumstances demanding immediate action, is an important consideration. If, when the contract is made, the price agreed to be paid appears to be just and reasonable, in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, the sum ought not to be reduced by an unexpected success in accomplishing the work, unless the compensation for the work actually done be grossly exorbitant." *The Elfrida*, 172 U. S. 186, 197, 19 Sup. Ct. Rep. 146.

³ *The Prinz Heinrich*, 13 Prob. Div. 31.

⁴ *The Camanche*, 8 Wall. 448. In this case the defense offered was that the services rendered were not salvage services, because, as alleged, they were rendered under an agreement for a fixed sum. Clifford, J., said, referring to it: "Three answers may be given to that proposition, each of which is sufficient to show that it cannot be sustained. (1) No such defense was set up in the answer. (2) Nothing was ever paid or tendered to the libelants for that.

performance of a salvage contract impossible and the vessel in distress is saved from peril by a different service from that contracted for — as where she is towed to C. instead of to G., as the contract provided — the court may award compensation as though no agreement therefor had been made.¹ Salvage claims rest, not upon contract, but upon the right to be paid out of the property saved; therefore if salvage services have been rendered the salvor does not forfeit his right to remuneration because he acted under an express agreement which he did not perform.²

§ 717. Nature of peril, and duty of claimant. The vessel must be in imminent peril, though it is not necessary that but for the service for which salvage is claimed she would have

part of their claim now in controversy, and it is well settled law that an agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment. Such an agreement does not alter the character of the service rendered; so that if it was in fact salvage service, it is none the less so because the compensation to be received is regulated by the terms of an agreement between the master of the ship or the owners of the saved property. *The Emulus*, 1 Sumn. 207. Defenses in salvage suits as well as in other suits in admiralty must be set up in the answer, and if not, and the services proved were salvage services, the libelants must prevail. *The Boston*, 1 Sumn. 328. Agreements of the kind suggested ought certainly to be set up in the answer, as it is not every agreement which will have the effect to diminish a claim for salvage compensation. On the contrary, the rule is that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a

bar to a meritorious claim for salvage. *The Versailles*, 1 Curt. 353; *The Lushington*, 7 Notes of Cases, 361; *The Centurion*, 2 Ware, 490; *The Foster*, Abb. Adm. 222; *The Whitaker*, 1 Sprague, 282; *The Brig Susan*, id. 503; *Parsons on Shipping*, 275; *The Phantom*, L. R. 1 Adm. & Ecc. 58; *The White Star*, id. 68; *The Saratoga*, 1 Lush. 321; *MacLachlin on Shipping*, 531; *Coffin v. The John Shaw*, 1 Cliff. 230. (3) But if the agreement had been set up in the answer, it would constitute no defense, as by the terms of the instrument the libelants were not to receive any compensation whatever, or be entitled to any lien upon the property, unless the materials and machinery were substantially saved, so that it is clear that the compensation was not to be paid at all events." See *Bowley v. Goddard*, 1 Low. 154.

A contract does not result from a mere request for aid made by the master of a vessel in distress. *The R. R. Rhodes*, 82 Fed. Rep. 751, 27 C. C. A. 253.

¹*The Westbourne*, 14 Prob. Div. 132.

²*The Hestia*, [1895] Prob. Div. 193.

been lost.¹ The peril may be from shipwreck, fire, pirates or enemies;² but it must not originate in the negligence or fault of the salvors.³ They cannot force themselves upon a vessel in distress against the will of the master;⁴ nor claim against the cargo if the owner is accessible, when there is an attempt between the claimant and the master to throw the whole expense upon the cargo;⁵ nor found a claim for salvage upon acts which are in themselves tortious or unlawful.⁶ Seamen belonging to the ship in peril cannot, as a general rule, claim salvage compensation; not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo get into a position of danger in order that by extreme exertion they might claim such compensation.⁷ Pilots, also, are excluded from such compensation for any exertions or services rendered while acting within the line of their duty;⁸ but they may become salvors, like other persons, if they perform extraordinary services outside of the line of their duty.⁹ So may

¹ *The Connemara*, 108 U. S. 352, 2 Sup. Ct. Rep. 754; *The Delphos*, 1 Newb. 412; *The Charles*, id. 329; *Talbot v. Seeman*, 1 Cranch, 1, 43; *The Viola*, 53 Fed. Rep. 172; *The Thomas Hilyard*, 55 id. 1015; *The City of Atlanta*, 56 id. 252.

² *Id.*; *Lee v. The Alexander*, 2 Paine, 466; *Davison v. Sealskins*, id. 324.

³ *The Clarita*, 23 Wall. 1; *The Coppella*, L. R. 1 Adm. & Ecc. 356; *The Queen*, 2 id. 53; *The Samuel H. Crawford*, 6 Fed. Rep. 906.

⁴ *New Harbor Protection Co. v. The Charles P. Chouteau*, 5 Fed. Rep. 463; *The Cleone*, 6 id. 517; *The Susan*, 1 Sprague, 503. See *Anna Leiland*, 1 Low. 310.

⁵ *The C. M. Titus*, 11 Fed. Rep. 442.

⁶ *Talbot v. Seeman*, 1 Cranch, 1; *Davison v. Sealskins*, 2 Paine, 324.

⁷ *The Clarita*, 23 Wall. 1; *Miller v. Kelly*, Abb. Adm. 564; *Hobart v. Drogan*, 10 Pet. 108; *Studley v. Baker*, 2 Low. 205; *Coffin v. Brig Akbar*, 5 Fed. Rep. 456; *The C. F. Bielman*, 108 Fed. Rep. 878.

"In every case where compensa-

tion in the nature of salvage has been awarded to seamen the voyage has terminated by the shipwreck of the vessel, which has either gone to the bottom or left her bones on the shore, or she has been abandoned by all, or by all except the salvors, under circumstances which show conclusively that the abandonment was absolute, without hope or expectation of recovery, or the seaman has been by the master unmistakably discharged from the service of the ship-owner." *The C. P. Minch*, 73 Fed. Rep. 859, 20 C. C. A. 70. The abandonment of a stranded vessel and her cargo to the insurer does not give the master and seamen the right to collect for salvage services; in such a case there is merely a change of employers. *The C. F. Bielman*, 108 Fed. Rep. 878.

⁸ *Studley v. Baker*, 2 Low. 205; *Hope v. The Dido*, 2 Paine, 243.

⁹ *Bean v. The Grace Brown*, 2 Hughes, 112; *Montgomery v. The T. P. Leathers*, 1 Newb. 421; *The Wave v. Hyer*, 2 Paine, 131.

the crew of an imperiled vessel after they are discharged from their duty and allegiance as such;¹ and passengers if they perform extraordinary services.² Salvage cannot be recovered by persons who have acted in the performance of a mere duty, as where they are employed by the public authorities to per-

The pilot act of Oregon (S. L. 1868, p. 23) provides that the steam tugs and pilot boats at the mouth of the Columbia river shall tow and pilot vessels upon the pilot grounds between Astoria and the open sea outside of the bar, "in all weather" when the bar "can be crossed by first-class steamers and sail vessels," for a uniform compensation, in proportion to the draft of the vessel, called pilot fees. Under this act it has been held that so long as it is reasonably safe to take a vessel in tow, anywhere on the pilot grounds, the tug is bound to do so, and is not entitled to compensation therefor as a salvor; but that she is not bound to incur extraordinary risk to tow a vessel or to rescue it from danger of wreck; and when she does so, she is entitled to compensation therefor as a salvor. *Roff v. Wass*, 2 Sawyer, 389.

In *Hobart v. Drogan*, 10 Pet. 108, Judge Story said: "A pilot, as such, is not disabled in virtue of his office from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. . . . Extraordinary events may occur in which (the seamen's) connection with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in

which case they may be permitted to claim as salvors. Such was the case of theseamen left on board in the case of *The Blaireau*, 2 Cranch, 268; and such was the exception alluded to in the case of *The Neptune*, 1 Hagg. Adm. 237. In this last case Lord Stowell, after saying that the crew of a ship cannot be considered as salvors, gave what he deemed a definition of a salvor. 'What (said he) is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer, without any pre-existing contract that connects him with the duty of employing himself for the preservation of the ship.' And it must be admitted that however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy and strikes at the root of those temptations, which might otherwise exist, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate." *Delong v. Peragio*, Bee, 212; *Hand v. The Elvira*, Gilp. 60; *Le Tegre*, 3 Wash. C. C. 567.

¹ *The Connemara*, 108 U. S. 352, 2 Sup. Ct. Rep. 754; *The Olive Branch*, 1 Low. 286; *The Antelope*, id. 130; *The Triumph*, 1 Sprague, 428; *The Blaireau*, 2 Cranch, 240; *Hobart v. Drogan*, 10 Pet. 108; *The Nightingale*, 6 N. S. W. L. R. 18 (P. & D.); *The Florence*, 16 Jur. 572.

² *The Connemara*, *supra*; *The Two Friends*, 1 W. Rob. 286; *The Brunston*, 2 Hagg. Adm. 3, note. See *Bond v. The Cora*, 2 Wash. C. C. 80.

form the very service rendered.¹ But a general agent for the ship may claim as a salvor.² Except as indicated, all persons [532] who give any personal assistance in saving the property are salvors; and the ship, cargo, freight, etc., saved make one fund on the subject of salvage.³

§ 718. **Property must be saved.** Salvors, strictly so called, are persons who undertake to save property in peril at the request of the owner or the master; they are under his direction and control and may be discharged by him, with or without good cause, upon being compensated for what they have already done, or without such immediate compensation if their lien is not endangered.⁴ Risk of life is not a necessary element of salvage service; where such risk, however, is incurred in saving property it will place the salvors in a higher position of merit, and entitle them to a more liberal compensation. But the controlling inquiry in salvage is, was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors?⁵ Unless it is saved in fact by those who claim as salvors, salvage will not be allowed, however good their intentions and heroic and perilous their exertions.⁶ Thus, if by accident or the negligence of the salvors a rescued ship is led into peril as great as that from which she has been delivered, all claim to salvage is lost.⁷ Where three vessels, at different times, rendered valuable services to a vessel in continuous peril, it was held that each was entitled to salvage, although the separate services of neither alone would have saved her.⁸ Those who begin a salvage service and are in the

¹ *Murphy v. Ship Suliste*, 5 Fed. Rep. 99.

² *The Kate B. Jones*, [1897] Prob. 366.

³ *The Cargo ex Ulysses*, 13 Prob. Div. 205 (seamen on government vessel); *The Ottawa*, 1 Low. 274.

⁴ *The Ida L. Howard*, 1 Low. 2.

⁵ *The Charles Avery*, 1 Bond, 119; *Blagg v. The Bicknell*, id. 270; *The Richard S. Garrett*, 55 Fed. Rep. 90; *The Enos Soule*, 95 id. 483; *The Eldorado*, 53 Fed. Rep. 840, 4 C. C. A. 47, reversing 50 Fed. Rep. 951; *The Viola*, 52 Fed. Rep. 172.

⁶ *Montgomery v. The T. P. Leath-*

ers, 1 Newb. 421; *The John Wurts*, Olcott, 462; *Clarke v. The Dodge Healey*, 4 Wash. C. C. 651; *Andrew v. The Edam*, 13 Fed. Rep. 135; *The Algitha*, 17 id. 551; *The Avoca*, 39 id. 567; *The Golden Gate*, 57 Fed. Rep. 661; *The L. W. Perry*, 71 Fed. Rep. 745.

⁷ *The Duke of Manchester*, 6 Moore's P. C. 91; *The Yan Yean*, 8 Prob. Div. 147; *The Cheerful*, 11 id. 3; *The Benlarig*, 14 id. 3; *The Lepanto*, [1892] Prob. 122.

⁸ *Muntz v. A Raft of Timber*, 15 Fed. Rep. 555; *The Island City*, 1 Black, 121; *The Strathnevis*, 76 Fed.

successful prosecution of it are entitled to be regarded as the meritorious salvors of whatever is preserved though wrongfully interrupted in the work by others who complete the service.¹

§ 719. Amount recoverable. The amount of salvage to be allowed is in the discretion of the court; there is no precise rule, nor is it in its nature reducible to rule, for it must [533] in every case depend on peculiar circumstances, such as peril incurred, labor sustained, value decreed, and so forth, all of which must be estimated and weighed.² In an early case in this country in which the foregoing observations were made, Johnson, J., said: "As far as our inquiries extend, when a proportion of the thing saved has been awarded, a half has been

Rep. 855; *Cowell v. The Brothers, Bee*, 136, Fed. Cas. No. 3,294; *The Veendam*, 46 Fed. Rep. 489.

After reviewing several cases Judge Hanford deduced these principles: First. To earn salvage, success must crown the efforts of the salvors. But, when a vessel has been actually rescued from a situation of peril, all who have contributed at any stage of the rescue are entitled to a share of the reward. Second. Voluntary abandonment of an attempt to rescue a vessel in peril works a forfeiture of the right to salvage. But when sailors are prevented by stress of weather, fog, or darkness, or other circumstances beyond their control, from rendering further assistance, and there has been no wilful disregard of duty on their part towards the imperilled ship, there should be no forfeiture. Third. The amount of salvage to be awarded should be commensurate with the merit of the salvor's conduct; and when salvage has been earned, and there has been no wilful misconduct or neglect, mere failure on the part of salvors to do all that might be done under the circumstances affords good ground for reducing the amount to be

awarded, but there is no inflexible rule making a total forfeiture the penalty. *The Strathnevis*, 76 Fed. Rep. 855.

¹ *The John Gilpin*, Olcott, 77.

² *The Adventure*, 8 Cranch, 221; *The Connemara*, 108 U. S. 852, 2 Sup. Ct. Rep. 754; *The Hesper*, 18 Fed. Rep. 692, 696.

The award will be reduced, if in making it there was a clear mistake, violation of just principles or a departure from authority. *The Bay of Naples*, 48 Fed. Rep. 737.

"A greater proportion is given where the value of the property saved is small, and a smaller proportion where the value is large. More is awarded where the salving ship is a steamer, and less where the service is performed by a sailing vessel; more where the ship in distress is on the open sea, and less where the mishap occurs near land; more in case of a derelict, and less in the case of a ship not abandoned; more in case where no other means of assistance are at hand than in those where such other assistance can be had; more where there is risk to the lives either of the saved or of the salvors than where there is no such risk." *Wilder's Co. v. Lurline*, 11 *Hawaii*, 83, 95.

the maximum, and an eighth the minimum; below that it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than half may have been awarded; but they will be found to be cases of very extraordinary merit or on articles of very small amount."¹ The more material considerations entertained by courts in determining the amount of compensation are thus stated, as the result of the admiralty decisions in England and America, by the British board of trade in instructions given in 1865 to the receivers of wrecks in Great Britain: The degree of danger from which lives or property are rescued; the value of the property saved; the risk incurred by the salvors; the value of the property employed by them in the enterprise, and the danger to which it was exposed; the skill shown in rendering service; the time and labor occupied. These considerations have been often acted upon, and there has been added to them another: The degree of the success achieved and the proportions of the value of the property lost and saved.² The more important factors are the value of the property saved, that being the subject-matter in respect of which the action arises; the perils from which the vessel has been rescued; the value of the rescuing vessel.³ The last consideration affects the amount of the reward only in so far as it exposes the owner of the salving ship to risk of loss.⁴ Since the enactment of the Harter act of February 13, 1893,⁵ author-

¹ *The Adventure*, *supra*; *Bearse v. Pigs of Copper*, 1 Story, 314; *Bond v. The Cora*, 2 Wash. C. C. 80; *British Consul v. Smith*, Bee, 178. See *McGinnis v. The Pontiac*, 5 McLean, 359; *Cross v. The Ballona*, Bee, 193; *The Dos Hermanos*, 10 Wheat. 306; *Smith v. The Stewart*, Crabbe, 218; *Hobart v. Drohan*, 10 Pet. 108; *Peisch v. Ware*, 4 Cranch, 347; *Tyson v. Pryor*, 1 Gall. 133; *The John Wurts*, Olcott, 462.

² *The Sandringham*, 10 Fed. Rep. 556, 573; *The Annie Henderson*, 15 id. 550; *The Egypt*, 17 id. 359; *The Queen of the Pacific*, 25 id. 610; *The Blackwall*, 10 Wall. 1; *The R. R. Rhodes*, 82 Fed. Rep. 751, 27 C. C. A. 258; *The Haxby*, 83 Fed. Rep. 715, 28 C. C. A. 33; *The Rita*, 62 Fed. Rep.

761, 10 C. C. A. 629; *The North Erin*, 71 Fed. Rep. 430; *La Hesbaya*, id. 742; *The T. F. Oakes*, 87 Fed. Rep. 229; *Inter-Island Steam Navigation Co. v. 1206 Bags of Sugar*, 9 Hawaii, 323.

³ *The Wellington*, 52 Fed. Rep. 605; *The Alamo*, 75 Fed. Rep. 602, 21 C. C. A. 451; *The R. R. Rhodes*, 82 Fed. Rep. 751, 27 C. C. A. 258; *The H. E. Runnels*, 82 Fed. Rep. 755, 27 C. C. A. 183; *The Dupuy de Lome*, 55 Fed. Rep. 93; *Murphy v. Ship Suliote*, 5 Fed. Rep. 99; *The Elm Branch*, 106 id. 952; *The St. Paul*, 86 id. 340, 30 C. C. A. 70; *The Kaiser Wilhelm Der Grosse*, 106 Fed. Rep. 963; *The Glengyle*, [1898] Prob. 97.

⁴ *The Werra*, 12 Prob. Div. 52.

⁵ *Suppl't to R. S. of U. S.* 81.

izing a vessel to deviate for the purpose of salvage without incurring any responsibility to cargo for so doing, less consideration than formerly is given to the value of the cargo of the salving vessel.¹ A distinction is made between the compensation of salvors who volunteer and those who go in answer to a request. In the former case there can be no recovery unless there is success; in the latter a recovery may be had in any event, and it will be more nearly approximated to the value of the services rendered.² In respect to vessels engaged in the business of salvage, where there are no circumstances of unusual danger and no exceptional activity, the reward will not be out of all proportion to what would have been accepted upon a contract contingent upon success.³ In one case this rule has been applied to a vessel not thus engaged.⁴ Although by the general maritime law, aside from the English statutes, the saving of human life, disassociated from the saving of property, is not a subject of salvage compensation, yet, when connected with the rescue of property, it is uniformly held to enhance the meritorious character of the service and the consequent remuneration.⁵ If salvors have sustained serious pecuniary loss in saving a vessel of ample value to defray it, in addition to a proper sum for the master and crew, and also to leave a substantial surplus to the owner, the remuneration should include a sum sufficient to reward the risk and labor, and cover damages and expenses resulting from the performance of the services, and evidence of these should be received.⁶ But except in very plain cases, where the injuries to the salving vessel are clearly distinguishable, consisting of some distinct

¹ *The Florence*, 65 Fed. Rep. 248.

² *Wilmington Transportation Co. v. The Old Kensington*, 39 Fed. Rep. 496; *The Undaunted*, 1 Lush. 90, quoted from on this point in *The Sabine*, 101 U. S. 384, 390; *The Kate B. Jones*, [1892] Prob. 366.

³ *The Birdie*, 7 Blatch. 243; *The H. B. Foster*, 1 Abb. Adm. 235; *Ehrman v. Swiftsure*, 4 Fed. Rep. 463. See *Ulster S. S. Co. v. Cape Fear Towing & Transportation Co.*, 94 Fed. Rep. 214, 36 C. C. A. 201; *The Hesper*, 18 Fed. Rep. 696; *The Catalina*, 105

Fed. Rep. 633, 44 C. C. A. 638; *The New Camelia*, 105 Fed. Rep. 637, 44 C. C. A. 642; *The Penobscot*, 106 Fed. Rep. 419, 45 C. C. A. 372.

⁴ *The Mary E. Long*, 7 Fed. Rep. 364.

⁵ *The Aid*, 1 Hagg. 84; *The Queen Mab*, 3 id. 242; *The Emblem*, Daveis, 61; *The Plymouth Rock*, 9 Fed. Rep. 413; *The Alamo*, 75 Fed. Rep. 602, 21 C. C. A. 451; *The T. F. Oakes*, 87 Fed. Rep. 229.

⁶ *The City of Chester*, 9 Prob. Div. 182; *The Sunnyside*, 8 id. 137.

damages necessarily arising to such vessel from the service rendered,¹ the injuries for wear and tear will not be compensated by a separate allowance, but as one of the risks of the service, enhancing its merit and its rewards because of this risk as one of the hazards of the enterprise.² The principle which controls is adequate compensation for the service rendered, in view of the difficulties attending it and the results achieved, bearing in mind the policy of encouraging efforts to rescue imperiled lives and property.³ "Salvage should be regarded in the light of compensation and reward and not in the light of prize. The latter is more like a gift of fortune, conferred without any regard to the loss or sufferings of the owner, who is a public enemy. Salvage is a reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic and daring efforts of those who have it in their power to furnish aid and succor. Anything beyond this would be foreign to the principles and purposes of salvage. Anything short of this would not secure its objects. The courts should be liberal, but not extravagant; otherwise that which is intended to be encouragement to rescue property from destruction may be a temptation to subject it to peril."⁴ The value of the property saved is always regarded,⁵ but its importance as a factor in determining the amount of the allowance is less than it was formerly. Increasing consideration is given to the perils encountered.⁶ This includes the absence of other assistance than that

¹ The Florence, 65 Fed. Rep. 248.

² The Niagara, 89 Fed. Rep. 1000.

³ The Plymouth Rock, 9 Fed. Rep. 413; The John Gilpin, Olcott, 77; The Egypt, 17 Fed. Rep. 359; The Mary E. Dana, id. 353; The Akaba, 54 Fed. Rep. 197, 4 C. C. A. 281; The Baker, 25 Fed. Rep. 774; The Gambetta, 74 Fed. Rep. 259, 20 C. C. A. 417.

⁴ Per Justice Bradley in *Murphy v. Ship Suliote*, 5 Fed. Rep. 99; *The Chinese Prince*, 61 id. 697; *The Elena G.*, id. 519; *The Florence*, 65 id. 284; *The Kaiser Wilhelm Der Grosse*, 106 id. 963.

⁵ *The Oxford*, 66 Fed. Rep. 590, 13 C. C. A. 647. The compensation may

be reduced below a fair *quantum meruit* when otherwise nothing would be left for the owner. *The Lamington*, 86 Fed. Rep. 675, 30 C. C. A. 271. See note to this case in the last volume, and see § 720.

⁶ Cases cited in next to the last preceding note; *The O. C. Hanchett*, 76 Fed. Rep. 1003, 22 C. C. A. 678; *The Boyne*, 98 Fed. Rep. 444; *The Elm Branch*, 106 id. 952; *The St. Paul*, 86 id. 340, 30 C. C. A. 70; *The Coya*, 108 Fed. Rep. 413; *The Glengyle*, [1898] Prob. 97. See *Hand v. The Elvira*, 1 Gilp. 607; *Murphy v. The Suliote*, 5 Fed. Rep. 99; *The Hyderabad*, 11 id. 748; *Anderson v.*

given by the salvor.¹ The value of the service is to be estimated by the condition of wind and sea prevailing at the time it is entered upon, the circumstances of the salvaged and salvaging vessels at that time, and the casualties which experience teaches are liable to happen in the course of events while the service continues. Changed conditions for the better which occur during the course of the service do not entitle the salvaged ship to claim the benefit thereof to the injury of the other.² If an injury is inflicted on the salvaged vessel during the course of the salvage operations, it may be regarded in fixing the amount of the award,³ and so may expense incurred in getting her off a bar where she became grounded during the salvaging operations; the allowance cannot specifically cover that expense because it was at the risk of the salvors.⁴ Where a vessel has rendered necessary services to another and was in a position to render further valuable services, and her continued assistance was dispensed with, the further services which she had a chance to render will be taken into account in making an award.⁵ If the salvaging vessel reaches her destination in time to fulfill her contracts and sail on her appointed day, the detention will not be considered important.⁶ In estimating the value of the property saved, it is said in a recent case, where the service rendered enabled the vessel to complete her voyage and earn the entire freight agreed upon, that the weight of authority has settled the rule to be that the freight to be con-

The Edam, 13 id. 135; The Cyclone, 16 id. 486; Baker Salvage Co. v. The Excelsior, 19 id. 436; The Rio Grande, 22 id. 914; The Labrador, 39 id. 503; The Neto, 15 id. 819. In the last case Locke, J., gives the circumstances connected with several unreported cases in the southern district of Florida, and the amount awarded in each. See, also, Bond v. The Cora, 2 Wash. C. C. 80; The Saragossa, 1 Bene. 553; The Lancaster, 8 Prob. Div. 65; The Marie Anne, 48 Fed. Rep. 742; The Kaaterskill, id. 701.

¹ The Boyne, 98 Fed. Rep. 444, and cases cited 447.

* ² The Great Northern, 72 Fed. Rep. 678.

³ The Haxby, 83 Fed. Rep. 715, 28 C. C. A. 33.

⁴ The William Smith, 59 Fed. Rep. 615.

⁵ The Maasdam, 10 T. L. Rep. 30.

⁶ The Werra, 12 Prob. Div. 52.

If towage is done by a freight or passenger steamer, which is necessarily delayed somewhat thereby, it will be compensated for at a somewhat greater rate than that of mere towage by tugs intended for that purpose. The Monticello, 81 Fed. Rep. 211. See The Great Northern, 72 id. 678; The Emily B. Souder, 15 Blatch. 185, Fed. Cas. No. 4,458.

sidered is only such proportion as the distance at which the service was performed bore from the point of departure to the whole voyage.¹ If the duty on a cargo in port has been paid, subject to repayment if there is a loss before it is landed, the value is to be computed for the purpose of fixing salvage at the value of the cargo with the duty unpaid.² Salvors have an interest in property saved by them, which is subject to the risk of subsequent depreciation in value occurring by accidents or otherwise.³ Hence, in determining the value of a vessel sold in salvage proceedings all necessary expenses incurred in preparing her for sale are to be deducted from the proceeds thereof, and the salvor's compensation must be based on the remainder.⁴

Where a vessel was wrecked on Charleston bar and her cargo of cotton cast ashore on the islands, and there secured by great labor and risk of life and health on the part of the salvors, the court noticed the fact that while employed in this service, and in securing and drying the cargo on shore, their growing crops suffered from neglect.⁵ The whole net pro-

¹ The Sandringham, 10 Fed. Rep. 556, 576; The Norma, Lush. 124.

² Cornell Steamboat Co. v. Eighteen Hundred Eighty-three Bags of Sugar, 108 Fed. Rep. 277.

³ The L. W. Perry, 71 Fed. Rep. 745.

⁴ The Lamington, 86 Fed. Rep. 675, 30 C. C. A. 271.

⁵ Stephens v. The Argus, Bee, 170; Bond v. The Cora, 2 Wash. C. C. 80.

In *The Attacapas*, 3 Ware, 65, Ware, J., said: "The general principle which governs courts of admiralty in awarding salvage is to give a liberal reward, not merely a compensation *pro opere et labore*, but such a reward as will be an inducement to men accustomed to the dangers of the sea to adventure on these perilous enterprises, by which not only property but often lives are saved. For saving life, at whatever risk, the courts can give no reward, for there is no common measure between life and money; but the merit of saving property may be measured

by a pecuniary compensation. Another reason for liberality is to make the compensation such as will in some measure guaranty the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection; and further, to insure the good faith of salvors, embezzlement is always visited with the entire forfeiture of salvage. . . . But, if I do not misjudge, there is another consideration belonging to this case that ought not to be overlooked. This vessel was rescued from the perilous shores of Cape Cod, a coast as much dreaded by mariners as the *infames scopulos Acroceraunia* of antiquity. For the interests of humanity, as well as those of commerce, it is certainly desirable that the inhabitants of such a coast should understand that if they will hazard their lives in relieving vessels in distress they will not be dismissed with a par-

ceeds may be awarded under special circumstances, as [534] where the amount is small and the owner of the property refuses to appear;¹ and counsel fees are sometimes considered by the court in estimating the amount to be awarded in salvage.² Where money is the thing saved, a fifth or a tenth, according to the circumstances, has been the ancient proportion.³ Interest has been awarded from the time of judicial demand.⁴

In awarding salvage upon a foreign vessel, courts in this country, it is said, will regard the rate of allowance in the courts of the owner's country.⁵ But it is ruled in a recent case where the salved and salving vessel belonged to different foreign countries that their rights and liabilities were determinable by the principles of the general maritime law, and the court declined to follow the code of the country to which one vessel belonged and the practice in the courts of that of which the other carried the flag.⁶ The rates of salvage compensation at sea cannot properly be adopted for such service on rivers.⁷ The difference recognized is the mere absence from cases of salvage on the rivers of some of the factors which increase the amount of the salvage on the high seas. In one case the court refused to lay down any rule distinguishing salvage upon the lakes from that on the high seas.⁸ No distinction is made between vessel and cargo in awarding such compensation on the ground that less exertion is necessary to save the cargo. The service is considered single and to be

simonious reward, such as will the next time put them to a calculation of the relative value of a gallant and hazardous salvage and the plunderings of a wreck."

If special losses or injuries are sustained by some of the men engaged in the service, the court, in distributing the award, will allow compensation therefor. *The Cyclone*, 16 Fed. Rep. 486; *The Helen F. Robbins*, 55 id. 1014.

¹*The Lahaina*, 19 Fed. Rep. 923; *The Zealand*, 1 Low. 1; *Llewellyn v. Two Anchors and Chains*, 1 Bene. 80; *The Burlington*, 73 Fed. Rep. 258. See § 720.

² *The Liverpool Packet*, 2 Sprague, 37.

³ *Taylor v. The Friendship*, Bee, 175.

⁴ *The Duprey de Lome*, 55 Fed. Rep. 93, 95.

⁵ *The Waterloo*, Blatchf. & H. 114.

⁶ *The Edam*, 13 Fed. Rep. 135. Values will be ascertained by the rules prevailing in the port of the forum. *The Marie Anne*, 48 id. 742.

⁷ *McGinnis v. The Pontiac*, 1 Newb. 130; *Mattingly v. Cotton*, 2 Flip. 288, Fed. Cas. No. 9,294.

⁸ *The R. R. Rhodes*, 82 Fed. Rep. 751, 27 C. C. A. 258.

compensated by a *quantum* of the proceeds of the whole property saved.¹ The weight of authority is "decidedly against differentiating the awards against different kinds of cargo, or relieving specie from bearing its share of the common burden when it is not removed to a place of safety before salving operations are begun."² Where several sets of salvors take part in the service, as in stripping and unloading a stranded vessel, they do not have separate liens on the several articles saved by each, but all are entitled to be paid out of the property saved.³ It is as much the duty of salvors to care for property which has been rescued as to save it, so long as it is in their custody or control; and service of this nature is not to be separated from the other and paid for independently.⁴

§ 720. **Derelict property.** The amount of salvage to be allowed in derelict⁵ cases is governed by the same principles that apply in other salvage cases, and is fixed in the discretion of the court according to the circumstances of each case; that is according to the danger to the property, its value, the risk to life, the skill and labor bestowed, and the duration of the service.⁶ And the amount so estimated has generally varied from two-thirds to one-half of the value of the property saved.⁷

¹ *Montgomery v. The T. P. Leathers*, 1 Newb. 421; *The Ottawa*, 1 Low. 274.

² *The St. Paul*, 86 Fed. Rep. 340, 30 C. C. A. 70, citing *Nelson v. Belmont*, 21 N. Y. 36; *McAndrews v. Thatcher*, 3 Wall. 347; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. Rep. 127; *Pacific Mail S. S. Co. v. New York H. & R. Min. Co.*, 74 id. 564, 20 C. C. A. 349; *The Longford*, 4 Asp. 385. A dictum of Dr. Lushington to the contrary may be found in *The Emma*, 2 W. Rob. Adm. 315.

³ *The Albion Lincoln*, 2 Low. 71.

⁴ *The Dolcoath*, 16 Fed. Rep. 264.

⁵ As to what constitutes a derelict see *The Burlington*, 73 Fed. Rep. 258, 264, and cases cited; *The Canada*, 92 Fed. Rep. 196; *The Lepanto*, [1892] Prob. 122.

⁶ *Post v. Jones*, 19 How. 150; *The Georgiana*, 1 Low. 91; *The Eleanor*,

48 Fed. Rep. 842; *The Janet Court*, [1897] Prob. 59.

⁷ *The Canada*, 92 Fed. Rep. 196; *Barrels of Oil*, 1 Sprague, 91; *Sprague v. Barrels of Flour*, 2 Story, 195; *The John E. Clayton*, 4 Blatch. 372; *Hindry v. The Priscilla, Bee*, 1; *Bell v. The Ann*, 2 Pet. Adm. 278; *The Elizabeth and Jane*, 1 Ware, 33; *The Boston*, 1 Sumn. 328; *The Charles Henry and Cargo*, 1 Bene. 8; *The Henry Ewbank*, 1 Sumn. 400; *Taylor v. The Cato*, 1 Pet. Adm. 48; *The John Wurts, Olcott*, 462; *The Georgiana*, 1 Low. 91; *The Cayenne*, 2 Abb. (U. S.) 42; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. Rep. 127; *The B. C. Terry*, 9 Fed. Rep. 920. In exceptional cases much greater proportions have been allowed. *Cargo from Wreck of Bark Edwards*, 12 Fed. Rep. 508; *The William Smith*, 59 Fed. Rep. 615; *The L. W. Perry*,

"The tendency is, where the service rendered is prompt and gallant, to make liberal rewards, in many instances exceeding more than half of the net value of the property saved."¹ If a claimant of the property appears, although the services rendered were very meritorious and the value of the property small, the court cannot award the entire proceeds of it to the salvors.² But if no claimant appears that may be done.³

According to an American case⁴ two reasons are recognized for allowing a liberal reward in case of derelict property: first, that the property having been abandoned or lost, it is not for its owner to complain of the reward paid to strangers who restore it; second, protection of the public against danger from the derelict property. Where a brig was abandoned in near proximity to the entrance to a great seaport, and in the track of vessels of every description inward and outward bound, so that, by being left floating, with some sails still up, and with no one aboard to set her lights, to keep her on her course, or to answer or give hails, the court denominated her a dangerous thing; and that, for taking in charge and saving a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation of any vessel from any voyage in order to supply the wreck with a crew, and to make her presence safe. Other and better reasons are given in a recent English case which has laid down that although there is no rule entitling the salvors of a derelict vessel, as of right, to a moiety or other specific proportion of the value of the property salvaged, and the reward is to be assessed upon the same principles as in other cases of salvage; still, there are usually present in the case of a derelict at least three special elements which tend to enhance the award: the high degree of danger to which the property to be salvaged is exposed, the difficulty in approaching the derelict vessel without any aid in boarding her, and the necessity, when taking her in tow, of supplying

71 id. 745; *Gardner v. Ninety-nine Gold Coins*, 111 id. 552; *The Pinmore*, 121 id. 423.

¹ *The Flower City*, 16 Fed. Rep. 866, per Coxe, J.

² *The L. W. Perry*, 71 Fed. Rep. 745.

³ *The Zealand*, 1 Low. 1, Fed. Cas.

No. 18,205; *The William Hamilton*, 3 Hagg. Adm. 168; *Llewellyn v. Two Anchors and Chains*, 1 Bene. 8, Fed. Cas. No. 8,428; *The Burlington*, 73 Fed. Rep. 258.

⁴ *The Anna*, 6 Bene. 166.

men to steer her, thereby exposing some of the salvors to additional risk, and rendering the salving vessel short-handed.¹ The fact that a derelict vessel might have been saved without the interposition of the salvors may be taken into account in the determination of the compensation, but cannot deprive them of all claim.² Timber found drifting with the tide on deep water, in a harbor and out of control of the owners, is the subject of salvage.³ Where the public custodian of such timber was entitled to demand seventy-five cents per stick for timber recovered and paid salvors fifty cents per stick for timber turned over to him, a recovery of this amount for services of a low order was reluctantly sustained.⁴

§ 721. **Forfeiture of right to compensation.** It is a general rule of admiralty to deny compensation to salvors, no matter how meritorious their services may have been, if they are guilty of misconduct or bad faith.⁵ And where there is such forfeiture, the shares forfeited do not accrue to co-salvors, to increase theirs, but are reserved for the owners of the property saved.⁶ Embezzlement of any part of the property works a forfeiture.⁷ So will neglect to inform the salvor beforehand of an imminent and secret danger, known to the salvor, and against which he was able to warn her. But he may be entitled to compensation for services performed, although his conduct has been such as to forfeit a salvage remuneration.⁸ Where the captain and owners had concealed a part of the goods saved, their share of the salvage was declared forfeited to the owner of the vessel saved.⁹ And if persons interfere unnecessarily with wrecked property which is being saved under a contract with the owners, such meddlers cannot claim

¹ *The Janet Court*, [1897] Prob. 59.

² *Holmes v. The Joseph C. Griggs and Cargo*, 1 Bene. 81; *The Capella*, [1892] Prob. 70.

³ *Whitmire v. Cobb*, 88 Fed. Rep. 91, 31 C. C. A. 395, and cases cited.

⁴ *Id.*

⁵ See *The Boston*, 1 Sumn. 328, Fed. Cas. No. 1,673; *The Byron*, 5 Adm. Rec. 248, Fed. Cas. No. 2,275; *The Lady Worsley*, 2 Spinks, 253; *The Bello Corrunes*, 6 Wheat. 152, cited in the dissenting opinion of Goff, C. J.,

in *The Clandeboye*, 70 Fed. Rep. 631, 17 C. C. A. 30; *The Bremen*, 111 Fed. Rep. 228.

⁶ *The Rising Sun*, 1 Ware, 385. See *McGregor v. Ball*, 4 La. Ann. 289.

⁷ *Id.*

⁸ *American Ins. Co. v. Johnson, Blatch. & H.* 9.

⁹ *Flinn v. The Leander*, 1 Bee, 260; *Mason v. The Blaireau*, 2 Cranch, 239; *The Boston*, 1 Sumn. 328, Fed. Cas. No. 1,673.

as salvors, although they bring it into port.¹ The making of false representations for the purpose of exaggerating the danger and hardship of the service to enhance the reward, spoliation, smuggling, obtrusion of unnecessary service, or refusal to accept proffered or needful assistance will be punished by total or partial forfeiture of compensation.² If the navigation of the salving vessel is negligent and bad and results in injury to the vessel saved the award will be lessened to the extent of such injury.³ This result does not follow unless the officers of the latter are free from negligence.⁴ "Salvors are responsible for the reasonable care of the property which they take in charge, both as respects damage to the property itself, as well as respects its inflicting damage on other property."⁵

¹ A Quantity of Iron, 2 Sprague, 51; service rendered, they being supported by testimony).
Hand v. The Elvira, Gilp. 60.

² Harley v. Gawley, 2 Sawyer, 7, ³ The Divina, [1892] Prob. 58.

11; Merritt & C. Derrick & Wreck- ⁴ The Altair, [1897] Prob. 105.

ing Co. v. Chubb, 113 Fed. Rep. ⁵ The Bremen, 111 Fed. Rep. 228,
173, 51 C. C. A. 119 (disallowance 234, citing Serviss v. Ferguson, 28
of interest because of exaggerated C. C. A. 327, 84 Fed. Rep. 202; The
claims); The Bremen, 111 Fed. Rep. Sumner, 1 Brown, Adm. 52, Fed. Cas.
228 (compensation denied because of No. 13,608.
false claims as to the extent of the

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SURETYSHIP.

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SECTION 1.

CREDITOR AGAINST SURETY.

§ 722. **The contract of suretyship, questions arising [537] out of.** As the contract of a surety is to answer for the debt, default or miscarriage of another, either by joining in the undertaking of the principal or by a collateral obligation, the amount recoverable by the creditor or promisee against the surety is a primary inquiry; then arises the consequent right of the surety, who has been compelled to pay, against his principal for reimbursement, and his right against co-sureties, if any, for contribution.

§ 723. **Measure of surety's liability.** Against a surety the damages recoverable are the amount of the debt which he has undertaken to pay, or the loss he has consented to be answerable for and interest, if the debt bears it, or if interest is chargeable on the principles by which it is imposed as damages for default in payment.¹ When a surety enters into the contract with the principal, undertaking with him to perform it, the consideration received by the latter supports it as to both;² and the agreement of the surety cannot extend further than that of the principal.³ And then, as well as when the surety afterwards assumes the same obligation upon a new considera-

¹ Hooper v. Hooper, 81 Md. 155, 176, 31 Atl. Rep. 508, 48 Am. St. 496; Mutual Benefit Ins. Co. v. Brown, 80 Mo. App. 459. See §§ 477, 478.

The liability of the surety on a penal bond is not extended beyond the amount specified as a penalty by the addition to such amount of the legal interest thereon from the date the liability accrued. Holmes v. Standard Oil Co., 183 Ill. 70, 55 N. E. Rep. 647, 82 Ill. App. 476. See §§ 477, 478.

² Smith v. Molleson, 148 N. Y. 241, 42 N. E. Rep. 669; Whitbeck v. Estate of Ramsay, 74 Ill. App. 524, 537; Harty v. Smith, id. 194; Dillman v. Nadelhoffer, 160 Ill. 121, 124, 43 N. E. Rep. 378; Winans v. Gibbs & Starrett Manuf. Co., 48 Kan. 777, 30 Pac. Rep. 163; Osborne v. Gullickson, 64 Minn. 218, 66 N. W. Rep. 965; Savage v. Fox, 60 N. H. 17; Dillingham v. Jenkins, 7 Sm. & M. 479.

³ Ellis v. Bibb, 2 Stew. 63.

tion,¹ he is bound to the like measure of responsibility; that is, the same rule of damages necessarily applies to both. In respect to the other party to the contract, they are equally principals in extent of liability,² except that the sureties are not liable for exemplary damages although the act which constituted a breach of their bond was a tortious one.³

A surety undertakes for another; the debt or damages sought [538] to be recovered result from the act or omission of that other; the surety is only under obligation to pay or make compensation according to his contract; his liability thus originates, and has no greater scope or extent than that contract, properly interpreted, provides for. Hence, not unfrequently, the amount recoverable from him will be materially affected by the construction which it receives.

§ 724. **Interpretation of surety's contract.** A surety's contract is to be interpreted like other contracts. In guaranties, letters of credit, and other obligations of sureties the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances, and to forward the purposes for which it is made.⁴ In many early cases it was held that such contracts

¹ A new consideration is essential to the validity of the guaranty of a note which is a subsisting obligation when the guaranty is made. *Bank of Commerce v. Ross*, 91 Wis. 320, 64 N. W. Rep. 993.

A guaranty not founded upon a present consideration, but upon one to be given, may be revoked before it is acted upon. *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305; *Oford v. Davies*, 12 C. B. (N. S.) 748; *Hunt v. Roberts*, 45 N. Y. 691, 696; *Challenge Corn Planter Co. v. Diel*, 92 Hun, 165, 36 N. Y. Supp. 364.

² *Hooper v. Hooper*, 81 Md. 155, 172, 31 Atl. Rep. 508, 48 Am. St. 496; *McIntosh v. Likens*, 25 Iowa, 555; *Kirby v. Studebaker*, 15 Ind. 45; *Castner v. Slater*, 59 Me. 212; *Monk v. Beal*, 2 Allen, 585; *Eastin v. Board of School Directors*, 40 La. Ann. 705, 4 So. Rep.

880; *St. Paul Foundry Co. v. Wegmann*, 40 Minn. 419, 42 N. W. Rep. 288.

The sureties on the bond of a contractor for government work conditioned for the good performance of the contract and also for the protection of third persons from whom the principal has obtained materials or labor are not affected by the amount expended by them in completing the work after the government took the work from the hands of the principal. *United States v. Rundle*, 100 Fed. Rep. 400, 40 C. C. A. 450.

³ *North v. Johnson*, 58 Minn. 242, 59 N. W. Rep. 1012; *Cobb v. People*, 84 Ill. 511. But see note to § 390 for cases holding otherwise.

⁴ *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. Rep. 402; *Sachs v. American Surety Co.*, 72 App. Div. 60, 76 N. Y.

should be construed strictly.¹ In *Russell v. Clark*² Marshall, C. J., said: "The law will subject a man having no interest in the transaction to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual who contracts with one man on the credit of another not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume." But in other, and especially the later, cases a more liberal rule is laid down. In *Mason v. Pritchard*³ the king's bench declared that the words of the guarantor were to be taken as strongly against the party giving the guaranty as the sense of them would admit of. In *Hargreave v. Smee*⁴ Tindal, C. J., said: "The question is what is the fair im- [539] port to be collected from the language used in this guaranty. The words employed are the words of the defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the court puts on any other instrument. With regard to other instruments the rule is that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." In *Douglass v. Reynolds*⁵ Story, J., after

Supp. 335; *McCormick Harvesting Machine Co. v. Laster*, 70 Ill. App. 425; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. 626, 25 N. E. Rep. 630; *McDonald v. Harris*, 75 Ill. App. 111; *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. Rep. 1014; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. Rep. 508, 48 Am. St. 496; *Cumberland Building Loan Ass'n v. Gibbs*, 119 Mich. 318, 78 N. W. Rep. 138; *Fink v. Farmers' Bank*, 178 Pa. 154, 35 Atl. Rep. 636, 56 Am. St. 746; *Fisk v. Rickel*, 108 Iowa, 370, 79 N. W. Rep. 120; *Ulster County Savings Institution v. Young*, 161 N. Y. 23, 55 N. E. Rep. 483; *Smith v. Molleson*, 148 N. Y. 241, 246, 42 N. E. Rep. 669; *Northern Light Lodge v. Kennedy*, 7 N. D. 146, 73 N. W. Rep. 524; *Belloni v. Free-*

born, 63 N. Y. 383; *Locke v. McLean*, 33 Mich. 473; *Gates v. McKee*, 13 N. Y. 232, 65 Am. Dec. 545; *Lee v. Dick*, 10 Pet. 482; *Crist v. Burlingame*, 62 Barb. 351; *Reed v. Fish*, 59 Me. 358; *Bailey v. Larchar*, 5 R. I. 530; *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485; *Brown v. Haven*, 37 Vt. 439.

¹ *Nicholson v. Paget*, 1 Cr. & M. 48; *Mellville v. Hayden*, 3 B. & Ald. 593; *Cremer v. Higginson*, 1 Mason, 323; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Mauran v. Bullus*, 16 Pet. 528.

² 7 Cranch, 69, 90.

³ 12 East, 227.

⁴ 6 Bing, 244.

⁵ 7 Pet. 113.

quoting in part the foregoing extract from the opinion of Chief Justice Marshall in *Russell v. Clark*, said: "On the other hand, as these instruments (commercial guaranties) are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement, and for this purpose it was recognized by this court in *Drummond v. Prestman*¹ as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit.² And the same rule was adopted in the king's bench in *Mason v. Pritchard*."³ In *Lee v. Dick*⁴ Thompson, J., said a guaranty is a commercial instrument and ought to be construed according to what is fairly to be presumed to have been the understanding of the parties without any strict technical nicety.⁵ As to commercial guaranties the language of Mr. Justice Story in *Lawrence v. McCalmont*⁶ has frequently been quoted with approbation,⁷ and probably expresses the rule of construction now generally accepted. He said: "We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation so as to attain the objects for which the instrument is designed and the purpose to which it is applied. We [540] should never forget that letters of guaranty are commercial instruments, generally drawn by merchants in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present

¹ 12 Wheat. 515.

² Fell on Guaranty, ch. 5, p. 129.

³ 12 East, 227.

⁴ 10 Pet. 482.

⁵ *Mayer v. Isaac*, 6 M. & W. 605.

⁶ 2 How. 426.

⁷ *Gates v. McKee*, 13 N. Y. 292, 65 Am. Dec. 545; *Davis v. Wells*, 104 U. S. 159; *Lafargue v. Harrison*, 70

Cal. 380, 59 Am. Rep. 416, 11 Pac. Rep. 636; *Tischler v. Hofheimer*, 83 Va. 35, 4 S. E. Rep. 370; *Tootle v. Elgutter*, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. Rep. 228; *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. Rep. 1014. See *Struthers v. Henry*, 33 Ont. 365.

active business commerce throughout the world. . . . Indeed, if the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words by which another party is misled to his injury."¹ When the language used is not ambiguous or loose its natural meaning will be given it,² although it results in giving the obligation a retroactive effect.³

When the instrument signed by the sureties expresses an intent as to the construction to be given it, such intent must be effectuated if no question of good morals, public policy or a violation of law is involved.⁴ It is a general rule of construction that statutes providing for liens in favor of parties furnishing labor and materials will be liberally construed to advance the remedy.⁵ This rule applies to the statute⁶ imposing upon the sureties of contractors for government work liability for the labor and material used by the latter. Such liability extends to material furnished the contractor and one who was associated with him in doing the work and who was jointly and severally liable to the government, but was not a party to the contract.⁷ The law in force when public bonds are made forms a part of them as fully as though the terms of the statute were incorporated in them.⁸ It is, however, competent for the parties to vary the statutory terms, and if they

¹ *Smith v. Molleson*, 148 N. Y. 241, 43 N. E. Rep. 669; *Gamble v. Cuneo*, 21 App. Div. 413, 47 N. Y. Supp. 548.

² *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 494, 17 N. E. Rep. 217.

³ *People v. Lee*, 104 N. Y. 441, 10 N. E. Rep. 884; *Moulding v. Wilhartz*, 169 Ill. 422, 48 N. E. Rep. 189; *Peoria Rubber Manuf. Co. v. During*, 85 Mo. App. 131. See *Hughes v. Gibson*, 15 Colo. App. 318, 62 Pac. Rep. 1037.

Such effect cannot be given when the liability assumed is expressed to be for any default which "should" occur. *Brooks v. Baker*, 9 Daly, 398.

⁴ *White Sewing Machine Co. v.*

Miller, 66 Minn. 119, 68 N. W. Rep. 851.

⁵ *Sutherland on Statutory Const.*, ch. 15.

⁶ 28 U. S. Stats. 278.

⁷ *United States v. Vermont Marble Co.*, 13 D. C. App. Cas. 506.

⁸ *State v. Nutter*, 44 W. Va. 385, 30 S. E. Rep. 67; *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 34 L. R. A. 477. Compare *First Nat. Bank v. Briggs' Assignees*, 69 Vt. 12, 37 Atl. Rep. 231, 60 Am. St. 922, 37 L. R. A. 845, with the federal case.

do so the particular language which is varied cannot be read into the bond.¹

A question which frequently arises on commercial guaranties is whether the guaranty is a continuing one, or whether it is exhausted by the first transaction under it. The language of guaranties is so various and the accompanying circumstances so dissimilar that each case must depend largely on its own facts. The conflict that is manifest between some cases that very nearly resemble each other plainly results from the application in one instance of a liberal rule of interpretation in resolving doubts in respect to the intention of the parties, and in another a strict rule, by resolving the doubt in one case against the guarantor and in the other in his favor.² One quite generally accepted rule for determining whether such obligations are continuing is that, if the amount of the liability is limited and the time is not, it is presumed to have been the intention of the parties that the instrument should not be limited in its scope to a single transaction.³ Another such rule is that

¹ *Howard County v. Hill*, 88 Md. 111, 41 Atl. Rep. 61.

² Compare *Grant v. Ridsdale*, 2 Har. & J. 186; *Rapelye v. Bailey*, 5 Conn. 149, 13 Am. Dec. 49; *Bent v. Hartshorn*, 1 Met. 24; *Drummond v. Prestman*, 12 Wheat. 515; *Boyce v. Ewart*, 1 Rice, 126; *Bastow v. Bennett*, 3 Camp. 220; *Merle v. Wells*, 2 id. 413; *Nicholson v. Paget*, 1 Cr. & M. 48; *Lee v. Dick*, 10 Pet. 482; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Fellows v. Prentiss*, 3 Denio, 512, 45 Am. Dec. 484; *Douglass v. Reynolds*, 7 Pet. 113; *Mayer v. Isaac*, 6 M. & W. 605; *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smea*, 6 Bing. 244; *Melville v. Hayden*, 3 B. & Ald. 593; *Evans v. Whyle*, 5 Bing. 485; *Glyn v. Hertel*, 8 Taunt. 208; *Cremer v. Higginson*, 1 Mason, 323; *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *Bell v. Bruen*, 1 How. 169; *Haigh v. Brooks*, 10 Ad. & E. 309; *Martin v. Wright*, 6 Q. B. 917; *Hitchcock v. Humphry*, 5 M. & G. 560; *Allan v. Kenning*, 9 Bing. 618;

Clark v. Burdett, 2 Hall, 197; *Crist v. Burlingame*, 62 Barb. 351; *Boehne v. Murphy*, 46 Mo. 57, 2 Am. Rep. 485; *Bailey v. Larchar*, 5 R. L. 530; *Adams v. Clark*, *Brayton*, 196; *Washington Bank v. Shurtleff*, 4 Met. 30; *Williamson v. Chiles*, 5 Ired. 244; *Lloyds v. Harper*, 16 Ch. Div. 290; *Tobler v. Willis*, 59 Tex. 80; *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385, 25 N. W. Rep. 377; *Whipple v. Mississippi & Y. Packet Co.*, 34 Fed. Rep. 54; *Kernochan v. Murray*, 111 N. Y. 306, 18 N. E. Rep. 868, 7 Am. St. 744, 2 L. R. A. 183, 53 Hun, 50; *Perryman v. McCall*, 66 Ala. 402, 41 Am. Rep. 752; *Platter v. Green*, 26 Kan. 252; *Young v. Brown*, 53 Wis. 333, 10 N. W. Rep. 394; *Rouss v. Creglow*, 103 Iowa, 60, 72 N. W. Rep. 429; *Celluloid Co. v. Haines*, 176 Mass. 415, 57 N. E. Rep. 691; *Twohy v. McMurrin*, 57 Minn. 242, 59 N. W. Rep. 301; *Illinois Roofing & Supply Co. v. Gorton*, 6 Pa. Dist. Rep. 407.

³ *Trustees Presbyterian Board v.*

in ascertaining such intention the facts and circumstances attending the execution of the contract may be considered, and great weight is sometimes given them.¹ In some cases the rule is said to be that unless the words used fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked.² Lord Ellenborough said on this point: If a party means to be a surety only for a single dealing, he should take care to say so. Probably the better rule of construction would be that applied to other contracts — to give the instrument that effect which shall best accord with the intention of the parties as manifested by the terms of the guar-

Gilliford, 139 Ind. 524, 38 N. E. Rep. 404; Crittenden v. Fiske, 46 Mich. 70, 41 Am. Rep. 146, 8 N. W. Rep. 573; Lane v. Mayer, 15 Ind. App. 382, 44 N. E. Rep. 73; Fisk v. Pickel, 108 Iowa, 370, 79 N. W. Rep. 120; Ford v. Harris, 102 Ky. 169, 43 S. W. Rep. 199; Fifth Nat. Bank v. Woolsey, 31 App. Div. 61, 52 N. Y. Supp. 827; Standard Oil Co. v. Hoese, 57 Neb. 665, 78 N. W. Rep. 292; Weill v. Hecht, 14 N. Y. Misc. 230, 35 N. Y. Supp. 834; Eichhold v. Tiffany, 20 N. Y. Misc. 680, 46 N. Y. Supp. 534; Rochford v. Rothschild, 16 Ohio Ct. Ct. 287; Ringe v. Judson, 24 N. Y. 64; Burt v. Butterworth, 19 R. I. 127, 32 Atl. Rep. 167; Mathews v. Phelps, 61 Mich. 327, 28 N. W. Rep. 108, 1 Am. St. 581; Gard v. Stevens, 12 Mich. 265; Kimball Co. v. Baker, 62 Wis. 526, 22 N. W. Rep. 730; Seller v. Jones, 16 M. & W. 112; Mason v. Pritchard, 12 East, 227; Parker v. Wise, 6 M. & S. 239; Hitchcock v. Humfrey, 6 Scott N. R. 540; Tootle v. Elgutter, 14 Neb. 158, 45 Am. Rep. 103, 15 N. W. Rep. 228; Schneider-Davis Co. v. Hart, 23 Tex. Civ. App. 529, 57 S. W. Rep. 903; Columbia Electrical Supply Co. v. Kemmet, 67 N. J. L. 18, 50 Atl. Rep. 663. *Contra*, Cheshire Beef Co. v. Thrall, 72 Vt. 9, 47 Atl. Rep. 160; Twohy v. McMurran, 57 Minn. 242, 59 N. W. Rep. 301; Historical Pub. Co. v. La

Vaque, 64 Minn. 282, 66 N. W. Rep. 1150.

¹ Sullivan v. Arcand, 165 Mass. 364, 43 N. E. Rep. 198; Hefffield v. Meadows, L. R. 4 C. P. 595; Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385, 25 N. W. Rep. 377, 55 Am. Rep. 697, note; John S. Brittain Dry Goods Co. v. Yearout, 59 Kan. 684, 54 Pac. Rep. 1062; Westervelt v. Mohrenstecher, 76 Fed. Rep. 118, 22 C. C. A. 93, 34 L. R. A. 477; Cambria Iron Co. v. Keynes, 56 Ohio St. 501, 47 N. E. Rep. 548; Powers v. Clarke, 127 N. Y. 417, 28 N. E. Rep. 402; Walsh v. Miller, 51 Ohio St. 462, 38 N. E. Rep. 381; Mathews v. Phelps, 61 Mich. 327, 28 N. W. Rep. 108, 1 Am. St. 581; Allen v. Savings Bank, 4 Mo. App. 66; Gardner v. Watson, 76 Tex. 25, 13 S. W. Rep. 39; Rindge v. Judson, 24 N. Y. 64, 70; Gates v. McKee, 13 id. 232, 64 Am. Dec. 545; Dobbin v. Bradley, 17 Wend. 422; Evansville Nat. Bank v. Kauffmann, 93 N. Y. 273, 45 Am. Rep. 204; Ruth-erford v. Brachman, 40 Ohio St. 604; Longfellow v. McGregor, 56 Minn. 312, 57 N. W. Rep. 926, 61 Minn. 494, 63 N. W. Rep. 1032.

² Wright v. Griffith, 121 Ind. 478, 23 N. E. Rep. 281, 6 L. R. A. 639; Tischler v. Hofheimer, 83 Va. 35, 4 S. E. Rep. 370; Hartwell & R. Co. v. Moss, 22 R. I. 583, 48 Atl. Rep. 941.

anty, taken in connection with the subject-matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety.¹

As is elsewhere² indicated, the general rule is that official bonds do not extend beyond the terms for which they were made. But this presumption is not conclusive, and if it is clear that the parties meant to create a continuing liability the bond will be given that effect. Where the condition of a bond was for the faithful performance of the duties of cashier "during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position," the sureties were liable for a breach of the bond by their principal after the expiration of his first term, he having held over without being re-elected.³ It was ruled otherwise where the bond of the treasurer of a corporation, who was elected for one year, contained the words "during his continuance in office,"⁴ and also where the principal was appointed for one year, the bond being silent as to its continuance.⁵ In a late Vermont case⁶ there is a full discussion and careful examination of the authorities on this question. The bond sued upon was for the faithful performance of the duties of the cashier of a national bank "forever, so long as he should occupy the position." The federal statute provided that the cashier should be appointed and removed by the bank directors at their pleasure. The directors of the plaintiff bank had adopted a by-law declaring that the cashier should be elected to hold office at the pleasure of the board. The bond in suit was executed after the principal therein had been elected "for the year ensuing." Subsequently he was re-elected for nine consecutive years. All the defaults of which he was guilty

¹Merle v. Wells, 2 Camp. 413; Savings Institution v. Young, 161 N. Home Savings Bank v. Hosie, 119 Y. 23, 55 N. E. Rep. 483.
Mich. 116, 77 N. W. Rep. 625; 1
Brandt on Suretyship (2d ed.), § 156.

²§ 488.

³Shackamaxon Bank v. Yard, 143 Pa. 129, 22 Atl. Rep. 908, 24 Am. St. 521, approved in Fink v. Farmers' Bank, 178 Pa. 154, 35 Atl. Rep. 636, 56 Am. St. 746. See Ulster County

⁴Ulster County Savings Institution v. Ostrander, 163 N. Y. 430, 57 N. E. Rep. 627.

⁵Waterford School Trustees v. Clarkson, 23 Ont. App. 213.

⁶First Nat. Bank v. Briggs' Assignees, 69 Vt. 12, 37 Atl. Rep. 231, 60 Am. St. 922, 37 L. R. A. 845.

were committed after the expiration of the first year. For these the surety was not liable. In direct opposition to this view is a case¹ decided about two years earlier by the circuit court of appeals, eighth circuit, Caldwell, Sanborn and Thayer, JJ., being agreed. This case is not mentioned in the opinion in the Vermont case, and, presumably, was not called to its attention. The facts are strikingly similar except that in the federal case the by-law of the bank provided that the cashier should be elected annually. The latter court gave more effect to the statute than did the Vermont court, the conclusion being that, because of the statute, the term of office of the cashier is not an annual one, but continues until the incumbent resigns, is removed, or a successor is appointed.

§ 725. Contract not to be extended by construction. [541]

The obligation of a surety or guarantor is confined to his contract. In this sense it is construed strictly. He is not liable on an implied engagement where a party contracting for his own interest might be, and has a right to insist upon the exact performance of any condition stipulated for whether others would consider it material or not.² "Nothing can be clearer," says Story, J.,³ "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract,⁴ or that it may even be for his benefit. He has a right to stand on the very terms of his contract; and if he does not assent to any variation of it and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the con-

¹ *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 34 L. R. A. 477. *Fidelity & Casualty Co.*, 98 Ky. 558, 33 S. W. Rep. 828.

² *Gates v. McKee*, 13 N. Y. 232, 64 Am. Dec. 545; *Chatham v. McCrea*, 12 Up. Can. C. P. 352; *People v. Chalmers*, 60 N. Y. 158; *Kingsbury v. Westfall*, 61 id. 356; *Evansville Nat. Bank v. Kauffmann*, 93 id. 273 45 Am. Rep. 204; *Springer Lithographing Co. v. Graves*, 97 Iowa, 39, 66 N. W. Rep. 66; *De Jernette v.*

³ *Miller v. Stewart*, 9 Wheat. 680; *Hutchinson v. Woodwell*, 107 Pa. 509; *Mann v. Brown*, 71 Tex. 241, 9 S. W. Rep. 111.

⁴ *Page v. Krekey*, 137 N. Y. 307, 314, 33 N. E. Rep. 311, 33 Am. St. 731, 21 L. R. A. 409, citing local cases; *Kirschbaum v. Blair*, 98 Va. 35, 34 S. E. Rep. 895.

stant habit of scanning the contracts of sureties with considerable strictness. The class of cases . . . where persons have been bound for the good conduct of clerks of merchants and others illustrates this position. The whole series of them, from *Lord Arlington v. Merricke*¹ down to *Pearsall v. Summersett*,² proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners by name it has constantly been held that the undertaking stopped upon the admission of a new partner.³ And the only case, that of *Barclay v. Lucas*,⁴ in which a more extensive construction is supposed

¹ 2 Saund. 412.

² 4 Taunt. 593.

³ A guaranty addressed to a particular person can only be acted on and enforced by that party. *Schoonover v. Osborne*, 108 Iowa, 453, 458, 79 N. W. Rep. 263; *Taylor v. Wetmore*, 10 Ohio, 490; *Second Nat. Bank v. Diefendorf*, 90 Ill. 396; *Crane Co. v. Specht*, 39 Neb. 123, 57 N. W. Rep. 1015, 42 Am. St. 562; *Penoyer v. Watson*, 16 Johns. 100; *Smith v. Montgomery*, 3 Tex. 199; *Bennett v. Draper*, 139 N. Y. 266, 34 N. E. Rep. 791; *Taylor v. McClung's Ex'r*, 2 Houst. 25; *Grant v. Naylor*, 4 Cranch, 205.

⁴ 1 T. R. 291, note. This case has been doubted. *Dance v. Girdler*, 1 New Rep. 42. In *Western v. Barton*, 4 Taunt. 673, Lord Mansfield, after stating the general rule, said: "This, then, being the construction of the instrument from almost all the cases, in truth, we may say from all (for though there is one adverse case of *Barclay v. Lucas*), the propriety of that decision has been very much questioned."

In *Burch v. De Rivera*, 53 Hun, 367, 6 N. Y. Supp. 206, the guaranty was of the credit of "the house of *De Rivera & Co.*" This was held to mean only the firm or partnership, and it did not continue after a change in the individuals composing

it. *Standard Oil Co. v. Arnestad*, 6 N. D. 255, 69 N. W. Rep. 197, 66 Am. St. 604, 34 L. R. A. 861; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. Rep. 867; *Backhouse v. Hall*, 6 B. & S. 507. *Contra*, In re *Cinque*, 109 Fed. Rep. 455, referring to *Cremer v. Higginson*, 1 Mason, 323, 337, Fed. Cas. No. 3,383.

There are some American cases which are not harmonizable with the general principles of law concerning the rights of sureties. Thus, it has been ruled that the sureties on the bond of a general agent are presumed to know when they become such that the business would naturally, if not necessarily, involve the employment by him of sub-agents, and the former are therefore liable for moneys received by the latter (*Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310; *Hayden v. Hill*, 52 Vt. 259), or by a partner of the obligor. *Palmer v. Bagg*, 64 Barb. 641, 56 N. Y. 523. It is believed that these adjudications are not sustained by the current of authority, though they have been distinguished from the cases cited in the preceding paragraph of this note. See *Standard Oil Co. v. Arnestad*, *supra*; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Parham Sewing Machine Co. v. Brock*, 113 Mass. 197; *London*

to have been given, confirms the general rule; for that turned upon the circumstance that the security was given to the house as a banking house, and thence an intention was inferred that the parties intended to cover all losses, notwithstanding a change of partners in the house."¹

The obligation is not to be extended to any other subject, person or period of time than is expressed or necessarily included in it.² Where debt was brought on a bond for

Assur. Co. v. Bold, 6 Q. B. 523; Belairs v. Ellsworth, 3 Camp. 52; White Sewing Machine Co. v. Hines, 61 Mich. 423, 28 N. W. Rep. 157.

If no assignment of claims against a contractor for labor or materials is made the sureties on his bond, conditioned for payment of persons supplying him therewith, are not liable to a bank which has paid time checks given the contractor's laborers and the orders given men who have supplied him with material. *United States v. Rundle*, 107 Fed. Rep. 227, 46 C. C. A. 251.

¹ See *Pease v. Hirst*, 10 B. & C. 122; *Greer v. Bush*, 57 Miss. 575.

² §§ 485, 498; 1 Brandt on Suretyship (2d ed.), § 93; *Hurst v. Randall*, 68 Mo. App. 507; *Gato v. Warrington*, 37 Fla. 542, 19 So. Rep. 883; *Drake v. Sherman*, 179 Ill. 362, 53 N. E. Rep. 638; *Sterling v. Wolf*, 163 Ill. 467, 45 N. E. Rep. 218; *Masury v. Westwater*, 94 Ill. App. 30; *Warrum v. Derry*, 14 Ind. App. 442, 42 N. E. Rep. 1123; *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. Rep. 560; *Kepley v. Carter*, 49 Kan. 72, 30 Pac. Rep. 182; *Burton v. Decker*, 54 Kan. 608, 38 Pac. Rep. 783; *Singer Manuf. Co. v. Armstrong*, 7 Kan. App. 314, 54 Pac. Rep. 751; *Wheeler & Wilson Manuf. Co. v. Brown*, 65 Wis. 99, 25 N. W. Rep. 427, 26 id. 564; *Stewart v. Levis*, 42 La. Ann. 37, 6 So. Rep. 898; *State v. Banks*, 76 Md. 136, 24 Atl. Rep. 415; *Canton Institution for Savings v. Murphy*, 156 Mass. 305, 31 N. E. Rep. 285; *John A. Tolman Co. v. Clem-*

ents, 98 Mich. 6, 56 N. W. Rep. 1038; *Erath v. Allen*, 55 Mo. App. 107; *McCormick Harvesting Machine Co. v. Regier*, 54 Neb. 528, 47 N. W. Rep. 957; *Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. Rep. 961; *Nashville, etc. R. Co. v. Harris*, 2 Tenn. Cas. 13; *Kirschbaum v. Blair*, 98 Va. 35, 34 S. E. Rep. 895; *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 100 Fed. Rep. 559, 40 C. C. A. 542; *Donovan v. Johnson*, 13 D. C. App. Cas. 356; *Howard County v. Hill*, 88 Md. 111, 41 Atl. Rep. 61; *Lininger v. Webb*, 51 Neb. 10, 70 N. W. Rep. 519; *Fogel v. Blitz*, 128 Mich. 503, 87 N. W. Rep. 640; *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. Rep. 169; *Grand Haven v. United States Fidelity & G. Co.*, 128 Mich. 106, 87 N. W. Rep. 104; *Mercer County v. Coovort*, 6 W. & S. 70; *Grant v. Smith*, 46 N. Y. 93; *Wayman v. Hoag*, 14 Barb. 232; *Hollond v. Teed*, 7 Hare, 50; *McGovney v. State*, 20 Ohio, 93; *Bill v. Barker*, 16 Gray, 62; *Backhouse v. Hall*, 6 B. & S. 507; *State v. Boon*, 44 Mo. 254; *Simson v. Cooke*, 8 Moore, 588; *Fisher v. Cutter*, 20 Mo. 206; *Dunlop v. Gordon*, 10 La. Ann. 243; *State v. Medary*, 17 Ohio, 554; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Glyn v. Hertel*, 8 Taunt. 208; *Supervisors v. Kaime*, 39 Wis. 468; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Dover v. Twombly*, 42 N. H. 59; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199; *Leeds v. Dunn*, 10 N. Y. 469; *Beckhead v. George*, 8 Hill, 635; *McClus-*

the faithful performance of official duty by a deputy collector of direct taxes in eight townships, and the instrument of appointment was referred to in the bond, it was held that the alteration of the instrument so as to include another township, without the consent of the sureties, discharged them from responsibility for moneys subsequently collected by the principal.¹ So where J., being desirous of purchasing goods

key v. Cromwell, 11 N. Y. 593; Connecticut Mut. L. Ins. Co. v. Bowler, 1 Holmes, 263; United States v. Cheeseman, 3 Sawyer, 424; Kelly v. Kellogg, 79 Ill. 477; Dunlap v. Wilson Sewing Machine Co., 81 Ill. 496; Cutting v. Ballou, 136 Mass. 337, 49 Am. Rep. 35; Boston & S. Glass Co. v. Moore, 119 Mass. 435; Harney v. Laurie, 13 Ill. App. 400; Bowers v. Cobb, 31 Fed. Rep. 678; Cornell v. Eagan, 13 Daly, 505; Post v. Losey, 111 Ind. 74, 12 N. E. Rep. 121; John Hancock Mut. L. Ins. Co. v. Lowenberg, 120 N. Y. 44, 23 N. E. Rep. 978; Brennan v. Clark, 29 Neb. 385, 399, 45 N. W. Rep. 472; Patterson v. Gage, 11 Colo. 50, 16 Pac. Rep. 560; Bensing v. Wren, 100 Pa. 500; Abrahams v. Jones, 20 Ill. App. 83; Dill v. Lawrence, 109 Ind. 564, 10 N. E. Rep. 573; Newton v. Devlin, 134 Mass. 490; Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Markland Mining & Manuf. Co. v. Kimmel, 87 Ind. 560; Kimball Co. v. Baker, 62 Wis. 526, 22 N. W. Rep. 730; Graeter v. De Wolf, 112 Ind. 1, 13 N. E. Rep. 111. See Richards v. Storer, 114 Mass. 101; Andre v. Fitzhugh, 18 Mich. 93; Saunders v. Stevens, 116 Mass. 133; Leonard v. Spidel, 104 Mass. 356; Tucker v. White, 5 Allen, 322; Clokey v. Evansville, etc. R. Co., 16 App. Div. 304, 44 N. Y. Supp. 631.

A guaranty of the payment of goods sold by a firm does not extend to sales made in his own name by a subsequently appointed receiver of the firm. The receiver is not an

agent of the firm, but an officer of the court which appointed him. Daube v. Philadelphia & R. Coal & Iron Co., 77 Fed. Rep. 713, 23 C. C. A. 430.

As to the effect upon sureties of the extension of the existence of a corporation to which they are bound, see Thompson v. Young, 2 Ohio, 334; Union Bank v. Ridgely, 1 H. & G. 324; Bank of Washington v. Barrington, 2 P. & W. 27; Brown v. Lattimore, 17 Cal. 93; Exeter Bank v. Rogers, 7 N. H. 21; National Bank v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513; People v. Backus, 117 N. Y. 196, 22 N. E. Rep. 759; National Exchange Bank v. Gay, 57 Conn. 224, 17 Atl. Rep. 555, 4 L. R. A. 343.

¹ Miller v. Stewart, 9 Wheat. 680; Lafayette v. James, 92 Ind. 240, 47 Am. Rep. 140 (additional duties imposed upon obligor by ordinance); Northwestern Nat. Bank v. Keen, 14 Phila. 7 (bookkeeper in bank promoted to teller and assistant cashier); People v. Pennock, 60 N. Y. 426 (money not received by principal in his official capacity); First Nat. Bank v. Gerke, 68 Md. 449, 13 Atl. Rep. 358 (assistant book-keeper promoted to note teller and discount clerk); Kellogg v. Scott, 58 N. J. Eq. 344, 44 Atl. Rep. 190 (book-keeper and collector required to perform duties of cashier, sureties not liable for embezzlement accomplished by means of fraudulent entries as book-keeper); Holme v. Brunskill, 3 Q. B. Div. 495 (surender by tenant of part of demised premises); King v. Herron, [1903] 2

of the plaintiff on credit, procured a letter of guaranty from the defendant to the plaintiff, by which the defendant promised to be surety for the amount of goods, to be paid January 1, 1840, and the plaintiff sold the goods to J., and took his note payable December 25, 1839, it was held that the defendant was not bound, although the plaintiff did not require payment from J. until after January 1, 1840.¹ A guaranty that the earnings of a schooner shall pay a certain dividend for two years does not extend beyond the time of the guarantee's ownership of her.² Sureties on bonds given to employers to secure the fidelity, honesty, care and diligence of employees do not insure the former against the destruction of his property or money, while in the latter's custody or control, by inevitable accident or against spoliation by thieves or robbers, when the employee is free from fraud or negligence.³

§ 726. Illustrations of the rule. A written guarantee "of the payment of all powder" consigned to a certain person for sale will not cover a sale to the consignee of powder remaining unsold upon closing the account between the consignor

Irish, 474 (alteration in duties of office of principal).

In order that sureties shall be discharged from liability by the imposition of new, distinct and separable duties upon their principal from those covered by their guaranty, such duties must render impossible or materially hinder or impede the performance of those guaranteed. "Where the new employment is separate and distinct, and in no respect essentially interferes with the duty covered by the bond, the imposition of such added duty is wholly a matter between the employer and servant with which the sureties have no concern," although such employment may increase the temptation and opportunity for a breach of the bond. *Mayor v. Kelly*, 98 N. Y. 467, 50 Am. Rep. 699; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Shackamaxon Bank v. Yard*, 150 Pa. 351, 24 Atl. Rep. 635, 30 Am. St. 807; *Harrisburg Savings & Loan Ass'n v. Yost*,

197 Pa. 177, 46 Atl. Rep. 910. See *Home Savings Bank v. Trabue*, 75 Mo. 199; *National Mechanics' Banking Ass'n v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146.

If a bond is given for the faithful performance of duty of the principal in one employment it cannot be extended by construction to cover another employment of the same kind although the second employment be designated as an extension or continuation of the first. *United States v. West*, 8 D. C. App. Cas. 59, 67. As to the release of sureties on the bonds of public officers, see § 485.

¹ *Walrath v. Thompson*, 2 N. Y. 185, 6 Hill, 540, 4 id. 200; *Dixon v. Spencer*, 59 Md. 246.

² *Bishop v. Alcott*, 86 N. Y. 503.

³ *Chicago, etc. R. Co. v. Bartlett*, 20 Ill. App. 96; *Baltimore & O. R. v. Jackson*, 3 Atl. Rep. 100 (Pa.); *Walker v. British Guarantee Ass'n*, 18 Q. B. 277, 83 Eng. C. L. 276.

and himself; and it cannot be controlled by evidence of a custom, known to the guarantor, of commission merchants to purchase goods remaining unsold under such circumstances, and to treat such a transaction as a sale to a third person.¹ It was remarked by the court that the defendant might have [543] been willing to guaranty the fidelity of the factor to account for actual sales of goods consigned, with the right to return those unsold, and yet have been unwilling to assume the responsibility of absolute purchases by him, to be retained whether he could sell them or not. One who assumes liability for the costs and damages which may be incurred in treating, according to law, a person named as a trespasser, indemnifies against liability incurred in the shape of costs and damages, and is liable for any actual loss or damage proved; he is not, however, liable for the loss of time or the personal services rendered by the party indemnified; neither is he liable for expenses incurred by such party in litigation with the alleged trespasser to enforce claims which did not arise out of acts of trespass committed by him.² An agreement to be responsible for any amount of credits does not bind the guarantor for an unreasonable amount. If \$300 or \$400 was a reasonable line of credit in the business in which the debtor engaged, it is a question for the jury whether or not the privileges of the guaranty were not abused by extending credit amounting to \$1,302.³ A bank cashier does not commit embezzlement or larceny or acts equivalent thereto by paying overdrafts without being authorized to do so if he does not receive or is not benefited by any of the money so paid.⁴ A guarantor who assumes liability for goods to an amount stated is discharged therefrom if goods in excess of that value are sold.⁵

¹ *Carkin v. Savory*, 14 Gray, 528; *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260, 7 N. E. Rep. 881 (sureties not liable for sales made to an agent under their contract guarantying his fidelity as such); *Burlington Ins. Co. v. Johnson*, 120 Ill. 622, 12 N. E. Rep. 205. See *Wilson v. Edwards*, 6 Lans. 134.

² *Beekman v. Van Dolsen*, 70 Hun, 288, 24 N. Y. Supp. 414.

³ *Lehigh Coal & Iron Co. v. Scallen*, 61 Minn. 63, 63 N. W. Rep. 245.

⁴ *Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 100 Fed. Rep. 559, 40 C. C. A. 542; *Milwaukee Theater Co. v. Fidelity & Causalty Co.*, 92 Wis. 366, 66 N. W. Rep. 360, 53 Am. St. 920.

⁵ *Bloomington Mining Co. v. Searles*, 63 N. J. L. 47, 42 Atl. Rep. 840.

One who has become guarantor for such notes of a specified description as another should give in pursuance of a written contract cannot by virtue thereof be held liable for notes differing materially from those which the contract provided for. Thus, where the contract, the performance of which is guaranteed, provides for notes at four months without interest, to be renewed, if desired, for sixty days at eight per cent., the guarantor is not holden for notes running six months, with interest for four months at seven per cent. and thereafter at eight per cent.; nor for six-month notes with interest at eight per cent. after four months; the variance is a substantial one.¹ A guaranty to make good to a specified amount any deficit in the payment of certain subscriptions to capital stock does not mean that the subscriptions had been made, or that they would be paid in full. It was based upon the assumption that they had been made and were valid.²

The sureties upon an assignee's bond given pursuant to the statute in reference to voluntary assignments for the benefit of creditors are not liable for the failure of their principal to account for the assets in his hands as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and the avails thereof in his hands to be applied in satisfaction of their claims.³ Where the surety's contract embraced the payment of laborers employed by the principal or his agent, it did not extend to laborers employed by his subcontractor.⁴ A requirement in a contract that the contractor should "furnish all materials" does not make his sureties liable to third persons for materials furnished him, notwithstanding the contractor's

¹ *Locke v. McVean*, 33 Mich. 473.

² *Sedalia, etc. R. Co. v. Smith*, 27 Mo. App. 371. See *Farmers' & Mechanics' Nat. Bank v. Lang*, 87 N. Y. 209.

³ *People v. Chalmers*, 60 N. Y. 154.

Under a statute which defined the duty of an assignee to be to take possession of the insolvent's estate to sue and recover all of it and the debts due, etc., and to convert the same into money, his sureties are not

liable for his conversion of the property of another person to the use of the estate. *Best v. Johnson*, 78 Cal. 217, 20 Pac. Rep. 415, 12 Am. St. 41, 3 L. R. A. 168.

⁴ *McCluskey v. Cromwell*, 11 N. Y. 593; *State v. Hinsdale-Doyle Granite Co.*, 117 Ind. 476, 20 N. E. Rep. 437; *Faurote v. State*, 110 Ind. 463, 11 N. E. Rep. 472; *United States v. Vermont Marble Co.*, 13 D. C. App. Cas. 506, 520.

proposal stipulated that he would furnish sureties for the payment of materials contracted for.¹

A bond for the faithful discharge of duty by a life insurance agent was conditioned that he should "receive and forward applications for, and deliver, policies and receive and forward premiums upon the same, within the city of D." He received the premiums of certain parties who had been insured in D. by a former agent of the company, but who had since removed therefrom, and it was held that the failure to pay over to the company such moneys was not a breach of the bond subjecting the sureties to liability.² The defendant guarantied payment to the plaintiff to the extent of 50% for gold he might supply [544] to E., a working goldsmith, for the purpose of carrying on his business. The plaintiff discounted bills for the goldsmith, and gave him for them partly gold and partly money, deducting from the gold the usual charge for credit for the length of time the bills had to run, and from the money interest at the same rate. E. did not indorse the bills, and the gold was applied by him to the purposes of his business. The bills were dishonored and suit was brought on the guaranty; the gold so advanced was not supplied within the meaning of the guaranty.³

Where a surety signed a note with his principal, payable to a bank ten days after date, it was held that the surety was not liable on it for moneys advanced by the bank after the note was due; it was not a continuing security.⁴ But where the makers of a note, signed by them for the accommodation of others, payable to a bank on demand, deliver it to the accommodated party, it is an inference of law, in the absence of further authority or restriction, that the latter may put it to any use of which it is capable, and may pledge it for future loans as a continuing guaranty until the sureties terminate their responsibility by notice.⁵ In such a case the principals delivered the note to the payee bank with a written memo-

¹ *Sterling v. Wolf*, 163 Ill. 467, 45

N. E. Rep. 218, 61 Ill. App. 515.

³ *Evans v. Whyle*, 5 Bing. 485.

² *Crapo v. Brown*, 40 Iowa, 487.

⁴ *Bank of St. Albans v. Smith*, 30

Vt. 148.

See *Fond du Lac Harrow Co. v.*

Bowles, 54 Wis. 425, 11 N. W. Rep. N. Y. 502.

⁵ *Agawam Bank v. Straver*, 18

randum therein that it was left as collateral security for all liability incurred by them, and evidence was held admissible, for the purpose of arriving at the intent of the parties in the hypothecation, that they were at the time under no liability to the bank; that in view of that fact they intended the note should be security for future advances, and that the words "*all liability*" in the memorandum imported a continuing guaranty.¹ "There was no contract," said Mr. Justice Selden, "even in form, by the makers of the note, with any party except the bank; and that contract was made, not when the note was signed, but when it was delivered to the bank. Of course, then, the terms agreed upon, when the deposit was made, were terms agreed upon between the bank and the makers of the note, provided the agent did not exceed his authority; and as the note acquired its validity at that time, and by virtue [545] of those terms, the whole arrangement is, upon well-settled principles, to be taken together as constituting but a single contract. Consequently, the absolute terms of the note are to be regarded as modified by the conditions of the simultaneous agreement to hold it merely as collateral to the loans to be made upon the faith of it. Although payable on demand, no suit could be maintained upon it until the debt for which it was held as security had become due, and no more could be recovered than the amount of such debt."

§ 727. **Further illustrations.** Although a contract of employment was executed a few days prior to a guaranty of the employee's conduct, both were construed together, and the sureties were liable only to the extent of their principal's obligation under the contract.² In the absence of a special provision assuming it, the sureties on a contractor's building bond are not liable for counsel fees incurred by the owner in defending suits brought to enforce mechanics' liens.³ In a contract with the war department to build a fort, it was agreed that advances should be made in part payment of the work, for

¹ Id. See *Weed v. Clark*, 4 Sandf. 81.

² *John A. Tolman Co. v. McClure*, 10 Ind. App. 28, 37 N. E. Rep. 289.

If a bond attached to a contract refers to the latter to indicate the liability assumed, both instruments

will be taken together in fixing the meaning of the parties. *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. Rep. 169.

³ *Donovan v. Johnson*, 13 D. C. App. Cas. 356. See § 85.

materials delivered with the invoice at the fort and pronounced by the engineer to be of proper quality, and at the end of each month for the work performed. After large advances had been made the contract was assigned and the assignee gave bond, with sureties, to account for the advances made under and by virtue of the contract. It was held that the sureties were entitled to the benefit of all limitations provided in the contract, and were not answerable for advances made when such limitations were dispensed with, whether they were made before or after the making of the bond, it not appearing that the sureties knew they had been made.¹ It is apparent from the illustrations which have been given, and many others that might be cited, that the plaintiff must bring his case very strictly within the undertaking of the surety, and cannot recover beyond it. Thus, the plaintiff and S. entered into a contract that S. should perform certain work at a fixed sum, receiving from time to time payment for three-fourths of the work done; the remaining one-fourth to be paid a month after completion of the whole; if S. should fail to complete the works plaintiff was to employ others and deduct the expenses from the sum payable to him. The defendant was surety for the performance of this contract by S., who abandoned it when partly performed. The plaintiff, at the request of S., had advanced him a sum which exceeded the whole cost of the work [546] then accomplished, but was less than the contract price. The plaintiff then had the works completed at a cost which, added to the price of that actually done, was less than the contract price, but, added to the money which he had advanced, was more than that sum. He sued the defendant on his guaranty, and it was held that he was only entitled to nominal damages, as the loss had arisen from his own act in advancing more money than he ought to have done, not from the refusal of S. to go on with the works.²

¹ United States v. Tillotson, 1 Paine, 305.

² Warne v. Calvert, 7 Ad. & E. 143; Wood's Mayne on Damages, 417.

The sureties on a bond for the completion of a public work which reserves to the contractee the right to complete it upon a breach by the

contractor are liable for the increased expense incurred in completing it and for damages done to the property of third persons in prosecuting the work; but not for payments made otherwise than in pursuance of a legal obligation. Newton v. Devlin, 134 Mass. 490.

Where a bond was conditioned to answer for the default of the principal as superintendent of water-works, "according to law and contract," the sureties were not liable for his default in failing to account for water rents collected by him notwithstanding his contract of employment provided for the collection thereof. The court was of the opinion "that where duties are imposed upon a principal in a bond, not official, which are not commonly attached to the position which he is filling, and no mention of such unusual and different duties is made in the conditions of such bond, that the sureties upon such bond can only be held for the default of the principal in the performance of such duties as are plainly and commonly understood to belong to the class of employment by which the principal is designated."¹ A surety for the purchase price of goods under a contract for their sale in car-load lots is not liable for purchases made by his principal in lesser quantities.² Under a guaranty of payment of all moneys which might be advanced and of any and all indebtedness due or to become due the guarantees "as per present or any future agreement between them" and the principal, the guarantor is not liable for an indebtedness which, as manifested by the situation of the parties and the subject-matter, was entirely foreign to the transactions originally contemplated.³

A surety who guaranties the punctual payment of the interest on a money bond which has six years and a half to run and on which interest is payable semi-annually, can only be made liable for such interest as accrues before the bond becomes due.⁴ In such a case Church, C. J., said: "The claim against the defendant is based upon the guaranty, which is in the following words: 'For value received, I guaranty the punctual payment of the interest on the within bond, and will pay the interest on demand in default of its payment by W.'

¹ *Salem v. McClintock*, 16 Ind. App. 656, 46 N. E. Rep. 39, 59 Am. St. 330.

² *Grasser & Brand Brewing Co. v. Rogers*, 112 Mich. 112, 70 N. W. Rep. 445, 67 Am. St. 389; *Smith v. A. L. Moore Co.*, 19 Ohio Ct. Ct. 617.

³ *John A. Tolman Co. v. Griffin*, 111 Mich. 301, 69 N. W. Rep. 649.

⁴ *Hamilton v. Van Rensselaer*, 43 N. Y. 244.

A guaranty of the payment of an interest-bearing obligation includes the interest so long as the debt remains unpaid. *Hurd v. Callahan*, 9 Abb. New Cas. 374; *Mutual Benefit Ins. Co. v. Brown*, 80 Mo. App. 459. See *French v. Bates*, 149 Mass. 73, 21 N. E. Rep. 237, 4 L. R. A. 268.

The question is whether the defendant as guarantor is liable for anything beyond the interest up to the time when the principal became due according to the terms of the bond. This must depend upon the construction of the language of the instrument, viewed in the light of circumstances existing at the time it was made. In ascertaining the meaning of the language used, the same rules of construction are applicable to contracts of suretyship as to other contracts. When the true signification of the contract is thus ascertained, the surety or guarantor has a right to insist that his liability shall not be extended beyond its precise terms.¹ What, then, is the true meaning of this contract? W. agreed to pay the principal in six years and a half, and, in the meantime, to pay semi-annual interest on specific days. The defendant is presumed to have seen and understood the exact agreement of W., and to have executed the guaranty in contemplation of its performance by him. He has a right to limit his liability, and he did limit [547] it. He did not guaranty the payment of the principal, but only the 'punctual payment of the interest on the within bond.' What interest? Clearly, the interest payable according to the terms of the bond, and that only. No other interest was specified or alluded to, and none other was contemplated by the defendant, as he contracted, we must presume, with reference to the payment of the principal when due by W. He neither agreed to pay the principal, nor to be liable for the consequences of its non-payment. . . . The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that, by strict legal rules, interest, as such, cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract."²

¹ Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545, and cases cited.

² Melick v. Knox, 44 N. Y. 676, is to the same effect.

There is a remarkable discrepancy between Hamilton v. Van Rensselaer, in the supreme court, as reported in 28 How. Pr. 192, and 43 Barb. 117, and

One who guarantees to hold another harmless against existing liabilities and uncollectible accounts of a corporation in proportion to the interest he may purchase in its stock is liable only to the proportion which the shares bought by the guarantee of the guarantor bears to the entire stock. The guaranty was not intended to cover subsequent purchases from other stockholders in which the guarantor had no interest.¹ Where, upon the dissolution of a firm, the notes, etc., thereof were transferred to one of the partners and he gave a bond conditioned for the payment of one-half the amount of the notes, etc., that shall prove to be uncollectible, the obligation assumed thereby was not simply a guaranty of collection, but was against the notes turning out to be valueless. The words "prove uncollectible" did not contemplate legal process to demonstrate the uncollectibility of the claims. It was not to be inferred, considering the relations of the parties, that the plaintiff assumed a series of litigations with all their attendant expenses.²

Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the whole period of actual occupancy was brought against both, it was held that the other lessee was not estopped to show that he signed the lease in the character of a surety for the term specified, without having in fact occupied the premises at any time; and further, that he was not liable for the rent after the time mentioned in the writing, the holding over being as to him no continuance of the lease.³ But where the premises are leased for a certain time with the privilege to the tenant to continue in possession for another succeeding term, and he avails himself of the privilege, the guaranty of a third person for the payment of the rent is a continuing guaranty during the possession of the tenant for such extended [548]

in the court of appeals, in 43 N. Y. 244. In the former the facts and the law are thus stated: A surety who guaranties the punctual payment of the interest on a money bond, and there is no stipulation for interest in the bond, can only be made liable for such interest as accrues by way of damages after the bond becomes due.

¹ Glenn v. Hill, 11 Wash. 541, 40 Pac. Rep. 141.

² Ralph v. Eldridge, 137 N. Y. 525, 33 N. E. Rep. 559.

³ Kennebec Bank v. Turner, 2 Me. 42.

term.¹ The cases are very numerous on the point that the responsibility of a surety is confined strictly to his undertaking. Those cited below may be found worth consulting by the curious reader who desires to pursue the subject.² Where the case is brought within the surety's contract he is only liable for such actual damages as the plaintiff shows.³ A defendant's covenant that the debts of a certain firm, into which the plaintiff was about to enter as a partner, did not exceed a certain sum, and that if they did the defendant would pay on demand of the plaintiff the amount by which they exceeded that sum, was held not to be a covenant for liquidated damages, but a contract to indemnify the plaintiff as to any loss he might suffer from an erroneous statement of the debts; it was for the jury to consider to what extent his position had been altered by reason of the defendant's breach of covenant.⁴

§ 728. **Guaranties, distinguishing characteristics of.** A guaranty imports a contract collateral to the contract debt or obligation of another, except where the word is used in the [549] sense of warranty.⁵ This collateral contract may em-

¹Dufau v. Wright, 25 Wend. 636; Decker v. Gaylord, 8 Hun, 110; Kaigh v. Fuller, 14 N. J. Eq. 419; Deblois v. Earl, 7 R. I. 26.

²Taylor v. Wetmore, 10 Ohio, 490; Blecker v. Hyde, 3 McLean, 279; Barns v. Barrow, 61 N. Y. 39; Sollee v. Mengy, 1 Bailey, 620; Michigan State Bank v. Peck, 23 Vt. 200, 65 Am. Dec. 234; Bussier v. Chew, 5 Phila. 70; Allison v. Rutledge, 5 Yerg. 193; Johnson v. Brown, 51 Ga. 498; Stevenson v. McLean, 11 Up. Can. C. P. 208; Penoyer v. Watson, 16 Johns. 100; Walsh v. Bailie, 10 id. 180; Parham Sewing Machine Co. v. Brock, 113 Mass. 194; Montefiore v. Lloyd, 15 C. B. (N. S.) 203, 33 L. J. (C. P.) 49; London Assur. Co. v. Bold, 6 Q. B. 514; Bill v. Barker, 16 Gray, 62; Manhattan Gas Light Co. v. Ely, 39 Barb. 174; Hollond v. Teed, 7 Hare, 50; Spiers v. Houston, 4 Bligh (N. S.), 515; Wright v. Russell, 2 W. Bl. 934; Mackay v. Dodge, 5 Ala. 388; Grant v. Smith, 46 N. Y. 93; Barnett v.

Smith, 17 Ill. 565; Sterns v. Marks, 35 Barb. 565; Simson v. Cooke, 8 Moore, 588; Wadsworth v. Allen, 8 Gratt. 174, 56 Am. Dec. 137; Palmer v. Bagg, 56 N. Y. 523; Dry v. Davy, 10 Ad. & E. 30; Union Bank v. Costen, 3 N. Y. 203; Hood v. Mathis, 21 Mo. 308; Reed v. Fish, 59 Me. 358; Boehne v. Murphy, 46 Mo. 57, 2 Am. Rep. 485; Dick v. Crowder, 10 Sm. & M. 71; Dobbin v. Bradley, 17 Wend. 422; Tucker v. White, 5 Allen, 322; Richards v. Storer, 114 Mass. 101; Sanderson v. Stevens, 116 id. 133; Clark v. Sawyer, 121 id. 224; Simonson v. Grant, 36 Minn. 439, 31 N. W. Rep. 861.

³King v. Norman, 4 C. B. 884.

⁴Walker v. Broadhurst, 3 Ex. 889. See Mauran v. Bullus, 16 Pet. 528.

⁵The fact that a contract is entered into by a guarantor jointly with his principal does not prevent it from being a guaranty if its terms disclose that the latter is separately bound by an original independent

brace part only of the debt or obligation of the principal,¹ or the whole of it; and the damages for its breach will depend upon its nature and extent. If it be a full guaranty of payment or performance owing by the principal, then the guarantor, when in default, must respond by the same measure and standard as the principal.² A guarantor may make himself liable for the principal debt although the demand may not be binding on the debtor.³

A continuing guaranty may be determined by notice from the security, where it is in the nature of a continuing offer, and only binding as far as acted upon,⁴ unless the considera-

contract to which that given as security is collateral, if the latter is conditioned for the performance of the principal's prior engagement. The principal's obligation is original with the obligee; the other is cumulative. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. Rep. 805; *Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763; *Singer Manuf. Co. v. Litterer*, 56 Iowa, 601, 9 N. W. Rep. 905.

¹*Skinner v. Valentine*, 59 N. Y. 473; *Melick v. Knox*, 44 id. 676; *Hamilton v. Van Rensselaer*, 43 id. 244.

²*Oakley v. Boorman*, 21 Wend. 588; *Gage v. Lewis*, 68 Ill. 604; *Smith v. Rogers*, 14 Ind. 324; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Fletcher v. Derrickson*, 3 Bosw. 181; *Skinner v. Valentine*, 59 N. Y. 473; *Douglass v. Howland*, 24 Wend. 35; *Gammel v. Paramore*, 58 Ga. 54; *Tuton v. Thayer*, 47 How. Pr. 180; *Gutta Percha & R. Manuf. Co. v. Benedict*, 37 N. Y. Super. Ct. 430; *Upham v. Prince*, 12 Mass. 14; *Cooper v. Page*, 24 Me. 73, 41 Am. Dec. 371; *More v. Howland*, 4 Denio, 264; *Carew v. Denney*, 8 Pick. 363; *Blanchard v. Wood*, 26 Me. 358; *Gist v. Drakely*, 2 Gill, 330, 41 Am. Dec. 426; *Cobb v. Little*, 2 Me. 261, 11 Am. Dec. 72; *Carter v. McGehee*, Phill. (N. C.) 431; *Bean v. Arnold*, 16 Me. 251; *Campbell v. Butler*, 14 Johns.

349; *Allen v. Brightmire*, 20 id. 365, 11 Am. Dec. 288; *James v. Long*, 68 N. C. 218; *Ellmaker v. Franklin Ins. Co.*, 5 Pa. 183; *Remsen v. Graves*, 41 N. Y. 471; *Hendricks v. Banning*, 7 Minn. 32; *Samson v. Thornton*, 3 Met. 275, 37 Am. Dec. 135; *Tenny v. Prince*, 4 Pick. 385, 16 Am. Dec. 347; *Josselyn v. Ames*, 3 Mass. 274; *Ulen v. Kittridge*, 7 id. 233; *White v. Howland*, 9 id. 314, 6 Am. Dec. 71; *Moeis v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Nelson v. Dubois*, 13 Johns. 175; *Harrick v. Carman*, 12 id. 159; *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68; *Sumner v. Gay*, 4 Pick. 311; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Hooper v. Hooper*, 81 Md. 155, 172, 31 Atl. Rep. 508, 48 Am. St. 496.

The use of the terms "about \$200 worth" in a guaranty has been regarded as an estimate, and liability for \$254.70 under it sustained. *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. Rep. 1014.

³*Mason v. Nichols*, 22 Wis. 360; *McLaughlin v. McGovern*, 34 Barb. 208; *Veasey v. Willis*, 6 Gray, 90.

The guarantor of a draft is not liable if the drawee rightfully refuses to accept it and is not liable therefor. *Merchants' Nat. Bank v. Citizens' State Bank*, 93 Iowa, 650, 61 N. W. Rep. 1065, 57 Am. St. 284.

⁴*Field v. Haish*, 85 Ill. App. 164,

tion is given once for all, when the obligation cannot be terminated by the guarantor and does not end with his death.¹ Where performance of a contract is guaranteed the surety may, after default by his principal which would justify the other party in terminating it, require that it be terminated, and the claim against himself confined to the damages then [550] recoverable.² A guarantor of payment is, like his prin-

167; *Offord v. Davies*, 12 C. B. (N. S.) 748; *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305. See *Brandt on Suretyship & G.* (2d ed.), §§ 134, 135.

"Where a guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guaranteed without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guaranteed are closed, of his liability thereunder." *Davis Sewing Machine Co. v. Mills*, 55 Iowa, 543, 8 N. W. Rep. 356.

If as the result of the neglect to give notice the guarantor suffers loss, he is relieved to that extent. *Singer Manuf. Co. v. Littler*, 56 Iowa, 601, 9 N. W. Rep. 905.

A guaranty for future advances is terminated by the death of the guarantor and notice thereof by the guarantee. *Valentine v. Donohoe-Kelly Banking Co.*, 133 Cal. 191, 65 Pac. Rep. 381.

¹ *Lloyds v. Harper*, 16 Ch. Div. 290; 1 *Brandt on Suretyship & G.* (2d ed.), § 133.

If the contract binds the heirs, executors and administrators of the surety during the time of the present or future employment of the principal, the estate will be bound to the end of the term of service, notwith-

standing the death of the surety. *Shackamaxon Bank v. Yard*, 150 Pa. 251, 24 Atl. Rep. 635, 30 Am. St. 807.

² *Hunt v. Roberts*, 45 N. Y. 691.

In this case the defendant guaranteed the performance on the part of C. of a building contract made by C. with the plaintiffs, wherein the plaintiffs agreed to perform the work by the 15th of October, and C. to furnish materials and pay a certain sum. After October 15th, the work being unfinished, the defendant gave notice to the plaintiffs that if they did not complete the work before the 1st of November he would not be responsible as guarantor thereafter. The plaintiffs kept on until June following, being delayed by C.'s failure to supply materials. The defendant, by an arrangement with a third person, and to which the plaintiffs were not a party, had assumed C.'s obligations, and after November 1st urged the plaintiffs to perform and himself supplied the material, but stated to them that he would not be personally responsible. It was held, in an action on the contract of guaranty, that the effect of the notice was an extension of time for performance, and continued the defendant's liability, as guarantor, to November 1st only; and his liability was limited to the debt and damages which the plaintiffs were entitled to claim at that time. See *Estate of De Silver*, 9 Phila. 302; *Pleasanton's Appeal*, 75 Pa. 344.

While it is the duty of the obligee to give notice to the guarantors of

principal, liable to interest from the time the money became due,¹ and for attorney fees when stipulated for in the contract.² A guaranty upon a note of its payment after maturity or any time thereafter with interest "and all costs and expenses paid or incurred in collecting the same, including attorneys' fees," embraces only the costs and expenses of an action against its maker; not those incurred in an action upon the guaranty. The whole liability under such a contract must be exhausted in one action; the guarantor cannot be sued for the debt and

their defaulting principal's conduct, except in cases governed by the commercial law, the failure to do so is matter of defense, and does not work a discharge unless damages result to them. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. Rep. 805; *Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763; *Davis v. Wells*, 104 U. S. 159; *Pittsburgh, etc. R. Co. v. Shaeffer*, 59 Pa. 350; *Grocers' Bank v. Kingman*, 16 Gray, 473; *Peel v. Tatlock*, 1 B. & P. 419; *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310.

A surety bound for the fidelity and honesty of his principal and for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may terminate his liability in either of two cases; first, where the guaranteed contract has no definite time to run; and second, where it has such time, but the principal has so violated it, and is so in default that the obligee may lawfully terminate it on account of the breach. *Emery v. Baltz*, 94 N. Y. 408; *Burgess v. Love*, L. R. 13 Eq. 450; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Ex. 73.

The weight of authority denies the right of a guarantor to revoke a continuing contract for the faithful discharge of duty without cause. *Gordon v. Calvert*, 2 Sim. 253, 4 Russ. 581; *Williams v. Reynolds*, 11 La. 230.

The Indiana court sees no reason why such a right should not be ex-

ercised; but it must be done reasonably and upon notice to all concerned. An employer, unless misconduct creating a probable emergency is shown to exist, is not bound to subject his affairs to embarrassment by immediately discharging an employee. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. Rep. 805.

¹ *Gammel v. Paramore*, 58 Ga. 54; *Gutta Percha & R. Manuf. Co. v. Benedict*, 37 N. Y. Super. Ct. 430; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. Rep. 672. The surety's liability for interest accrues only after demand on his principal and his refusal to pay, or from commencement of suit, in which latter case interest accrues from the day of service. *Id.*; 1 *Brandt on Suretyship & G.*, § 112.

The guarantor of any sum not exceeding a specified amount for goods sold and money loaned is liable for interest upon the sum named, no provision in the contract requiring immediate payment. After the parties to such contract had treated accrued interest as an augmentation of the principal sum and charged up interest thereon, one of them could not object to such procedure on the ground that it resulted in compounding the interest. *Hooper v. Hooper*, 81 Md. 155, 31 Atl. Rep. 508, 48 Am. St. 496.

² *First Nat. Bank v. Breese*, 39 Iowa, 640.

afterwards for the costs and expenses.¹ Where the agreement guarantied provides for stipulated damages in case of the principal's default, the guarantor is liable by his guaranty for those damages.² A guarantor of payment is not liable for the costs of an unsuccessful action against the principal debtor where the creditor is not bound to resort to legal proceedings against him before he can have recourse against the party secondarily liable;³ but it is otherwise where the guaranty is of collection and payment.⁴ If proceedings are taken against the debtor and something realized from him the amount to be credited in the guarantor's favor is the net sum realized. He has no equity which requires that the gross amount shall be applied to the satisfaction of the debt.⁵

§ 729. **Measure of guarantor's liability.** In a case of a guaranty of the amount due on a note, and not of its collectibility, the damages are what the plaintiff has lost by the breach; and this loss is the value of a judgment against the maker, if one had been obtained; and if it appears that the maker was solvent and prevented a recovery of judgment by proving payment, the measure of damages is the amount which purports to be due on the note.⁶ A guaranty against any loss which might occur by reason of a sale of goods, which, by stipulation between the principal parties, are to be sold within ninety days, will not render the guarantor liable if, by their agreement, the goods are not sold within that time and the time for the sale is fixed at a subsequent date.⁷ But where the guaranty was of the payment of any purchase of bagging and rope between its date and a stated date in the future, it was held to extend to purchases upon a reasonable credit made between those dates, although the time of payment was not to arrive until after that day.⁸ The guarantor of the payment of all notes which should be sold is not liable for the payment of notes transferred for a consideration other than money at the time paid or promised to be paid.⁹

¹ Abbott v. Brown, 131 Ill. 108, 22 N. E. Rep. 813.

² Gridley v. Capen, 72 Ill. 11.

³ Tuton v. Thayer, 47 How. Pr. 180.

⁴ Id.

⁵ Hurd v. Callahan, 9 Abb. New Cas. 374.

⁶ Head v. Green, 5 Biss. 311.

⁷ Fisher v. Cutter, 20 Mo. 206.

⁸ Louisville Manuf. Co. v. Welch, 10 How. 461.

⁹ Labaree v. Klosterman, 33 Neb.

150, 49 N. W. Rep. 1102.

A contract was made for furnishing a steam-engine, and a surety in behalf of the manufacturers guarantied its performance, and in case of breach to refund all sums of money the other party might pay or advance with interest. It was held that the contract was not in the alternative, but con- [551] sisted of two terms: one, that the principals should perform their engagement, not merely by the delivery of some machinery, but of such as the contract required; the other, that if there should be a non-performance, whether excusable or not, the money advanced on the contract should be refunded to the extent that the principals were liable. The machinery delivered was imperfect so as to constitute a breach of the contract, and it was held that the surety was liable for such damages as would enable the plaintiffs to supply the deficiency; the jury were not required to assume that the contract price was the full value of the machinery.¹ Where the action was on a guaranty that stock should be worth \$700, market value, within one year from date, it was held that the true measure of damages was the difference between \$700 and \$500, the latter sum being the highest value reached in the market during the year, and not the difference between \$700 and \$300, the latter being the market value at the end of the year.² The purchaser of corporate stock who has been guarantied that it could be sold for a specified sum within one year and who has bound himself not to sell it for less than such sum without his vendor's consent, and to use due diligence to obtain a larger price for it, may, on making a sale after the expiration of the year for a much smaller sum, recover the difference between the two sums. The sale contemplated by the parties being for cash, evidence respecting exchanges of similar stock for other property was inadmissible as to the value of the stock during the year.³ The defendant sold to plaintiff certain shares of railroad stock, with a guaranty that it should yield annually six per cent. dividends for the space of three years. In an action on the guaranty it was held that its true construction was that the stock should be equal in value to stock yielding annually a dividend of six per cent.; the measure of damages was

¹ Benjamin v. Hillard, 23 How. 149.

³ Lobeck v. Duke, 50 Neb. 568, 70 N.

² Woodward v. Powers, 105 Mass. W. Rep. 36.

108, 7 Am. Rep. 503.

the difference between the actual value of the stock transferred and a stock which should yield six per cent. annually for the next three years following the transfer.¹ On the breach of a guaranty that dividends at a fixed rate would be paid on the preferred stock of a railway, all the property of which had been sold on foreclosure, and the guarantor having become insolvent, and its assets passed by assignment for the benefit of its creditors, including future and contingent demands, the damages to be recovered included those which were prospective, and equaled the difference between the pecuniary condition of the stockholders in perpetual receipt of their dividends and their condition without them, which was a sum equal to the par value of the stock.² The liability of the guarantor of the validity of a judgment barred by the statute of limitations is the amount paid for it, with interest.³

Where the plaintiff was induced to remove his store building and stock of goods from a village to a new town site by a contract guarantying that a railroad would be constructed and in operation to such site within a time named, both parties contemplating the breaking up of the business established in such village, the damages sustained by the plaintiff on a breach included such as resulted from the loss of the profits of such business.⁴ On the breach of a guaranty as to the number of mares that would be bred to a stallion, there may be a recovery of the probable profits that would have been made if there had been no breach, the evidence furnishing the basis for the computation.⁵ A guarantor of a mortgagee who has advanced securities to build a house on a lot and whose obligation to the latter is to indemnify, keep harmless and insure him against all loss or damage, not exceeding a sum named, is liable for the value of the securities advanced to the contractor after he has abandoned his contract and pledged them to third parties. The liability of the guarantor existed from the time it became apparent that the contractor had failed in

¹Struthers v. Clark, 30 Pa. 210; Morris v. Barrett, 24 Ohio St. 201.

²Marbury v. Kentucky Union Land Co., 62 Fed. Rep. 335, 10 C. C. A. 393.

³Duecker v. Goeres, 104 Wis. 29, 80 N. W. Rep. 91. See § 669.

⁴Arkansas Valley Town & Land Co. v. Lincoln, 56 Kan. 145, 42 Pac. Rep. 706.

⁵Stewart v. Patton, 65 Mo. App. 21.

his duty, and evidence as to the value of the land on which the house was to be built was immaterial.¹ The liability of a surety on the breach of a bond given to secure the erection of houses on a designated piece of land is the difference between the value of the land without the buildings and its value with them.² The damages to a mortgagee from the breach of a bond to secure the rebuilding of a house on the mortgaged premises are measured by the difference, at the time of the breach, between the value of the premises without the house thereon and the amount of the mortgage debt, not exceeding the amount which the rebuilding of the house would have increased the value of the premises; or, in other words, the depreciation in the value of the security.³ In a recent case in New York the plaintiff was the owner of a vacant lot worth \$160,000, and which was mortgaged for \$120,000. He contracted to sell it for \$190,000, payment to be made by assuming the mortgage and giving an additional mortgage for \$70,000. The purchaser bound himself to erect a building upon the lot, and the plaintiff to advance to the purchaser \$100,000 as a building loan. The latter further agreed to furnish a bond guaranteeing the performance of all the terms of his contract and to hold the plaintiff harmless from any damage resulting from the breach thereof. Such bond was conditioned that if the purchaser shall erect and complete the said building as required, the bond shall be void; otherwise, it shall be in full force and effect. The building was not erected. The interest on the \$70,000 mortgage being unpaid, the plaintiff foreclosed the mortgage and recovered a deficiency judgment for \$51,469.14, which was unsatisfied. The bond was regarded as security for the erection of the building; and, it appearing that if it had been erected the property would have been ample security for the mortgages and also for the money agreed to be advanced in the erection of the building, thus enabling the plaintiff to secure the profit of \$30,000 which he contemplated making, that sum was the measure of the guar-

¹ Union Trust Co. v. Citizens' Trust Co., 185 Pa. 217, 39 Atl. Rep. 886. v. Citizens' Trust & Surety Co., 190 Pa. 247, 42 Atl. Rep. 682.

² United Real Estate Co. v. McDonald, 140 Mo. 605, 41 S. W. Rep. 913; German-American Title & Trust Co. ³ Longfellow v. McGregor, 61 Minn. 494, 62 N. W. Rep. 1032.

antor's liability.¹ A surety who became bound for the sale of mortgaged goods and the payment of the proceeds thereof to the mortgagee may show that an inventory of the goods said to be attached to his bond included articles which the mortgagor did not own and which never came into the possession of the mortgagee, and were not delivered by him to the mortgagor. Where a portion of such goods consisted of second-hand furniture, machinery and other articles used in the business of the mortgagor, some of which had a merely nominal value, the liability of the surety on the breach of a condition in the bond for the delivery of the goods to the mortgagee was, for goods on hand at the time of demand, their then value; for such as had been fairly sold, the proceeds of the sale, and for goods converted and not accounted for their value when converted.² One who binds himself as a guarantor of the assistant cashier of a bank that the latter will honestly, faithfully and efficiently discharge the duties of that position, guarantees not only his personal honesty, but also his competency, skill and diligence in the discharge of his duties. Hence, if the assistant cashier connives at the cashier's act in unlawfully appropriating the funds of the bank to his own use, he renders the guarantor liable for his act or neglect,³ so far as such neglect was the natural and proximate cause of the cashier's wrong doing.⁴

§ 730. **Effect of indorsing negotiable paper.** There is some conflict as to the effect of an indorsement made by a third person in blank upon a negotiable note at or after its inception. In New York the contract implied, according to the intermediate decisions, is that of an indorser, and parol evidence cannot be admitted to modify it.⁵ In the case⁶ which [552] established this doctrine in that state the chancellor said: "I fully concur in the opinion expressed by Mr. Justice Bronson,⁷ that where a man writes his name in blank upon the back of a promissory note, he only agrees that he will pay the note

¹ *Sachs v. American Surety Co.*, 72 App. Div. 60, 76 N. Y. Supp. 335.

² *Wheeler v. Meyer*, 95 Mich. 36, 54 N. W. Rep. 689.

³ *Hobart v. Dovell*, 38 N. J. Eq. 553, 566; *Fiala v. Ainsworth*, 63 Neb. 1, 88 N. W. Rep. 135.

⁴ *Fiala v. Ainsworth*, *supra*.

⁵ *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 7 Hill, 416, 42 Am. Dec. 82; *Spies v. Gilmore*, 1 N. Y. 321.

⁶ *Hall v. Newcomb*, *supra*.

⁷ In *Seabury v. Hungerford*, 2 Hill, 80.

to the holder on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he has indorsed the paper to enable the maker to raise money on it does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. . . . And for the courts to allow proof by parol to charge a mere surety beyond the legal effect of his written blank indorsement on such paper would bring them in direct conflict with the provisions of the statute of frauds." The more recent cases modify this rule so far as to allow the presumption that an indorsement in blank, before the note is completed by delivery, was made for the purpose of becoming liable as second indorser, to be rebutted by proof that it was made to give the maker credit with the payee.¹ The indorsement of a note before its delivery to the payee at the request of the maker, the indorser knowing that his name is required by the payee as a condition of making, and as security for, the loan, places the indorser in the same relation to the payee as if he had indorsed by agreement with him; the liability is that of first indorser.² This rule prevails in Oregon,³ which has also adopted the rule of the New York cases that where a third party indorses a note before it is delivered to the payee he is presumptively a second indorser.⁴

In Connecticut the contract which the law implies, *prima facie*, from a blank indorsement of a promissory note, whether negotiable or not, is that it is due and payable according to its terms; that the maker shall be able to pay, and that it is collectible by the use of diligence.⁵ But the blank indorsement is only *prima facie* evidence of such contract; it is competent between the parties to the indorsement to prove by parol the agreement which was in fact made at the time of the indorse-

¹ Coulter v. Richmond, 59 N. Y. 478; Phelps v. Vischer, 50 id. 69, 10 Am. Rep. 433. ing v. Creighton, 19 Ore. 120, 24 Pac. Rep. 198, 20 Am. St. 800.

² Davis v. Bly, 164 N. Y. 527, 58 N. E. Rep. 648. ⁵ Perkins v. Catlin, 11 Conn. 213; Laffin v. Pomeroy, id. 440; Huntington v. Harvey, 4 id. 124; Bond v.

³ Wade v. Creighton, 25 Ore. 455, 36 Pac. Rep. 289. Storrs, 13 id. 412; Castle v. Candee, 16 id. 223; Clark v. Merriam, 25 id.

⁴ Kamm v. Holland, 2 Ore. 59; Cogswell v. Hayden, 5 Ore. 23; Deer- 576; Ranson v. Sherwood, 26 id. 437; Forbes v. Rowe, 48 id. 413.

ment.¹ Where, however, there is an express guaranty of payment, it is held to be an absolute engagement on the part of the guarantor that the note shall be paid within the time specified therefor by the maker or himself.² But, generally, the stranger who indorses before delivery is liable as an original promisor, or as a guarantor,³ except when the indorsement is of a note payable to the order of the maker,⁴ and one not a [553] holder indorsing afterwards a guarantor.⁵

The rule which governs the federal courts is thus stated by Clifford, J.: "Where the indorsement is in blank, if made be-

¹ Id.; *Beckwith v. Angell*, 6 Conn. 315.

² *Breed v. Hillhouse*, 7 Conn. 522. But see *Sage v. Wilcox*, 6 id. 81.

³ *Samson v. Thornton*, 3 Met. 275, 37 Am. Dec. 135; *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68; *Ulen v. Kittridge*, 7 Mass. 233; *White v. Howland*, 9 id. 314, 6 Am. Dec. 71; *Burton v. Hansford*, 10 W. Va. 470; *Boynton v. Pierce*, 79 Ill. 145; *Underwood v. Hossack*, 38 Ill. 208; *Carroll v. Weld*, 13 Ill. 682, 56 Am. Dec. 481; *White v. Weaver*, 41 Ill. 409; *Champion v. Griffith*, 13 Ohio, 228; *Seymour v. Mickey*, 15 Ohio St. 575; *Van Doren v. Tjader*, 1 Nev. 380, 90 Am. Dec. 498; *Fuller v. Scott*, 8 Kan. 25; *Chandler v. Westfall*, 30 Tex. 475; *Horton v. Manning*, 37 Tex. 23; *Pahlman v. Taylor*, 75 Ill. 629; *Clapp v. Rice*, 13 Gray, 403, 74 Am. Dec. 639; *Schmidt v. Schmaelter*, 45 Mo. 502; *Chaffee v. Jones*, 19 Pick. 260; *Martin v. Boyd*, 11 N. H. 385, 35 Am. Dec. 501; *Chaffee v. Memphis, etc. R. Co.*, 64 Mo. 193; *Heise v. Bumpass*, 40 Ark. 545; *Kiskadden v. Allen*, 7 Colo. 206; *Harding v. Heirs of Waters*, 6 Lea, 324; *Cayuga Nat. Bank v. Dunklin*, 29 Mo. App. 442; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Woodman v. Boothby*, 66 Me. 389; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Stein v. Passmore*, 25 Minn. 256; *Rothschild v. Grit*, 31 Mich. 150, 18 Am. Rep.

171; *Baker v. Robinson*, 63 N. C. 191; *McGee v. Connor*, 1 Utah, 92; *Duncanson v. Kirby*, 90 Ill. App. 15; *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. Rep. 48, 13 L. R. A. 649; *Adams v. Huggins*, 73 Mo. App. 140; *McFetrich v. Woodrow*, 67 N. H. 174, 38 Atl. Rep. 18; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596, 45 N. E. Rep. 1094, 60 Am. St. 719, 35 L. R. A. 786; *Ballard v. Burton*, 64 Vt. 387, 16 L. R. A. 664, 24 Atl. Rep. 769; *Donohoe-Kelly Banking Co. v. Puget Sound Savings Bank*, 13 Wash. 407, 43 Pac. Rep. 359, 942, 52 Am. St. 57; *Roanoke Grocery & Milling Co. v. Watkins*, 41 W. Va. 787, 24 S. E. Rep. 612; *Bank v. Lumber Co.*, 100 Tenn. 479, 47 S. W. Rep. 85.

⁴ *First Nat. Bank v. Payne*, 111 Mo. 291, 20 S. W. Rep. 41, 33 Am. St. 520.

⁵ *Tenney v. Prince*, 4 Pick. 385, 16 Am. Dec. 347; *Thomas v. Jennings*, 5 Sm. & M. 627; *Rey v. Simpson*, 22 How. 341; *Whiton v. Mears*, 11 Met. 563, 45 Am. Dec. 233; *Killian v. Ashley*, 24 Ark. 511; *Stagg v. Linnenfelter*, 59 Mo. 336; *Hayden v. Welton*, 43 N. J. L. 128; *Corby v. Brokmeyer*, 84 Mo. App. 649; *Roanoke Grocery & Milling Co. v. Watkins*, 41 W. Va. 787, 24 S. E. Rep. 612; *Buck v. Hutchins*, 45 Minn. 270, 47 N. W. Rep. 808; *Rankin v. Matthiesen*, 10 S. D. 628, 75 N. W. Rep. 196 (indorsement after maturity of note).

fore the payee, the liability must be either as an original promisor or guarantor, and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor; but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded such an indorser by the commercial law."¹ In several states the *prima facie* liability of one who indorses in blank before the payee has received the note is that of indorser.² In some states where a third person indorses a note after a prior indorsement by the payee and below the latter's signature, it is conclusively presumed that he did so in aid of the negotiation of the note, and thereby becomes a second indorser regardless of whether the holder of the note is an innocent purchaser or not.³ It is generally held that a blank signature or indorsement in pursuance of a special undertaking authorizes the real agreement to be written over the name afterwards by the holder, and that an agreement so filled up will satisfy the statute of frauds.⁴ Whether written or not, it

¹ *Martin v. Good*, 95 U. S. 90, 97; *Miller v. Ridgeley*, 22 Fed. Rep. 889; *First Nat. Bank v. Lock-Stitch Fence Co.*, 24 id. 221; *Wade v. Creighton*, 25 Ore. 455, 36 Pac. Rep. 289.

² *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101, and cases in that court cited 74 Ind. page 533; *Cogswell v. Hayden*, 5 Ore. 22; *Milton v. De Yampert*, 3 Ala. 648; *Arnold v. Bryant*, 8 Bush, 668; *Jones v. Goodwin*, 39 Cal. 493, 2 Am. Rep. 473; *Fisk v. Miller*, 63 Cal. 377; *Fessenden v. Summers*, 62 id. 484; *Eilbert v. Finkbeiner*, 68 Pa. 243, 8 Am. Rep. 176; *Zahm v. First Nat. Bank*, 103 Pa. 576; *Maddox v. Duncan*, 143 Mo. 613, 45 S. W. Rep. 688, 41 L. R. A. 581; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256.

³ *Bowler v. Braun*, 63 Minn. 32, 65

N. W. Rep. 124, 56 Am. St. 449; *National Bank of Bellows Falls v. Dorset Marble Co.*, 61 Vt. 106, 2 L. R. A. 428, 17 Atl. Rep. 42; *Perry v. Friend*, 57 Ark. 437, 21 S. W. Rep. 1065.

⁴ *Duncanson v. Kirby*, 90 Ill. App. 15; *Peterson v. Russell*, 62 Minn. 220, 64 N. W. Rep. 555, 54 Am. St. 634, 29 L. R. A. 612; *Tenney v. Prince*, 4 Pick. 385, 16 Am. Dec. 347; *Josselyn v. Ames*, 3 Mass. 274; *Campbell v. Butler*, 14 Johns. 349; *Nelson v. Dubois*, 13 id. 175; *Reynolds v. Ward*, 5 Wend. 501; *Fulton v. Matthews*, 15 Johns. 433, 8 Am. Dec. 261; *Turner v. Burrows*, 8 Wend. 144; *Russell v. Landstoffs*, 2 Doug. 514; *Collis v. Emett*, 1 H. Bl. 313; *Violet v. Patton*, 5 Cranch, 151; *Welsh v. Ebersole*, 75 Va. 651; *Harding v. Heirs of Waters*, 6 Lea, 324; *Perkins v. Catlin*, 11 Conn.

is open to proof;¹ but in a case within the statute it must be written.²

§ 731. **Methods by which suretyship assumed for commercial paper.** A contract of suretyship may arise in various ways in connection with commercial paper. The maker of a note and the acceptor of a bill are the primary debtors thereon to the holder or his assigns for whose benefit either may be made. They may, as they often do, assume that liability for the accommodation of some other party to the paper, or a third person; they thus become sureties for the person accommodated.³ In his hands, as holder, the paper would be satisfied; for being ultimately liable to the maker or acceptor, who is ostensibly bound as primary debtor thereon for anything he may have to pay, such holder is not permitted to recover from him; his claim on the paper is for precisely the same sum that the accommodation maker or acceptor on payment would be entitled to demand from him as their principal by way of indemnity; and, to prevent circuity of action, when he becomes its owner the paper is canceled.⁴ Thus, a note payable to a firm was signed by one of its members and two other persons as sureties; in an action by the other member against the sureties, it was held that, as the member signing the note was, [554] on the face of it, entitled to one-half of the amount the sureties were liable only for the other half, although there was a mistake in making it payable to the firm instead of the plaintiff alone, unless the sureties knowingly agreed to the making of the note as the plaintiff alleged it ought to have been made.⁵

213, 29 Am. Dec. 294; Taylor v. French, 2 Lea, 257, 31 Am. Rep. 611; Sloan v. Gibbes, 56 S. C. 480, 486, 35 S. E. Rep. 408, 76 Am. St. 559.

¹ Kingsland v. Koeppel, 137 Ill. 344, 28 N. E. Rep. 48, 13 L. R. A. 649; Pflirsch v. Heitner, 91 Ill. App. 407; Fullerton v. Hill, 48 Kan. 558, 39 Pac. Rep. 583, 18 L. R. A. 33; Ewan v. Brooks-Waterfield Co., 55 Ohio St. 596, 45 N. E. Rep. 1094, 35 L. R. A. 786; Roanoke Grocery & Milling Co. v. Watkins, 41 W. Va. 787, 24 S. E. Rep. 612; Bank v. Layne, 101 Tenn. 45, 46 S. W. Rep. 762; Peterson v. Russell, *supra* (as to irregular indorsements

only); Welsh v. Ebersole, 75 Va. 651; Jones v. Dow, 142 Mass. 130, 7 N. E. Rep. 839; Oakley v. Boorman, 21 Wend. 588; Nettleton v. Ramsey County Land & Loan Co., 54 Minn. 395, 56 N. W. Rep. 128; Rardin v. Walpole, 38 Ind. 146; Clark v. First Nat. Bank, 57 Mo. App. 277.

² Hayden v. Weldon, 43 N. J. L. 128; Moore v. Folsom, 14 Minn. 340, 100 Am. Dec. 227.

³ Bank of Toronto v. Hunter, 20 How. Pr. 292.

⁴ § 143.

⁵ McMicken v. Webb, 6 How. 292.

So a note or bill may be indorsed by a surety to give it value for negotiation in the hands of the payee or any subsequent holder. While such paper, valid in its inception, is held by any person except the accommodated party, deriving a title from him for whose benefit it was made, it is enforceable against the accommodation maker, acceptor or indorser in the same manner and for the same amount as though he was not a surety. The drawer of an accepted bill, and the indorsers of notes and bills, are secondarily liable to the holder, and are in a certain sense sureties. When their liability becomes fixed by demand and notice the holder is, *prima facie*, entitled to recover from either the face amount of the paper; but between immediate parties, indorsee against his indorser, or payee against drawer, the consideration of the transfer between them may be inquired into, and if the plaintiff has discounted the paper at a larger rate than the interest, or has paid less than its face value, the amount paid and interest is the measure of damages, exclusive of costs of protest and damages on bills.¹ This is the measure of liability implied by law from the manner in which the drawer and indorsers become parties.

§ 732. **Measure of liability of guarantor of payment.** In cases of guaranty of payment, either express or implied, the rule is not the same. It is true that that consideration is open for examination in case of a simple contract, and now generally by statute even when the contract is under seal; but not with a view to limiting the recovery of it, or to give weight to any complaint of inadequacy.² The undertaking of the guarantor is commensurate with that of the principal debtor;³ and the general principle applies that the injured party [555] is entitled to recover a sum as damages for the breach of a contract which is equivalent to the benefit he would have derived from its performance. One who guarantees the prompt pay-

¹ *Breman v. Hess*, 13 Johns. 52; *Cook v. Clark*, 4 E. D. Smith, 213; *Wright v. Butler*, 6 Wend. 284; *French v. Grindle*, 15 Me. 163; *Lobdell v. Baker*, 3 Met. 469; *Cobb v. Baker v. Arnold*, 3 Cal. 279; *Munn Titus*, 10 N. Y. 698.

v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; *Schaeffer v. Hodges*, 54 Ill. 337; *Wiffin v. Roberts*, 1 Esp. 261; *Cram v. Hendricks*, 7 Wend. 569; *Short v. Coffeen*, 76 Ill. 245;

² *Oakley v. Boorman*, 21 Wend. 588.

³ *Gage v. Lewis*, 68 Ill. 604; *Lombard v. Mayberry*, 24 Neb. 674, 40 N. W. Rep. 271.

ment of a note represents to every subsequent holder that the note is valid, and liability upon the guaranty is not dependent upon the validity of the note as against the *bona fide* purchaser who relied on the guaranty.¹

In New York a few cases have been determined exceptionally, that is, on the principle that a guarantor, like an indorser, is only liable for the amount paid; but they are believed to be departures from the general rule applicable to guaranties. In one of these cases² a note for \$210, payable to the defendant or bearer, was sold to him by the plaintiff for \$200, and he guarantied the payment of it. The plaintiff brought suit on this guaranty to recover only the amount he had paid, and it was insisted for him that the rule between indorsee and indorser applied.³ The defendant set up the defense of usury because for \$200 he agreed to pay \$210, with interest on the latter sum from a previous day. Cowen, J., said: "It is answered that an usurious intent is not to be inferred, inasmuch as the plaintiff cannot in legal effect recover, and does not in truth seek to recover, more than he advanced with the legal interest. If such were the express agreement at the time, it would clearly take away the sting of usury; and if that appear upon the face of the declaration to be but the legal effect of the guaranty then the case is the same. Had the defendant simply indorsed the note, leaving himself to be charged in the usual way by demand and notice, the transaction would not have been usurious." It was considered as depending on the same principle as *Cram v. Hendricks*.⁴ In another case⁵ a bond and mortgage for \$3,000, payable one year from date, with interest to become due half-yearly, and on which over five months' interest had already accrued, were assigned absolutely by the holder for \$2,600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3,000, and contained a covenant that that amount was due and owing on the bond and mortgage. At the time of executing the assignment the assignor also executed to the assignee a bond with surety conditioned that the mortgagor

¹ *Holm v. Jamieson*, 173 Ill. 295, 50 N. E. Rep. 702; *Veazie v. Willis*, 6 Gray, 90; *Purdy v. Peters*, 35 Barb. 239.

² *Mazuzan v. Mead*, 21 Wend. 285.

³ *Braman v. Hess*, 13 Johns. 52.

⁴ 7 Wend. 569.

⁵ *Rapelye v. Anderson*, 4 Hill, 472.

should pay \$3,000, together with the interest, by the day appointed for that purpose in the securities assigned. [556] On a bill filed by the assignor to set aside the assignment and to have the bond of guaranty canceled, it was held that the transaction was on its face a mere sale of a chose in action, unconnected with a loan, and therefore not *per se* usurious. It was declared, also, that in an action upon a bond of guaranty the assignee's recovery would be limited to the actual amount paid for the bond and mortgage. Cowen, J., dissented, and in his opinion opposes the principle of the preceding case. He says: "The supreme court ruled the same way as this court did on what we believed to be equivalent circumstances, but on the express authority of a court having power to review the decision." That a guaranty of payment and an indorsement are equivalent circumstances is expressly affirmed by the senators who delivered the prevailing opinions; that is, equivalent in the aspect in which they were considered — in an action by the guarantee or indorsee that the amount recoverable is the amount paid to the guarantor or indorser.¹

¹ Franklin, Senator, said: "But it is contended that this ought to be considered as a loan in consequence of a collateral bond having been given and received to secure the ultimate payment of the sum of \$3,000 and interest, for which the original bond and mortgage were given and for which only \$2,600 had been paid by the appellant. But I am unable to distinguish this case from that of Cram v. Hendricks, or from the still stronger one of Mazuzan v. Mead (21 Wend. 285), in which a note of \$210 was sold for \$200, being a greater discount than legal interest, and the seller guarantied, in express terms, to pay not only the \$200, but the amount payable by the face of the note. . . . If the condition of the bond of guaranty of Anderson and Remsen had been that in case John Anderson, the original obligor, did not pay the sum of \$3,000 and in-

terest secured by his bond and mortgage, that then and in that case they would, it would have presented no stronger case than the indorsement of Cram on the note of Hendricks, or the guaranty mentioned in case of Mazuzan v. Mead. The condition of this bond, however, is, not that Anderson and Remsen would pay the sum of \$3,000 and interest, if the obligor John Anderson did not, but that if he did not pay that amount, then the bond was to be void, otherwise to remain in full force and virtue; so that upon the principle laid down and decided in the case of Cram v. Hendricks and Mazuzan v. Mead, the amount which could be collected by Rapelye would have been, not the consideration expressed in the assignment, or the amount for which the bond and mortgage of John Anderson were given, but the actual sum received;

[557] While it is true that an indorsement in blank is by legal construction a guaranty only of the payment of the note to the amount paid on its transfer with interest, it must be equally true that where the agreement is not left to be implied from a simple indorsement, but is expressed, the latter will have effect according to the intent which is thus manifested; and if the undertaking is that the principal debtor shall pay the amount of the note, or if the guarantor undertakes directly to pay the sum mentioned in it on the default of the maker or other condition fulfilled, in either case that sum will, on general principles, be the measure of damages in the action upon the guaranty.¹

In another case in New York, decided the same year as the first of the preceding cases,² the court expressly ruled that the obligation of a guarantor is not to be measured by the consideration paid when the intent is clear to secure the full amount of the paper guaranteed. Cowen, J., said: "It is not for us to hamper Mr. O., or any other citizen, in such a way as to preclude his making money by insuring the debts of his neighbors. It is enough that he has not been imposed upon. He is *sui juris*. He fixed the consideration of his indorsement; and had it been to secure a much larger amount the result must have been the same. There is no distinction in

being \$2,600, together with the interest which might have accrued thereon from the time of the actual receipt thereof."

Bockee, Senator, said: "The guaranty above mentioned is that the mortgagor, John Anderson, shall pay the \$3,000. It is not in the alternative that the obligors shall pay that sum. If John Anderson does not pay, the obligors are left merely on the ground of their legal liability. The judgment is entered for the sum of \$6,000, and the court may direct by indorsement on the execution a collection of the sum equitably due, or, on an assessment of damages by a jury, they may award the sum actually paid on the assignment and sale of the mortgage. It may be ad-

mitted that, *prima facie*, the rule of damages would be the sum of \$3,000, the consideration mentioned in the assignment. So it was in the case of Cram v. Hendricks. Cram stood on the ground of legal liability as general indorser of a promissory note, and the rule for damages against him was, *prima facie*, the amount of the note. The court, by limiting the amount of recovery to the actual consideration of the indorsement, refused to give a construction which would render the contract usurious." Goldsmith v. Brown, 35 Barb. 484; Jones v. Stienbergh, 1 Barb. Ch. 250.

¹ See Anderson v. Rapelye, 9 Paige, 483, 486, 491; Yankey v. Lockheart, 4 J. J. Marsh. 277.

² Oakley v. Boorman, 21 Wend. 588.

principle between an indorsement to secure future advances and an indorsement to secure a precedent debt." Following cases which are elsewhere noted,¹ it has been ruled in Missouri that one who holds a note as collateral to a debt of a less amount than the note can recover from the sureties only so much as is due him.²

§ 733. **Guaranty of collectibility; liability for costs; diligence.** A guaranty of collection is in legal effect an undertaking to pay the debt, if it cannot be made by diligent legal measures from the principal debtor, or any deficiency after all remedies are exhausted. It is only in that event and to that extent that such a guarantor can be put in default; payment according to that measure will satisfy his undertaking. There is some diversity as to the necessity of a judgment and return of execution unsatisfied against the principal debtor as an absolute condition to suit on such a guaranty.³ But it is

¹ § 541.

² *Doud v. Reid*, 53 Mo. App. 553.

³ In New York, Wisconsin, Michigan, Kentucky, Texas, Nebraska and Iowa the rule is that ordinarily the only evidence that a claim is not collectible is the failure of legal proceedings, diligently pursued, to result in its collection. *Toles v. Ade*, 91 N. Y. 562; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 311, 32 N. E. Rep. 231; *Schmitz v. Langhaar*, 88 N. Y. 503; *Moakley v. Riggs*, 19 Johns. 69, 10 Am. Dec. 196; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Ralph v. Eldredge*, 58 Hun, 203; *Borden v. Gilbert*, 13 Wis. 670; *French v. Marsh*, 29 Wis. 649; *Getty v. Schantz*, 101 Wis. 229, 77 N. W. Rep. 191; *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447; *Clark v. Kellogg*, 96 Mich. 171, 55 N. W. Rep. 667; *Ely v. Bibb*, 4 J. J. Marsh. 71; *Shepard v. Phears*, 35 Tex. 71; *Central Investment Co. v. Miles*, 56 Neb. 272, 76 N. W. Rep. 566, 71 Am. St. 681; *Durand v. Bowen*, 73 Iowa, 573.

The same rule has been announced by at least one of the federal courts. *Dwight v. Williams*, 4 McLean, 581.

In New York nothing beyond an execution is required of the creditor. *Schmitz v. Langhaar*, 88 N. Y. 503; *Thomas v. Risley*, 23 N. Y. Misc. 109, 50 N. Y. Supp. 711.

In Ohio, Pennsylvania, Massachusetts, Maine, Vermont, Connecticut, North Dakota and Minnesota the institution of a suit is not necessary if the debtor is insolvent, and proof of the waiver of the condition by the guarantor is allowed. *Stone v. Rockefeller*, 29 Ohio St. 625; *McDoal v. Yeomans*, 8 Watts, 361; *McClurg v. Foyer*, 15 Pa. 293; *Miles v. Linnell*, 97 Mass. 298; *Gillingham v. Boardman*, 29 Me. 79; *Bull v. Bliss*, 30 Vt. 127; *Allen v. Rundle*, 50 Conn. 1; *Lemmon v. Strong*, 55 id. 443; *Roberts v. Laughlin*, 4 N. D. 167, 172, 59 N. W. Rep. 967; *Brackett v. Rich*, 23 Minn. 485, 23 Am. Rep. 703.

If the degree of diligence to be exercised by the creditor is stipulated in the contract it must be used. *Allen v. Rundle*, *supra*. Compare *Heralson v. Mason*, 53 Mo. 211.

If legal proceedings have not been resorted to the proof must clearly show that the debtor was, when the

agreed that the guarantor is only answerable if, and to the extent, the debt is uncollectible against the principal debtor. When a note is guaranteed to be collectible the legal remedy against all prior solvent parties, such as an indorser,¹ the estate of a deceased indorser,² and all of several principals,³ must be exhausted before the guarantor is in default.⁴ Such a guar-

obligation matured, and continued to be, so utterly insolvent that an action against him would have been fruitless. *Osborne v. Thompson*, 36 Minn. 528, 33 N. W. Rep. 1.

If the persons primarily liable have left the state and were insolvent, the creditor who has instituted suit is not bound to send executions against them to their present place of residence. *Camden v. Doremus*, 13 How. 515.

Where the creditor is required to resort to legal proceedings the surety need not make a request of him to do so. *Toles v. Adeo*, 91 N. Y. 562. The loss of an opportunity to arrest a principal for whose amenability to process the sureties are bound is presumptively injurious to them without proof. *Id.*

"In the absence of any explanation it is not due diligence to permit a frivolous answer to an ordinary action on a promissory note against a debtor in failing circumstances to remain on the record for three months, during which time not a step of any nature is taken in the action. And, unexplained, it is not due diligence in the commencement of an action to wait over four months after the time when the necessity for its commencement has arisen, before issuing process against, and serving it upon, a failing debtor in the same city, whose whereabouts are known and who is not concealing himself to avoid process." *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423, 32 N. E. Rep. 236. See *Salt Springs Nat. Bank v. Sloan*, 135 N.

Y. 371, 32 N. E. Rep. 231; *Roberts v. Laughlin*, 4 N. D. 167, 59 N. W. Rep. 967; *Stackpole v. Dakota Loan & Trust Co.*, 10 S. D. 389, 73 N. W. Rep. 258; *Getty v. Schantz*, 101 Wis. 229, 77 N. W. Rep. 191.

If the guaranty is special, as to pay if the debt cannot be recovered out of designated property, the plaintiff does all that is required by entering judgment on the note, thus acquiring a lien on such property, and then keeping that lien alive. *Ritchie v. Walter*, 166 Pa. 604, 31 Atl. Rep. 334.

¹ *Loveland v. Shepard*, 2 Hill, 139; *Dana v. Conant*, 30 Vt. 246; *Summers v. Barrett*, 65 Iowa, 292, 21 N. W. Rep. 646.

² *Benton v. Fletcher*, 31 Vt. 418.

³ *Aldrich v. Chubb*, 35 Mich. 350; *Northern Ins. Co. v. Wright*, 70 N. Y. 445, 26 Am. Rep. 615.

⁴ *Brandt on Suretyship & G.* (2d ed.), § 100.

In *Sears v. Van Dusen*, 25 Mich. 351, the purchaser of an overdue note, the collection of which was guaranteed by its prior owner, refused to receive the money from the maker and delayed for two years to sue upon it, during which time the latter became insolvent. The guarantor was held to be discharged. The exact effect of this case is not easily ascertainable; it has been approvingly cited on the point that the delay was fatal. *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606. An unexcused delay of five and one-half years in bringing a suit against the debtor releases a guarantor. *Tiffany v. Willis*, 30 Hun, 266.

anty not only binds him to pay the uncollectible debt, but also the costs of the action against the principal and other parties for its collection.¹ Where an action against the principal is required as a condition, this rule as to costs is manifestly just. In such a case the guarantee will not have the full benefit of the agreement unless the guarantor bears the expense of complying with the condition he has imposed.² Where other evidence will suffice to show the debt not collectible, so as to allow the guarantee to resort to the guarantor without first bringing a suit, the latter's liability for costs in a suit which is nevertheless brought must depend on there being reasonable [559] grounds to expect that the debt could be collected in whole or in part by the proceedings in which the costs were incurred. Where, on a guaranty of the payment of a mortgage, the guarantee incurred costs to foreclose it after a prior mortgage of the same premises had been forelosed, a sale made and a deed delivered, it was held he could not recover the costs of such an unnecessary foreclosure.³

§ 734. Guarantor's liability where collateral is given. If the debt, the collection of which is guarantied, is collaterally secured, there is some conflict of decision on the question whether the guarantor is liable for that part of it which might be made by resort to the security. In a case in Ohio⁴ where the collection of a note was guarantied, and, pursuant to an understanding when the guaranty was made, the creditor took security from the maker by mortgage of real estate, it was held that on the default and bankruptcy of the maker the guarantee could at once pursue his remedy on the guaranty against the

In Connecticut the holder of a note is not bound to attach the real estate of the maker before proceeding against a guarantor. *Forbes v. Rowe*, 48 Conn. 413; *Allen v. Rundle*, 50 id. 588.

While the creditor must exhaust all the property and securities in his grasp, he is not obliged to pursue every claim which his debtor may have, especially if it is contingent and uncertain, as the statutory liability of the stockholders of a corporation. *National Loan & Build-*

ing Society v. Lichtenwalner, 100 Pa. 100, 45 Am. Rep. 359.

¹ *Mosher v. Hotchkiss*, 3 Abb. App. Dec. 326, 3 Keyes, 161; *Tuton v. Thayer*, 47 How. Pr. 180.

² *Mosher v. Hotchkiss*, *supra*. See *Redfield v. Haight*, 27 Conn. 31; *Gilman v. Lewis*, 15 Me. 452.

³ *Peck v. Cohen*, 40 N. Y. Super. Ct. 142. See *Brown v. Haven*, 37 Vt. 439.

⁴ *Stone v. Rockefeller*, 29 Ohio St. 625.

guarantor without exhausting it on the security. Gilmore, J., said: "In considering this question it is to be kept in mind that the plaintiff sues upon a contract of guaranty relating alone to the collectibility of the note upon the back of which it is indorsed. The terms of such a contract are to be construed strictly, and the words, being those of the guarantor, are to be taken most strongly against him. The law will not supply any condition which is not incorporated into the agreement or to be fairly implied from the language used; and, in the absence of accident or mistake, it is presumed conclusively that the terms of the contract as agreed upon between the parties at the time are fully expressed in the written guaranty. It cannot be said that the contract sued upon and that set up by way of defense have any such necessary connection with each other as to require them to be read and construed together as constituting one contract. They are neither of the same nature nor between the same parties. They are therefore wholly independent of each other, and must be so regarded. As independent contracts each must be susceptible of performance [560] according to its terms and legal effect. These contracts are respectively susceptible of such performance, and the guarantor is bound to perform according to the terms of guaranty sued upon, i. e., to pay the note at maturity if the maker fails to do so, and is then entirely insolvent and bankrupt. When he pays the note in accordance with the terms of his guaranty the contract set up in his answer will, in equity, at once inure to his benefit by substitution." This rule is sustained by other authorities.¹ The reasoning upon which it is rested is not very satisfactory. By the mortgage the creditor acquires a specific lien on the debtor's property for the debt; the insolvency and bankruptcy of the debtor has not affected that lien; hence, to the extent of that property so appropriated to satisfy the debt the insolvency or bankruptcy of the debtor is wholly immaterial. He has so much property, notwithstanding his insolvency or bankruptcy, subject to the appropriate process of a court for the satisfaction of the debt. The note

¹ Allen v. Woodard, 125 Mass. 400, 3 Ired. Eq. 64; Hayes v. Ward, 4 28 Am. Rep. 250; Vance v. English, Johns. Ch. 123, 8 Am. Dec. 554; Buck 78 Ind. 80; Watson v. Sutherland, 1 v. Sanders, 1 Dana, 187; Hill v. Bour-Tenn. Ch. 208. See Gary v. Cannon, 29 La. Ann. 841.

and mortgage are connected, and, without exhausting the security afforded by the latter, the note in no proper sense could be treated as not collectible; to the extent that the debt could be made from such security, it should be deemed collectible. In a Michigan case¹ the payee of a note secured by mortgage of real estate transferred the note and assigned the mortgage. He indorsed on the note a guaranty of collection, and it was held that he was not liable on the guaranty until resort had been had to the mortgage. In such a case it was considered that the guaranty does not refer merely to the personal responsibility of the guarantor. When, with the guaranty itself, the guarantor furnishes the means of obtaining payment in whole or in part and these means have been attached to the debt itself, and cannot be severed from it, the parties must be held to have contemplated the entire transaction and a resort to those means. Any other rule would be at variance with the object of such securities. Although a mortgage is in a strict sense only collateral to the debt, yet it is generally regarded as forming its chief value, and persons usually contract with that idea.²

§ 735. Discharge or reduction of surety's responsibility by act of creditor. A surety is a favorite of the law,³ [561] and where any act is done by the obligee that may injure him the courts are very glad to lay hold of it in his favor.⁴ If the creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act required by the surety which his duty enjoins him to do, and the omission proves injurious, the surety will be discharged.⁵ Courts of law and equity are governed by the same principles in determining

¹ *Barman v. Carhartt*, 10 Mich. 338, approved in *Johnson v. Shepard*, 35 Mich. 115.

² *Baxter v. Smack*, 17 How. Pr. 183; *Cady v. Sheldon*, 38 Barb. 103; *Vanderkemp v. Shelton*, 11 Paige, 28, 1 Clark, 331; *Brainard v. Reynolds*, 36 Vt. 614; *New York Security & Trust Co. v. Lombard Investment Co.*, 73 Fed. Rep. 537; *Dewey v. W. B. Clark Investment Co.*, 48 Minn. 130, 50 N. W. Rep. 1032, 31 Am. St. 623; *Roberts v. Laughlin*, 4 N. D. 167, 59 N. W. Rep. 967; *Johnson v. Cook*, 24

Wash. 474, 482, 64 Pac. Rep. 729, citing the text; *Newell v. Fowler*, 23 Barb. 628.

³ *People v. Chalmers*, 60 N. Y. 154.

⁴ *Law v. East India Co.*, 4 Ves. 824.

⁵ 1 Story's Eq., § 325; *Woolley v. Louisville Banking Co.*, 81 Ky. 527, 538; *Crim v. Fleming*, 101 Ind. 524, 51 Am. Rep. 761; *Joyce v. Cockrill*, 92 Fed. Rep. 838, 35 C. C. A. 38; *Springer Lithographing Co. v. Graves*, 97 Iowa, 39, 66 N. W. Rep. 66; *Benton County Savings Bank v. Bodicker*, 105 Iowa, 548, 75 N. W. Rep.

whether a surety has been discharged by anything done or a duty omitted by the creditor.¹ Whatever will exonerate a surety from liability in equity¹ will constitute a sufficient defense at law.² The relation demands from the creditor that he exercise good faith toward the surety. Hence, if a master holding a guaranty for the faithful performance of a servant's duty discovers in the course of his service that the servant is dishonest, he must discharge him or at least notify those who are bound for him. If he does neither he takes upon himself the responsibility for losses thereafter sustained. His concealment of the fact is a fraud as to the sureties.³ This rule does not apply to public officials.⁴

632, 67 Am. St. 310, 45 L. R. A. 321; 538, 20 S. E. Rep. 521; *Stackpole v. Main Street Hotel Co. v. Horton*, 10 S. D. 389, 73 N. W. Rep. 258; *Galbraith v. Hardware Co.*, 56 Kan. 448, 43 Pac. Rep. 769; *Redlon v. Heath*, 59 Kan. 255, 43 Pac. Rep. 769; *First Nat. Bank v. Mattingly*, 92 Ky. 650, 18 S. W. Rep. 940; *New England Mut. L. Ins. Co. v. Randall*, 42 La. Ann. 260, 7 So. Rep. 679; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Plunkett v. Davis Sewing Machine Co.*, 84 Md. 529, 36 Atl. Rep. 115; *Backus v. Archer*, 109 Mich. 666, 67 N. W. Rep. 913; *Cushing v. Cable*, 54 Minn. 6, 55 N. W. Rep. 736; *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. Rep. 816; *Gano v. Farmers' Bank*, 103 Ky. 508, 45 S. W. Rep. 519; *Fidelity Mut. L. Ass'n v. Dewey*, 83 Minn. 389, 86 N. W. Rep. 423; *Morrison v. Arons*, 65 Minn. 321, 68 N. W. Rep. 33; *Tradesmen's Nat. Bank v. National Surety Co.*, 169 N. Y. 563, 62 N. E. Rep. 670; *Sun L. Ins. Co. v. United States Fidelity & G. Co.*, 130 N. C. 129, 40 S. E. Rep. 975; *United States v. Freel*, 186 U. S. 309; *Evans v. Graden*, 125 Mo. 72, 28 S. W. Rep. 439; *Welch v. Hub-schmitt Building & W. Co.*, 61 N. J. L. 57, 38 Atl. Rep. 824; *Antisdel v. Williamson*, 165 N. Y. 372, 59 N. E. Rep. 207; *Myer v. Reedy*, 115 N. C. 588, 20 S. E. Rep. 521; *Stackpole v. Dakota Loan & Trust Co.*, 10 S. D. 389, 73 N. W. Rep. 258; *Galbraith v. Townsend*, 1 Tex. Civ. App. 447, 20 S. W. Rep. 943; *Getty v. Schantz*, 101 Wis. 229, 77 N. W. Rep. 191; *Electric Appliance Co. v. United States Fidelity & Guaranty Co.*, 110 Wis. 434, 85 N. W. Rep. 648; *St. Louis Brewing Ass'n v. Hayes*, 107 Fed. Rep. 395, 46 C. C. A. 370; *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. Rep. 117; *American Surety Co. v. Ballman*, 104 Fed. Rep. 634. See notes to § 728.

¹ *Schroepell v. Shaw*, 3 N. Y. 446.

² *Id.*; *Baker v. Briggs*, 8 Pick. 128, 19 Am. Dec. 311; *Springer v. Tooth-aker*, 43 Me. 381; *People v. Jansen*, 7 Johns. 332; *King v. Baldwin*, 2 Johns. Ch. 554; *Sailly v. Elmore*, 2 Paige, 497; *Viele v. Hoag*, 24 Vt. 46; *Heath v. Derry Bank*, 44 N. H. 174; *Watriss v. Pierce*, 32 id. 560; *Rogers v. School Trustees*, 46 Ill. 428; *Shelton v. Hurd*, 7 R. I. 403, 84 Am. Dec. 564; *Wayne v. Kirby*, 2 Bailey, 551; *Maxwell v. Connor*, 1 Hill Eq. 14; *State Bank v. Watkins*, 6 Ark. 123; *Smith v. Clap-ton*, 48 Miss. 66; *Pioneer Savings & Loan Co. v. Freeburg*, 59 Minn. 230, 61 N. W. Rep. 25.

³ *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Ex.

⁴ *Fidelity & Deposit Co. v. Commonwealth*, 104 Ky. 579, 47 S. W. Rep. 579, 49 id. 467. See § 482.

§ 736. **Right of subrogation.** As a security for and means of reimbursement, a surety has a right of subrogation upon the performance of his contract; he is then entitled to stand in the place of the creditor as to all securities for the debt held or acquired by the latter, and to have the same benefit from them as the creditor might have had.¹ This right extends to all securities held by him for the payment of such debt at the time the same is paid, even though they were acquired without the knowledge of the surety and after he became bound.² It does not depend upon any request or contract on the part

73; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50; *Ætna Ins. Co. v. Fowler*, 108 Mich. 557, 66 N. W. Rep. 470; *Mason & Hamlin Co. v. Gage*, 119 Mich. 361, 78 N. W. Rep. 130; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. Rep. 261, 64 Am. St. 475; *Wilkerson v. Crescent Ins. Co.*, 64 Ark. 80, 40 S. W. Rep. 465, 62 Am. St. 152; *Bellevue Loan & Building Ass'n v. Jeckel*, 104 Ky. 159, 46 S. W. Rep. 482. See *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *United States L. Ins. Co. v. Salmon*, 91 Hun, 535, 36 N. Y. Supp. 830, affirmed without opinion, 157 N. Y. 682; *Lauer Brewing Co. v. Riley*, 195 Pa. 449, 46 Atl. Rep. 71; *Andrus v. Bealls*, 9 Cow. 693; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. Rep. 805.

"It is the duty of a person taking a guaranty for the good conduct of an employee to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and if such duty is not performed the instrument so taken is, *ipso facto*, invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the

effect of a meditated fraud if the person so retaining the agent can be permitted to disown the implication inevitably arising from his own conduct." *Sooy v. State*, 39 N. J. L. 136, approved in *Connecticut General L. Ins. Co. v. Chase*, 72 Vt. 176, 47 Atl. Rep. 825. See *British Empire, etc. Assur. Co. v. Luxton*, 9 Manitoba, 169.

¹*Philbrick v. Shaw*, 62 N. H. 356; *Briggs v. Hinton*, 14 Lea, 238; *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Heart v. Bryan*, 2 Dev. Eq. 147; *Marsh v. Pike*, 10 Paige, 595; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Buchanan v. Clark*, 10 Gratt. 164; *Mathews v. Aikin*, 1 N. Y. 595; *McArthur v. Martin*, 23 Minn. 74; *In re Hewitt*, 25 N. J. Eq. 210; *Lewis v. Palmer*, 28 N. Y. 271; *Rice v. Rice*, 108 Ill. 199; *Stokes v. Little*, 65 Ill. App. 255; *Harper v. Rosenberger*, 56 Mo. App. 388; *Fisher v. Columbia Building & Loan Ass'n*, 59 Mo. App. 430; *Hill v. King*, 48 Ohio St. 75, 26 N. E. Rep. 988.

The surety's rights in this respect are not affected by the fact that the property upon which he bases his claim was mortgaged to him for another and prior debt. *Torp v. Gulseth*, 37 Minn. 135, 33 N. W. Rep. 550.

²*Scanland v. Settle*, Meigs, 169; *Smith v. McLeod*, 3 Ired. Eq. 390; *Wendell v. Highstone*, 52 Mich. 552, 18 N. W. Rep. 354.

of the debtor with the surety, but grows rather out of the relations existing between the latter and the creditor, and springs from the most obvious principles of natural justice.¹

[562] When one has been compelled to pay a debt which ought to have been paid by another he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor, both may have been equally liable; but if, as between themselves, there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement.² He is entitled to recourse to all persons who stand in the relation of principal to him for reimbursement, and to all co-sureties for contribution.³ "Where the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and the *cestui que trust*, against those who have participated in his wrongful acts."⁴ Though the creditor has released the surety by surrendering a fund which he was entitled to, the former, if he has sustained damages from the principal's breach of his contract, may set off the amount against the surety's demand for the application of the fund to his benefit.⁵

This right in the surety does not extend to independent collateral securities, but enables him to be substituted in the creditor's place and stead to the debt and the instrument which is its evidence, and to hold it alive and enforceable as against the principal debtor.⁶ Such instrument may be assigned to a third person.⁷ The right of such person, when he

¹ Mathews v. Aikin, 1 N. Y. 595.

² McCormick v. Irwin, 35 Pa. 111; New York State Bank v. Fletcher, 5 Wend. 85; Huston v. Branch Bank, 25 Ala. 250; Boyd v. McDonough, 39 How. Pr. 389.

³ Cooper's Appeal, 149 Pa. 239, 24 Atl. Rep. 339; Urbahn v. Martin, 19 Tex. Civ. App. 93, 46 S. W. Rep. 299. See § 754.

⁴ Sheldon on Subrogation, § 29, approved in Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. Rep. 414; Pierce v. Garrett, 65 Ill. App. 682.

On the payment of a judgment by one of two joint sureties he is en-

titled to enforce the lien of the judgment for one-half the amount for which it was rendered. Holt v. Strain, 2 Tenn. Cas. 166.

⁵ St. Mary's College v. Meagher, 11 S. W. Rep. 608, 11 Ky. L. Rep. 112.

⁶ Goodyear v. Watson, 14 Barb. 481; Chandler v. Higgins, 109 Ill. 602; Kätz v. Moessinger, 110 id. 372.

⁷ Chandler v. Higgins, 103 Ill. 602; Searing v. Berry, 58 Iowa, 20, 11 N. W. Rep. 708; Manford v. Firth, 68 Ind. 83; Frank v. Traylor, 130 Ind. 145, 148, 29 N. E. Rep. 486, 16 L. R. A. 115; Peirce v. Garrett, 65 Ill. App. 628.

owned the land bound for the debt, to buy the bond executed by the surety and sue upon it has been sustained.¹ "A bond, therefore, may survive payment, when it can become merely purchase-money when it is a surety who buys. If under such circumstances payment will not kill it, still less will that constructive payment which is argued out of an assignment to the surety who is obligor. He may hold it till the principal debtor is in default and then enforce it as against him, precisely with the same effect as if he had been a co-obligor in the bond, for in equity that is what his covenant made him. The surety's payment of what, as to the creditor, is his own debt becomes a purchase as against the debtor primarily liable."² But the creditor who holds an obligation which is protected by collaterals furnished by the first indorser is not bound to account therefor to one who subsequently binds himself by a separate instrument to pay any sum, within a stated limit, that might not be collected on that obligation or

¹ *Wadsworth v. Lyon*, 93 N. Y. 201, 214, 45 Am. Rep. 190.

² *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. Rep. 20; *Searing v. Berry*, 58 Iowa, 21, 11 N. W. Rep. 708; *Crisfield v. State*, 55 Md. 192; *German American Savings Bank v. Fritz*, 68 Wis. 390, 32 N. W. Rep. 123; *New Bedford Inst. v. Hathaway*, 134 Mass. 69.

In *Mason v. Pierron*, 63 Wis. 239, 244, 23 N. W. Rep. 119, *Lyon, J.*, points out the distinction between the extent to which subrogation is granted in England and America. "It was formerly held in England, following the Roman law, that a surety subrogated to the rights of a creditor had precisely the same rights the creditor had and stood in his place; but in later times the rule has been restricted in that country, and it is there now held that the right of subrogation extends only to securities other than the obligation or instrument which is the evidence of the debt. Thus, if the debt be evidenced by a bond, payment by

one or two sureties of the whole debt cancels the bond; or if it be upon a judgment, such payment cancels the judgment, and the surety so paying becomes a mere general creditor of his co-surety, to whose demand none of the peculiar incidents of a debt upon specialty or judgment adheres. The courts of this country, however, have very generally adhered to the ancient rule, and hold that although the lien or obligation be extinguished at law by the payment of the debt, yet, for the benefit of the surety, it continues in equity in full force. The cases which illustrate the above propositions are very numerous in both countries. A great many of them will be found cited in *Story's Eq. Jur.* in the notes to sections 8, 492, 493, 495, 496, 499, *a, b, c*; 3 *Pom. Eq. Jur.*, §§ 1418, 1419 and notes." See *Fleming v. Beaver*, 2 *Rawle*, 128, 19 *Am. Dec.* 629; *Edgerley v. Emerson*, 23 *N. H.* 555, 55 *Am. Dec.* 207; *Brewer v. Franklin Mills*, 42 *N. H.* 292.

from the security.¹ It was said by Sergeant, J., in stating a limitation to the general rule that a surety may avail himself of any security given the creditor by the debtor, "but where such means consist of the responsibility of an individual becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities which may give rise to new questions as to priority between the former and the latter surety; such latter surety stipulating at the instance of the principal to pay the debt suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and he has no right to complain that he is not allowed to use as a payment by himself the money which proceeds from another person whom his principal was previously bound to save harmless."²

Usually payment in full of the debt is required before the right of subrogation can be availed of;³ though it has been allowed after payment by the surety and his principal.⁴ If the creditor consents to the surety's subrogation *pro tanto* the principal debtor and other creditors cannot be heard to object.⁵ On the payment of part of the debt the surety may be substituted to the creditor's lien to that extent, subject to the creditor's priority for the balance. He may bring the creditor and principal debtor in and enforce the lien for the payment of the balance to the creditor first, and then for the reimbursement of the payment made.⁶ In equity the right of subrogation may be protected by a decree in advance of payment by the

¹ Tracy v. Pomeroy, 120 Pa. 14, 13 Atl. Rep. 514.

² Potts v. Nathans, 1 W. & S. 155, 37 Am. Dec. 456; Nettleton v. Ramsey County Land & Loan Co., 54 Minn. 395, 56 N. W. Rep. 128; Hackett v. Watts, 138 Mo. 502, 517, 40 S. W. Rep. 113; Harper v. Rosenberger, 56 Mo. App. 388.

A surety in bonds given by a debtor for rent of his own land, rented by him under a decree to pay liens binding the land, and paying the same for his principal, may be substituted to such liens against the land, which are not discharged, as

between the principal debtor and his surety, by such renting. Neal v. Buffington, 42 W. Va. 327, 26 S. E. Rep. 172.

³ Ames v. Huse, 55 Mo. App. 422; Stamford Bank v. Benedict, 15 Conn. 437; Gannett v. Blodgett, 39 N. H. 150; Musgrave v. Dickson, 172 Pa. 629, 33 Atl. Rep. 705, 51 Am. St. 765.

⁴ Magee v. Leggett, 48 Miss. 139.

⁵ Fisher v. Columbia Building & Loan Ass'n, 59 Mo. App. 430; Gedyer v. Matson, 25 Beav. 310; Motley v. Harris, 1 Lea, 577.

⁶ Neal v. Buffington, 42 W. Va. 327, 26 S. E. Rep. 172.

surety.¹ In Minnesota if the defendant in an action upon a note will, upon payment of the judgment thereon, be subrogated to the rights of the plaintiff in a security the court will, if the facts are properly pleaded, before rendering judgment, require the plaintiff to execute and file a transfer to the defendant of the security, to be delivered on payment of the judgment.²

The rule that the surety is not entitled to be subrogated until he has paid the entire debt is not applicable where separate notes or instalments are paid, and the remedy sought is upon the promise or contract of the principal debtor to pay an entire debt payable in instalments, and not the apportionment or application for his benefit of securities in the hands of the creditor. No question can arise in such a case as to the sufficiency of the security as between the plaintiff and the principal creditor, because the defendant's promise and undertaking are to assume and pay the entire debt, and it is immaterial in whose hands the notes are.³ Neither does that rule apply where a compromise is made in good faith between the sureties and the obligee in their bond, neither fraud nor mutual mistake being shown.⁴ Another exception to the rule has been declared where the creditor holds as collateral two funds, as property of the debtor and the liability of a guarantor. If he elects to enforce such liability and its amount is not ascertainable until judicial proceeding has been had, equity will define the rights of the parties as to both classes of security and control in the hands of the creditor that to which the guarantor may be entitled when the extent of his liability is fixed.⁵ A surety who has paid the creditor a part of the debt may recover from him the amount paid where the creditor has, upon receiving from the principal debtor the balance of the debt, surrendered to him, without the knowledge or consent of the

¹ *Manning v. Ferguson*, 103 Iowa, 561, 72 N. W. Rep. 762. But see *Bartholomew v. First Nat. Bank*, 57 Kan. 594, 47 Pac. Rep. 519.

² *Knoblauch v. Foglesong*, 37 Minn. 320, 33 N. W. Rep. 865; *Barton v. Moore*, 45 Minn. 98, 47 N. W. Rep. 460; *Leonard v. Swanson*, 58 Minn. 231, 232, 59 N. W. Rep. 1009.

³ *Per Vanderburgh, J.*, in *Nettleton v. Ramsey County Land & Loan Co.*, 54 Minn. 395, 56 N. W. Rep. 128, 40 Am. St. 342.

⁴ *Perkins v. North End Bank*, 17 Wash. 100, 49 Pac. Rep. 241.

⁵ *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. Rep. 356; *Sternbach v. Friedman*, 34 App. Div. 534, 54 N. Y. Supp. 608.

surety, the collateral security deposited with the creditor by the principal debtor.¹

While it is true that privity is not in all cases necessary, still, to entitle one to be subrogated, he must have paid the money upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right.² It has, therefore, been ruled that if several or successive obligations of suretyship be not in substance and nature for the same thing, and have no relation to nor operation upon each other, the doctrine of subrogation cannot be invoked.³ Following this principle, it has been held where a sheriff who had given separate bonds, one for the collection of state taxes and the other for county taxes, settled the first by using some of the funds collected for county taxes, and the sureties on the county tax bond were forced to make good the default of the sheriff thereon, that they could not, in the absence of knowledge on the part of the state treasurer or of the sureties on the state tax bond of the misapplication of funds, recover the amount so misapplied from the state tax bond sureties, since the latter's bond was extinguished by performance and the state could not have been compelled to refund the money, nor could it have revived the liability of the sureties if it had refunded it.⁴ If a tax collector has paid all the taxes he was required to collect, his sureties cannot be subrogated to the rights of the government against taxpayers who are delinquent. Taxes are not debts.⁵

The right of subrogation or any right of that nature can not antedate the time when the sureties became such; hence they cannot have a conveyance made by their principal before they signed his bond set aside.⁶ And a surety who was not originally bound for the debt, but who comes in during the prosecution of the remedy for the debt against the principal, cannot obtain a preference over creditors of the principal whose liens attached before the surety became bound. As to any such prior interest in the property he must occupy the

¹ Morton v. Dillon, 90 Va. 592, 19 S. E. Rep. 654.

² 2 Beach on Eq. Jurisp., § 801.

³ Langford v. Perrin, 5 Leigh, 552.

⁴ Liles v. Rogers, 113 N. C. 197, 18 S. E. Rep. 104, 37 Am. St. 627.

⁵ Jones v. Gibson, 82 Ky. 561.

⁶ Poynter v. Mallory, 20 Ky. L. Rep. 284, 45 S. W. Rep. 1042.

place of debtor.¹ Where the custodian of public moneys is a trustee and the statute gives a preference as to the payment out of the estate of a decedent of any money received by him in trust, the public enjoys that preference, and the right inures to the sureties of such decedent as a custodian of such moneys.² The right of subrogation is not inconsistent with the surety's right to a judgment against his principal for the amount he has paid; he may have such judgment or proceed to reimburse himself from the collaterals.³

§ 737. **Creditor's duty to realize on securities.** If the creditor parts with or renders unavailable securities or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of their value, because securities which the creditor is entitled to apply in discharge of his debt he is bound to apply or hold as a trustee ready to be applied for the benefit of the surety.⁴ The latter in such case is discharged to the extent that he is injured.⁵ If the payee causes the surety to forego security when

¹ 2 Brandt on Suretyship & G. (2d ed.), § 308; Exchange Building & Investment Co. v. Bayless, 91 Va. 134, 21 S. E. Rep. 279.

² Whitbeck v. Ramsey, 74 Ill. App. 524; Hunter v. United States, 5 Pet. 173.

³ Maffat v. Greene, 149 Mo. 48, 50 S. W. Rep. 809.

⁴ Theobald on Princ. & Surety, § 174; Cullum v. Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

⁵ Cummings v. Little, 45 Me. 183; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Ives v. Bank, 12 Mich. 361; Wharton v. Duncan, 83 Pa. 40; Kirkpatrick v. Hawk, 80 Ill. 122; Foss v. Chicago, 34 id. 488; Rogers v. School Trustees, 46 id. 428; Pitts v. Congdon, 2 N. Y. 352, 51 Am. Dec. 299; Bonney v. Bonney, 29 Iowa, 448; American Bank v. Baker, 4 Met. 164; Holland v. Johnson, 51 Ind. 346; Baker v. Briggs, 8 Pick. 122, 19 Am. Dec. 311; Chester v. Bank of Kingston, 16 N. Y. 336; Finney v. Commonwealth, 1

P. & W. 240; Hurd v. Spencer, 40 Vt. 581; Shannon v. McMullen, 25 Gratt. 211; Law v. East India Co., 4 Ves. 824; Port v. Robbins, 35 Iowa, 208; Taylor v. Jeter, 23 Mo. 244; Schroeppell v. Shaw, 5 Barb. 580; Brandt on Suretyship & G. (2d ed.), § 440 *et seq.*; Bowen v. Groover, 77 Ga. 126; St. Mary's College v. Meagher, 11 S. W. Rep. 608, 11 Ky. L. Rep. 112; Allen v. O'Donald, 23 Fed. Rep. 573; Smith v. McKean, 99 Ind. 101; Sterne v. Bank, 79 id. 549; Sterne v. McKinney, id. 578; Humphrey v. Hayes, 94 N. Y. 594; Grow v. Garlock, 97 id. 81; Doty v. Case & W. Thresher Co., 50 Hun, 595, 3 N. Y. Supp. 510; Day v. Ramey, 40 Ohio St. 446; Kaufman v. Loomis, 13 Ill. App. 124; Brown v. Rathburn, 10 Ore. 158; Guild v. Butler, 127 Mass. 386; Hutton v. Campbell, 10 Lea, 170; Watson v. Read, 4 Baxter, 49, 1 Tenn. Ch. 196; Holt v. Manier, 1 Lea, 488; Sample v. Cochran, 82 Ind. 260 (it makes no difference that the obligation was not enforceable against the principal); Clow v. Derby Coal Co.

he would have taken it, the surety is released regardless of the care or negligence of the payee.¹ A waste or misapplication of a pledge or other security or its avails,² or a fraudulent sale of property held as security at less than its value,³ will entitle the surety to relief to the extent of his injury from such waste, sale, or sacrifice on such sale. Where securities are surrendered their value will be estimated as of the time they were given up, not at the time of the trial of an action against the surety; and if they are upon real property their value in the county in which it is situated governs.⁴ The fact that there are other sureties on other notes given to secure portions of the same debt will not affect the defendant's right to be released to the full extent of the value of the surrendered securities, the other sureties not being parties to the action.⁵

In order that the creditor's act shall have the effect stated upon a surety the former must have knowledge of the existence of the relation of principal and surety. If such fact does not appear otherwise it may be shown by extrinsic evidence.⁶ The creditor is affected by knowledge acquired at any time before he does an act which alters the surety's rights.⁷ It was contended in a Louisiana case that the sureties were not affected

98 Pa. 432; *Brennan v. Clark*, 29 Neb. 385, 399, 45 N. W. Rep. 472; *Struss v. Masonic Savings Bank*, 89 Ky. 61, 11 Ky. L. Rep. 333, 11 S. W. Rep. 769; *Holmes v. Williams*, 177 Ill. 386, 53 N. E. Rep. 93; *Bronson v. McCormick Harvesting Machine Co.*, 52 Neb. 342, 72 N. W. Rep. 312; *Foerderer v. Moors*, 91 Fed. Rep. 476, 33 C. C. A. 641; *Wood v. Brown*, 104 Fed. Rep. 203, 43 C. C. A. 474; *McMullen v. Ritchie*, 64 Fed. Rep. 253; *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. Rep. 865.

¹ *First Nat. Bank v. Lillard*, 55 Mo. App. 675.

² *Phares v. Barbour*, 49 Ill. 370; *Vose v. Florida R. Co.*, 50 N. Y. 369; *Wendell v. Highstone*, 52 Mich. 552, 18 N. W. Rep. 354; *Austin v. Belknap*, 54 Vt. 495; *Nelson v. Munch*, 28 Minn. 314, 9 N. W. Rep. 863; *Bixby v. Barklie*, 26 Hun. 275; *Hutchinson*

v. Woodwell, 107 Pa. 509, 520; *Templeton v. Shakley*, id. 370; *Sternbach v. Friedman*, 34 App. Div. 534, 54 N. Y. Supp. 608.

³ *Everly v. Rice*, 20 Pa. 297.

The creditor, if free from fault, is not liable for the neglect of an officer resulting in the loss of a security. *Keeble v. Jones*, 1 Tenn. Cas. 541.

⁴ *Bank v. Gifford*, 79 Iowa, 300, 44 N. W. Rep. 558.

⁵ *Id.*

⁶ *Harris v. Brooks*, 21 Pick. 195, 33 Am. Dec. 254; *Carpenter v. King*, 9 Met. 511, 43 Am. Dec. 405; *Wilson v. Foot*, 11 Met. 285; *Horne v. Bodwell*, 5 Gray, 457; *Guild v. Butler*, 127 Mass. 386.

⁷ *Guild v. Butler*, *supra*; *Pooley v. Harradine*, 7 El. & B. 431; *Bailey v. Edwards*, 4 B. & S. 761; *Ewin v. Lancaster*, 6 id. 571; *Swire v. Redman*, 1 Q. B. Div. 536, 542.

by a sale of their principal's property made by the creditor when the latter's judgment against the debtor was largely in excess of the amount for which they were bound. The theory of the creditor was "that, having a final and unqualified judgment against the defendant for \$33,000 as their agent, the plaintiff had the right to receive payment or securities from him for the deficiency which was not covered by the obligations of the sureties," which aggregated only \$10,000; that it had the right to appropriate property turned over by him to the satisfaction of the difference between those sums; that only when that difference was made up could the sureties complain of any application made of such property, and then only to the extent of any damage they had sustained. This contention was overruled and the sureties were adjudged to be released by the unauthorized sale of the securities received from their principal.¹ The principle of this case is undoubtedly correct. It finds support in the English cases which establish the proposition thus stated by Mr. Mayne: Where a debtor, whose whole debt is covered by a guaranty, becomes a bankrupt and a dividend is received, the creditor can of course only recover the balance from the surety. Where, however, only a portion of the debt is so secured the creditor cannot apply the dividend to the unsecured portion, and recover the whole of the residue from the surety. The latter has a right to have the dividend applied ratably to the whole debt, and a proportionate deduction made from the whole amount for which he is liable.² And so, if the difference between his liability and the entire debt is covered by the guaranty of another person, each surety may claim a ratable deduction out of each pound of the amount of debt to which their respective guaranties extend. The plaintiff cannot apply the whole of the dividends to either part of the demand at his own election and thus vary, at his own pleasure, the extent of the responsibility of the sureties.³ In all

¹ *New England Mut. L. Ins. Co. v. Randall*, 42 La. Ann. 260, 7 So. Rep. 679. The code of Louisiana provides: "The surety is discharged when by the act of the creditor the subrogation to his rights, mortgages and privileges can no longer operate in favor of the surety."

² *Dumont v. Fry*, 14 Fed. Rep. 293.

³ *Mayne on Dam.* (6th Eng. ed.), 331, citing *Bardwell v. Lydall*, 7 Bing. 489; *Raikes v. Todd*, 8 A. & E. 846; *Gee v. Pack*, 33 L. J. (Q. B.) 49; *Thornton v. McKewan*, 1 H. & N. 525; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, 7 id. 680.

these cases the court construed the contract by the surety as being a guaranty of a limited portion of the debt, in which case the surety who pays that portion has in respect of it all the rights of the creditor, including the right to a dividend.¹ A different case, however, arises where the surety undertakes to be liable for the whole of the debt, subject to a limitation that he is not to be called upon to pay more than a specified amount. In such a case the creditor is entitled to redeem the whole debt by any dividends he can obtain, and to call upon the surety to pay the balance to an amount not exceeding the sum for which he has become bound.²

A surety is also discharged by the tender of payment to the creditor, refused by him.³ An informal offer of payment when refused by the creditor is generally construed as a mere gratuitous indulgence, having no legal effect upon the surety's liability unless it operates to prejudice or hinder him. But if the principal is insolvent at the time such a tender is declined the case is different, and becomes one of positive wrong to the surety, discharging his liability.⁴ So, if the creditor purchase property on which the debt for which the surety is bound is a [563] lien, and removes it from the state;⁵ if the creditor has the means of satisfaction in his hands, and suffers such means to pass into the hands of the debtor;⁶ or if a creditor of an estate, with surety, refuses to present his claims to the commissioners for adjustment when requested to do so, the surety will be discharged.⁷ But where the surety applies to a court of

¹ See per Lord Hatherley, *Hobson v. Bass*, *supra*, at p. 794.

² *Ellis v. Emmanuel*, 1 Ex. Div. 157.

³ *Joslyn v. Eastman*, 46 Vt. 258; § 271; *Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. Rep. 105; *Hayes v. Josephi*, 26 Cal. 535; *Sears v. Van Dusen*, 25 Mich. 351; *McAllister v. Pitts*, 58 Neb. 424, 78 N. W. Rep. 711; *Wolf v. Madden*, 82 Iowa, 114, 47 N. W. Rep. 981; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254.

⁴ *White's Adm'r v. Life Ass'n*, 63 Ala. 419, 35 Am. Rep. 45; *Life Ass'n v. Neville*, 72 Ala. 517, 49 Am. Rep. 71. See *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606, disapproved of

in *Spurgeon v. Smitha*, 114 Ind. 453, 456, 17 N. E. Rep. 105.

If a debtor owing two demands offers to pay one of them, and the creditor induces him to pay the other, the indorsers upon the demand the debtor designed to pay are not released. *Second Nat. Bank v. Poucher*, 56 N. Y. 348.

⁵ *McMullen v. Hinkle*, 39 Miss. 142.

⁶ *Commonwealth v. Vanderslice*, 8 S. & R. 452.

⁷ *McColum v. Hinkley*, 9 Vt. 143.

As to the rule under the Illinois statute of 1869, see *Huddleston v. Francis*, 124 Ill. 195, 16 N. E. Rep. 243, and cases there cited.

chancery before suit is brought against him, as he may do, to be relieved from his obligation on a debt for which a decedent's estate is primarily liable, and it appears that such estate would not have paid the whole debt, the court will require the surety to pay into court, for the benefit of the creditor, the deficiency, out of which the surety will be allowed to deduct his costs, and the balance, if any, will be paid to the creditor.¹

Where the creditor has obtained a lien upon property by judicial process or judgment, and releases it, the surety for the debt will be discharged to the extent of the value of the property so released.² If the right of the creditor to resort to the principal debtor's property is lost in consequence of his exaction of unlawful interest, without the surety's knowledge, the latter is not liable.³

In Kentucky and Pennsylvania the surety on a negotiable note, made payable at and discounted to and owned by a bank which holds on general deposit for the principal in the note, at the maturity thereof, a sum more than sufficient to pay the same, is discharged from liability thereon by reason of the failure of such bank to apply to the payment of the note a sufficient sum from this unappropriated deposit, and by permitting the entire deposit to be checked out for other purposes by the principal who afterwards becomes insolvent.⁴ In Indiana the right of the bank, under a similar state of facts, to apply the deposit to the payment of its demand is admitted, but it is held that the bank is not bound to so apply it.⁵ "The

¹ McCollum v. Hinkley, 9 Vt. 143; Eddy v. People, 187 Ill. 304, 58 N. E. Rep. 397. the surety. Mingus v. Daugherty, 87 Iowa, 56, 54 N. W. Rep. 66, 43 Am. St. 354.

² Moss v. Pettengill, 3 Minn. 217; Parker v. Nations, 33 Tex. 210; Jenkins v. McNeese, 34 Tex. 189; Mulford v. Estudillo, 23 Cal. 94; Bank v. Fordyce, 9 Pa. 275, 49 Am. Dec. 561; Sterne v. Bank, 79 Ind. 549; Sterne v. McKinney, id. 578. See Lusk v. Ramsay, 3 Munf. 417. ³ Small v. Hicks, 81 Ga. 691, 8 S. E. Rep. 628.

⁴ Pursifull v. Pineville Banking Co., 97 Ky. 154, 30 S. W. Rep. 203, 53 Am. St. 409, distinguishing National Mahaiwe Bank v. Peck, 127 Mass. 298, 34 Am. Rep. 368; Commercial Nat. Bank v. Henninger, 105 Pa. 496; Mechanics' & Traders' Bank v. Seitz, 150 Pa. 632, 24 Atl. Rep. 356, 30 Am. St. 853.

⁵ Second Nat. Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239.

The lien of a landlord for rent due is a security, and if it is lost through his act or neglect the surety is discharged. The question of negligence is for the jury; the mere non-enforcement of the lien does not discharge

cases where the right becomes a duty on the part of the bank rest on the special equity of the party, usually the indorser, to have the payment enforced against the depositor as the one primarily liable. And even in these cases all the circumstances enumerated must exist. Thus the deposit must be sufficient at the time of maturity of the note. Subsequent deposits will not raise the duty.¹ And the deposit must not have been previously appropriated to any other uses.² . . . And lastly, the deposit must be to the credit of the party primarily liable.”³

In a recent New York case a mortgagor had conveyed the premises, subject to the mortgage debt, to a person who did not covenant to pay such debt. It was not the effect of the conveyance to create the technical relation of principal and surety between the parties; but as the land was the primary fund for the payment of the debt, the mortgagor, to the extent of the value of the land, had an equity therein similar to that of a surety. On the refusal of the mortgagee to foreclose the mortgage at the request of the mortgagor, the latter was relieved from liability for any deficiency arising on the sale to the extent of any depreciation in the value of the property resulting from the delay in foreclosing; and, in the absence of such proof of depreciation, was entitled to be relieved from liability for a deficiency to the extent of the taxes, water rents and interest upon the mortgage which were permitted to accumulate after the request to foreclose was given.⁴

§ 738. Same subject; release limited to injury sustained by surety. The surety is not, however, discharged by release of securities or liens unless he is injured;⁵ or no farther than his means of indemnity are impaired.⁶ Thus, a release of a

¹ *People's Bank v. Legrand*, 103 Pa. 309, 49 Am. Rep. 126; *First Nat. Bank v. Shreiner*, 110 Pa. 188, 20 Atl. Rep. 718.

² *Id.*; *German Nat. Bank v. Foreman*, 138 Pa. 474, 21 Atl. Rep. 20. This case, it is said in that cited in the next note, concedes the principle “though an exception of doubtful correctness was made against a mere notice from the depositor not to pay, unaccompanied by a specific appropriation to a different purpose.”

³ *First Nat. Bank v. Peltz*, 176 Pa. 513, 518, 25 Atl. Rep. 218, 53 Am. St. 686, 36 L. R. A. 832.

⁴ *Gottschalk v. Jungmann*, 78 App. Div. 171, 79 N. Y. Supp. 551. Two judges dissented.

⁵ *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49; *American Bank v. Baker*, 4 Met. 164.

⁶ *Barhydt v. Ellis*, 45 N. Y. 107; *Vose v. Florida R. Co.*, 50 id. 375; *Underhill v. Palmer*, 10 Daly, 478; *Lewis v. Armstrong*, 80 Ga. 402, 7 S. E. Rep.

part of the property included in the mortgage securing a debt, without more, will not discharge a surety; for, if there should still be enough left for his protection, he is entitled to have it subjected to the payment of the debt; and, if sufficient to pay it, he is not, of course, prejudiced by the partial release and cannot complain.¹ So the surrender of a fictitious or forged bond held as security will not affect the liability of a surety;² nor the sale of pledged collateral for its market value, the proceeds being applied as a credit.³ If securities are exchanged the surety is released to the extent of the difference between the value of those surrendered and those received at the time of the exchange.⁴

In *Cummings v. Little*⁵ the defendants were joint and several promisors upon three notes payable to one Smith or order. Smith also held a mortgage from one of the defendants of personal property of less value than the amount of the notes. Afterwards, without consulting the other defendants, who were, in fact, sureties on the notes, though not signing as such, he discharged the mortgage. The notes were trans- [564] ferred to the plaintiff by the payee after maturity. Davis, J., delivering the opinion, said: "It has been treated as a doubtful question whether the value of the property stated in the mortgage is not conclusive upon the parties. Admitting that it is conclusive, it is so only in regard to the value at the date of the mortgage. Any subsequent loss or depreciation may properly be taken into consideration in estimating the value of the property at the time when the mortgage was discharged. And it is obvious that the discharge of the mortgage could have injured the sureties only to the amount of the value of the property so estimated. And, though the sureties are discharged to that extent, for the excess of the amount due at the

114; *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. Rep. 353; *Bedwell v. Gehart*, 67 Iowa, 44, 24 N. W. Rep. 585; *Australian Joint Stock Bank v. Hetherington*, 14 N. S. W. L. R. 503 (law); *Noble v. Murphy*, 91 Mich. 653, 52 N. W. Rep. 148, 30 Am. St. 507; *Denny v. Seeley*, 34 Ore. 364, 368, 55 Pac. Rep. 976, and cases cited; *Attorney-General v. Huon*, 7 Vict.

L. R. (Eq.) 30; *Mingus v. Daugherty*, 87 Iowa, 56, 54 N. W. Rep. 66.

¹ *Bonney v. Bonney*, 29 Iowa, 448.

² *Loomis v. Fay*, 24 Vt. 240.

³ *Denny v. Seeley*, 34 Ore. 364, 55 Pac. Rep. 976.

⁴ *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798, 16 C. C. A. 425; *Bank of Victoria v. Smith*, 20 Vict. L. R. 450.

⁵ 45 Me. 183.

date of the discharge, over and above the value of the property when released, the sureties are still liable.¹ But it does not follow that they are liable in this action. If an action at law can be maintained upon the note, it cannot be against the principal and sureties *jointly*. For, in such action, the defendants cannot be separated in the judgment. They must stand or fall together. But they are not liable for the same amount. How, then, can judgment be entered up? There is no provision of law by which the principal may be held for the whole, and the sureties for a part only, and several executions issued accordingly. Nor has this court general equity powers, as in some of the states, by which, after judgment against all the parties, the plaintiff may be enjoined from enforcing it against the sureties for the whole amount. Therefore, in an action at law, unless they may prove the release of the collateral security as an entire defense to the action, they have no remedy.² In this action, if liable at all, they are liable for the whole amount of the note. Not being liable for the whole, they cannot be held in this suit for any part. If the plaintiff had released the principal he would have discharged the sureties. But a release of collateral securities of less value than the amount of the note discharged the sureties *pro tanto* only. As [565] to the plaintiff's remedy for the balance, it is unnecessary for us to express any opinion."³

Where the creditor has taken a security from his debtor, after a surety had become bound for the debt under an arrangement with the debtor, which binds the creditor in good faith to discharge the security upon an agreed event other than the actual payment of the debt, the discharge of the security pursuant to such an arrangement will not necessarily discharge the surety. This was held in a case⁴ involving these facts: A creditor, after the failure of the surety, who was an accommodation indorser of a negotiable note not then due, applied to the maker of the note for further security, who,

¹ American Bank v. Baker, 4 Met. 164; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Neff's Appeal, 9 W. & S. 36; Everly v. Rice, 20 Pa. 297; Payne v. Commercial Bank, 6 Sm. & M. 24.

² Baker v. Briggs, 8 Pick. 122, 19 Am. Dec. 311.

³ See Carroll v. Bowie, 7 Gill, 34.

⁴ Pearl St. Congregational Society v. Imlay, 23 Conn. 10.

thereupon, made a mortgage of real estate sufficient to secure the debt upon the parol condition that the creditor should release the mortgaged premises upon the debtor's providing other satisfactory security, soon after which the debtor became bankrupt, and some months after, and before the note became due, the creditor accepted as security the indorsement of the note by a responsible person under the name of the original surety, and thereupon, without notice to the original surety, released the mortgaged premises. The fact that the mortgage had been taken and was held by the creditor came to the knowledge of the surety; but the parol agreement to discharge it was wholly unknown to him. It was held in a suit by the creditor against the original surety on the note so indorsed that the above facts constituted no valid defense.¹

§ 739. **Creditor's duty to acquire liens.** The direct discharge of a lien or security for the debt, whether it be one created by contract, or obtained by attachment or execution levy, or by judgment, will relieve a surety to the extent that he suffers loss thereby; yet, where the loss of a security does not arise from a positive or affirmative act of the creditor, but results from his neglect to take some measures to protect or continue it, and render it effectual and productive, the surety has not always the same ground of complaint. As to securities in the hands of the creditor when the surety assumes his obligation, and the existence of which for what they purport to be must be presumed to be contemplated by the [566] surety, conscience and good faith may impose some obligation upon the creditor, assuring the surety against any undisclosed infirmity known to such creditor or traceable to his act,² and against any disappointment by the failure to do any act necessary to make such security effective. Thus, the failure of the creditor to have recorded the bill of sale of a vessel given him as security by the principal, in consequence of which she was taken possession of by a subsequent purchaser, was held to have discharged the surety to the full extent of her value.³

¹ See *Sheehan v. Taft*, 110 Mass. 331.

² *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665.

Burr v. Boyer, 2 Neb. 265; *Toomer v.*

Dickerson, 37 Ga. 428. See *Evans v.*

Kister, 92 Fed. Rep. 828, 35 C. C. A. 28.

Where collateral securities pledged

³ *Capel v. Butler*, 2 Sim. & S. 457; for the payment of a note consisted

Because of the duty to pay his principal's debt which the surety has assumed and the right vested in him to pay it and become subrogated to the privileges of the creditor, the latter is not bound to take active measures to obtain payment from the principal unless required to do so by the surety's contract, nor to obtain security; and it has been held that he is not bound to active diligence to preserve liens which he has acquired subsequent to the surety becoming bound; that he may omit to bring suit, or otherwise to prefer the claim against the principal or his estate;¹ that he may omit to take out execution, or countermand one already issued before levy; may omit to

of tax-sale certificates and notes, the neglect of the pledgee to collect money paid to the county auditor in redemption from tax sales represented by said certificates or to commence action upon the notes until the same had become barred by the statute of limitations was such negligence as rendered the pledgee liable to the pledgor for the value of the securities pledged. *First Nat. Bank v. O'Connell*, 84 Iowa, 377, 51 N. W. Rep. 162, 35 Am. St. 313.

¹ *Flentham v. Steward*, 45 Neb. 640, 63 N. W. Rep. 924; *Eckhoff v. Eickenbary*, 52 Neb. 332, 72 N. W. Rep. 308; *Bank of Maywoods v. Estate of McAllister*, 56 Neb. 188, 76 N. W. Rep. 552; *Osborne v. Gullikson*, 64 Minn. 218, 66 N. W. Rep. 965; *Pinch v. McCulloch*, 72 Minn. 71, 74 N. W. Rep. 897; *Blanding v. Wilsey*, 107 Iowa, 46, 77 N. W. Rep. 508; *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798, 16 C. C. A. 425; *Purdy v. Forstall*, 45 La. Ann. 814, 13 So. Rep. 95; *Johnson v. Planters' Bank*, 4 Sm. & M. 165, 43 Am. Dec. 480; *Cohen v. Commissioners*, 7 Sm. & M. 487; *Cain v. Bates*, 35 Mo. 427; *Hathaway v. Davis*, 33 Cal. 161; *People v. White*, 11 Ill. 341; *Hooks v. Bank*, 8 Ala. 580; *Minter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Fetrow v. Wiseman*, 40 Ind. 148; *Sibley v. McAllister*, 8 N. H. 389; *McBroom v.*

Governor, 6 Port. 32; *Pearson v. Gayle*, 11 Ala. 278; *Ray v. Brenner*, 12 Kan. 105; *Villars v. Palmer*, 67 Ill. 204; *Mitchell v. Williamson*, 6 Md. 210; *Vredenberg v. Snyder*, 6 Iowa, 39; *Moore v. Gray*, 26 Ohio St. 525; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102; *Dye v. Dye*, 21 Ohio St. 86, 8 Am. Rep. 40; *Richards v. Commonwealth*, 40 Pa. 146; *Hagood v. Blythe*, 37 Fed. Rep. 249; *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. Rep. 906; *Benedict v. Olson*, 37 Minn. 431, 35 N. W. Rep. 10; *Edwards v. Dargan*, 30 S. C. 177, 8 S. E. Rep. 858; *Alexander v. Byrd*, 75 Va. 690; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 id. 491; *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606 (no distinction made between indulgence with the express consent or even request of the creditor and silent delay if there is no change in the contract); *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. Rep. 621; *Star Wagon Co. v. Swezy*, 63 Iowa, 520, 19 N. W. Rep. 298; *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. Rep. 39; *French v. Bates*, 149 Mass. 73, 81, 21 N. E. Rep. 237, 4 L. R. A. 149; *Smith v. Freyler*, 4 Mont. 489, 47 Am. Rep. 358, 1 Pac. Rep. 214; *Harris v. Newell*, 42 Wis. 687; *Hawkins v. Mims*, 36 Ark. 145, 38 Am. Rep. 30. But see *McCullum v. Hinkley*, 9 Vt. 143; *Dorsey v. Wayman*, 6 Gill, 59.

revive a judgment to continue it as a lien, or to enroll it when essential to create a lien,¹ or may discontinue an action whether property has been attached or not.² If the surety has the same opportunity to administer upon the estate of his principal that the creditor has, equity will not hold the latter responsible for mere neglect.³ The rule as stated by the Connecticut court is sustained by the cases cited to this section: In order to discharge a surety there must be a release of "some mortgage, pledge or lien, some right or interest in property which the creditor can hold in trust for the surety and to which the surety, if he pays the debt, can be subrogated, and the right to apply or hold must exist and be absolute."⁴ This rule will not apply where the failure to sue or the forbearance in other matters results from a contract between debtor and creditor,⁵ although there is no injury sustained by the surety;⁶ nor where the neglect is so gross as to amount to fraud.⁷

As the creditor is a trustee in respect to any security he may obtain for the debt for which a surety is bound, he would seem to owe, as a duty to the surety, ordinary diligence at

¹ *United States v. Simpson*, 3 P. & W. 437, 24 Am. Dec. 331; *Mandorff v. Singer*, 5 Watts, 172; *Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Pickens v. Finney*, 12 Sm. & M. 468; *McGee v. Metcalf*, id. 535, 51 Am. Dec. 122; *Bel lows v. Lovell*, 4 Pick. 153, 5 id. 307; *Chipman v. Todd*, 60 Me. 282; *Schroep pell v. Shaw*, 3 N. Y. 446; *Terrel v. Townsend*, 6 Tex. 149; *Knight v. Charter*, 22 W. Va. 422; *Kindt's Ap peal*, 102 Pa. 441; *Winton v. Little*, 94 id. 64; *First Nat. Bank v. Homes ley*, 99 N. C. 531, 6 S. E. Rep. 797; *Forbes v. Smith*, 5 Ired. Eq. 369, 49 Am. Dec. 432; *Brown v. Chambers*, 63 Tex. 131; *Crawford v. Gaulden*, 33 Ga. 173; *Lumsden v. Leonard*, 55 Ga. 374; *Fuller v. Tomlinson*, 58 Iowa, 111, 12 N. W. Rep. 127; *Adams & F. Harvester Co. v. Tomlinson*, 58 Iowa, 129, 12 N. W. Rep. 139. See *Coombs v. Parker*, 17 Ohio, 289, 49 Am. Dec. 459; *Wornell v. Williams*, 19 Tex. 180; *Herrick v. Orange County Bank*, 27 Vt. 584; 2 Am.

Lead. Cas., notes to *Pain v. Packard* and *King v. Baldwin*, 364-418; note to *Rees v. Berrington*, 2 *Lead. Cas.* in *Eq.* 1867.

² *Bank v. Rogers*, 16 N. H. 9; *Barney v. Clark*, 46 id. 513; *Somersworth Savings Bank v. Worcester*, 76 Me. 327, applying the rule in *New Hamp shire* to a case governed by its law.

³ *Grindol v. Ruby*, 14 Ill. App. 439.

⁴ *Glazier v. Douglass*, 32 Conn. 393; *Tyler v. Waddingham*, 58 id. 375, 398, 20 Atl. Rep. 335, 8 L. R. A. 657.

⁵ *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. Rep. 817; *Stuart v. Lancaster*, 84 Va. 772, 6 S. E. Rep. 139; *Day v. Martin*, 78 Va. 1; *Newark v. Stout*, 52 N. J. L. 35, 47, 18 Atl. Rep. 943; *Calloway's Ex'r v. Price's Adm'r*, 32 Gratt. 1; *Farnsworth v. Coots*, 46 Mich. 117, 8 N. W. Rep. 705.

⁶ *Forbes v. Sheppard*, *supra*.

⁷ *Newark v. Stout*, *supra*. See *Struss v. Masonic Savings Bank*, 89 Ky. 61, 11 Ky. L. Rep. 333, 11 S. W. Rep. 769.

[567] least to preserve it. And when it is lost in consequence of a want of that diligence, the surety is relieved to the same extent as when the creditor by a positive act relinquishes or otherwise renders it unavailing. The latter is not bound to exert himself to obtain a lien; but if he chooses to do so, he is bound to ordinary care and diligence in preserving it for the interest of all parties concerned.¹ In *Taft v. Gifford*² D., as principal, and G., as surety, gave a joint note to T., in March, 1841, payable in April, 1842. In April, 1843, T. demised a farm to D. for one year, by a written lease which contained a provision that the produce and profits of the farm should be holden for the payment (among other debts of D.) of the aforesaid note. T. took no measures to obtain the produce of the farm, but permitted D. to dispose of it without objection; G. had no knowledge of these provisions in the lease until after D. had disposed of such produce. Held, in a suit by T. on the note, that his omission to obtain the produce of the farm and apply it to the payment or part payment of the note did not discharge G. from his liability to pay it in full. The principal was defaulted and the surety defended. His defense was put

¹ *City Bank v. Young*, 43 N. Y. 457; *Sherraden v. Parker*, 24 Iowa, 28; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Lochrane v. Solomon*, 38 Ga. 286; *Merchants' Bank v. Cordevoille*, 4 Rob. (La.) 506; *Saulet v. Trepagnier*, 2 La. Ann. 427; *Ramsey v. Westmoreland Bank*, 2 P. & W. 203; *Watts v. Shuttleworth*, 5 H. & N. 235; *Gillespie v. Darwin*, 6 Heisk. 21; *Hayes v. Little*, 52 Ga. 555; *Clopton v. Spratt*, 52 Miss. 251; *Slatterly v. Police Jury*, 2 La. Ann. 444; *Watson v. Alcock*, 1 Sm. & Giff. 319, affirmed, 4 De Gex, Mac. & G. 242; *Ex parte Mure*, 2 Cox, 63; *Miller v. Berkey*, 27 Pa. 317; *Toomer v. Dickerson*, 37 Ga. 428; *Burr v. Boyer*, 2 Neb. 265; *Teaff v. Ross*, 1 Ohio St. 469; *Mayhew v. Crickett*, 2 Swanst. 185. See *Black River Bank v. Page*, 44 N. Y. 453.

There is a conflict of authority on this proposition. In Nebraska and Georgia it is held that the creditor's

neglect to file a chattel mortgage exonerates the surety *pro tanto*. *Toomer v. Dickerson*, *Burr v. Boyer*, *supra*. The same rule is applied to such neglect of a real-estate mortgage in Ohio (*Teaff v. Ross*, *supra*); but it is otherwise in Indiana and South Carolina. *Philbrooks v. McEwen*, 29 Ind. 347; *Lang v. Brevard*, 3 Strobb. Eq. 59; *Hampton v. Lévy*, 1 McCord Eq. 107.

If an assignee of the creditor takes securities held by him with knowledge of an express agreement between the former and the surety that they shall be collected, the failure to use reasonable diligence to that end releases the latter, though he has not taken any steps to hasten the performance of the creditor's duty. *Crim v. Fleming*, 101 Ind. 154; *Smith v. McKean*, 99 id. 101.

² 13 Met. 187.

on the ground that the plaintiff voluntarily relinquished a security which was given him by the principal, and from which the whole or a part of the amount of this note might have been realized; that, by a rule of equity, adopted as a rule of law, the defendant is discharged in full or *pro tanto*. Shaw, C. J., said: "The court are of the opinion that the facts do not bring the case within the principle stated, even supposing — of which we give no opinion — that this would be a good defense in a joint action upon a joint note against principal and surety. The plaintiff received nothing under this provision. It [568] was a mere executory agreement authorizing the plaintiff to take possession of the produce when it should come into existence; and if he had exercised that power and taken such possession before the right of any creditor or purchaser had intervened it might have given him a lien.¹ But until possession taken he had no lien, and could not hold the produce against a *bona fide* purchaser or attaching creditor.² And we think he was not bound to any active diligence in availing himself of the power to obtain a lien any more than the holder of a note, with a surety, is bound to active diligence in securing his note by attachment of the property of the principal when he has an opportunity to do so.³ It was a collateral security, not given at the time the note was made, but afterwards, and not taken with the knowledge or for the use and benefit of the surety. It was a means of obtaining a pledge at the option of the plaintiff, of which he might have availed himself or not, but it did not constitute an actual security. The plaintiff's forbearing to act upon this executory agreement and taking no measures to enforce it was not such a voluntary relinquishment of any pledge or security as to bring the case within the principle relied on by the defendant."⁴

Where a receiver was directed in making a sale to retain a lien, as well as to take personal security, and the surety knew that such order had been made and expected that it would be complied with, and signed as surety, relying upon compliance, but did not notify the promisee of such reliance, the contract was not affected by the neglect of the receiver to retain a lien.

¹ Bartlett v. Williams, 1 Pick. 288.

⁴ Grisard v. Hinson, 50 Ark. 229, 6

² Jones v. Richardson, 10 Met. 481. S. W. Rep. 906.

³ 1 Story's Eq., § 325.

"There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee, or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise."¹

§ 740. **Value of released securities.** Where the creditor has released a security to the benefit of which the surety would be entitled on the performance of his contract, whether the latter is injured, or on which party is the burden of proof in respect to the amount of damages, depends largely on the facts of the particular case. Where a judgment against the principal was discharged and there was no proof as to its value, it was presumed to be of its face value.² This conclusion would seem to be correct on the general presumption of solvency, and without invoking the principle stated, which is undoubtedly correct, "that when the amount is made incapable of estimation by the act of the wrong-doer he must be made responsible for the value it may, by reasonable possibility, turn out to be of." A creditor who held sundry de- [569] mands as a collateral security for a debt for which a surety was also bound compromised with the debtors in such demands and sued the surety for such deficiency. The plaintiff insisted that these compromises were, *prima facie*, beneficial, rather than prejudicial, to the defendants, and if not so, it was incumbent on them to prove it, it being reported by the master that the compromises were made in good faith. The court said, however, that it was not sufficient for the plaintiff to prove that they acted in good faith. They might thus act, on the opinion that they were authorized to make the compromise without consulting the sureties; or they might think the com-

¹ Joyce v. Auten, 179 U. S. 591, 595, 21 Sup. Ct. Rep. 227, citing Goodman v. Simonds, 20 How. 343, 366; Dair v. United States, 16 Wall. 1; Merriam v. Rockwood, 47 N. H. 81; Selser v. Brock, 3 Ohio St. 320; Passumpsic Bank v. Goss, 31 Vt. 315; State v. Potter, 63 Mo. 212, 21 Am. Rep. 440; Worrell v. Williams, 19 Tex. 180.

² Fielding v. Waterhouse, 40 N. Y. Super. Ct. 424. See § 1132 for the rule as to conversion of securities.

Where a creditor relinquishes a lien on his debtor's property the *onus* is on him, in a suit against the surety, to show that the latter was not injured thereby. Allen v. O'Don-ald, 23 Fed. Rep. 573.

promises would be beneficial to them. But if they have in fact been prejudicial and not beneficial, the plaintiffs are clearly responsible, and must account for the securities at their nominal or real value. And they are bound to prove all the facts and circumstances in reference to which the compromises were made. If these should be proved, and it should thereupon appear that the defendants have not been and cannot be prejudiced by the compromises, then another question would be raised, namely, whether the plaintiffs would be bound to account for the securities at their nominal or real value.¹ There is doubtless a presumption that the surety is injured by the release of any security, but this presumption would not of itself entitle him to any substantial deduction from the debt; but securities usually import a certain value or amount secured, and the value or amount thus indicated may usually be taken as a measure of the actual value in the absence of countervailing evidence.²

§ 741. **Surety's right to put creditor in motion.** The doctrine that a surety may call upon his creditor to collect the debt by legal proceedings against the principal debtor, although such duty is not expressly assumed by the contract, and that the surety is discharged to the extent that he is damaged by the creditor's delay, was established at law in New York in *Pain v. Packard*,³ and approved by the court of errors in *King v. Baldwin*,⁴ overruling the court of chancery.⁵ The principle has not been formally denied, but the courts have not been disposed to apply it except in cases where the surety became such at the inception of the contract, or the relation had its origin in dealings between the parties originally bound by the contract, subsequent to its inception, of which the creditor had notice.⁶ It does not apply where there is a guaranty of payment made by a vendor on the sale to the plaintiff of a bond and mortgage, the former receiving the full amount of the security as the consideration of the transfer, so

¹ *American Bank v. Baker*, 4 Met. 164.

² See *Cummings v. Little*, 45 Me. 183; *Vose v. Florida R. Co.*, 50 N. Y. 369.

³ 13 Johns. 174, 7 Am. Dec. 369.

⁴ 17 Johns. 384.

⁵ 2 Johns. Ch. 558.

⁶ See *Trimble v. Thorne*, 16 Johns. 151; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Remsen v. Beckman*, 25 N. Y. 552.

as to release the defendant from liability on his guaranty by reason of the neglect of an assignee of the bond and mortgage to proceed after notice to collect it, the property meanwhile having depreciated in value and the obligor having become insolvent.¹ The Tennessee and Pennsylvania courts have applied or recognized the same rule;² but it has been said by the former that it goes to the verge of the law.³ A surety cannot claim any benefit from his notice and the creditor's neglect to act upon it unless he establishes the solvency of his principal at the time notice was given and his subsequent insolvency. The principal is not solvent unless he is able to pay all his debts according to the ordinary usage of trade.⁴ The surety's notice must expressly state that he will consider himself discharged if the creditor does not proceed.⁵ The existence of the right in the surety to put the creditor in motion and to claim any benefit from his failure to act pursuant to the notice is denied by the great weight of authority.⁶

In several states statutes have been enacted which empower the surety to call upon the creditor to pursue the debtor by legal proceedings, and release the surety from liability if he is injured by the creditor's neglect to do so. The recent cases construing these statutes are collected in the note below; for obvious reasons they cannot be considered here.⁷

¹ *Newcomb v. Hale*, 90 N. Y. 326, 42 Am. Rep. 173.

² *Hancock v. Bryant*, 2 Yerg. 476; *Thompson v. Watson*, 10 id. 362; *Cope v. Smith*, 8 S. & R. 110, 11 Am. Dec. 582.

³ *Burrows v. Bank*, 6 Humph. 440.

⁴ *Herrick v. Borst*, 4 Hill, 650; *Marsh v. Dunkel*, 25 Hun, 167.

⁵ *Jackson v. Huey*, 10 Lea, 184, 43 Am. Rep. 381. See *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Coykendall v. Constable*, 48 Hun, 360, 1 N. Y. Supp. 9.

⁶ *Harris v. Newell*, 42 Wis. 687; *Hubbard v. Davis*, 1 Aiken, 296; *Hickock v. Farmers' Bank*, 35 Vt. 476; *Page v. Webster*, 15 Me. 269; *Mahurin v. Pearson*, 8 N. H. 539; *Bull v. Allen*, 19 Conn. 101; *Saseer v. Young*, 6 G. & J. 243; *Pintard v. Davis*, 21 N. J.

L. 632, 47 Am. Dec. 172; *Broughton v. Duvall*, 3 Call, 61; *Dennis v. Rider*, 2 McLean, 451; *Carr v. Howard*, 8 Blackf. 191; *Turner v. Hale*, 8 Kan. 38; *Ingels v. Sutliff*, 36 id. 444, 13 Pac. Rep. 828; *Findley v. Hill*, 8 Ore. 247, 34 Am. Rep. 748; *Rockwell v. Portland Savings Bank*, 39 Ore. 241, 64 Pac. Rep. 388; *Bank of Maywood v. Estate of McAllister*, 56 Neb. 188, 76 N. W. Rep. 552; *Osborne v. Smith*, 18 Fed. Rep. 126.

⁷ *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577; *Coles v. Ballard*, 78 Va. 139; *Hayward v. Fullerton*, 75 Iowa, 371, 39 N. W. Rep. 651; *Moore v. Peterson*, 64 Iowa, 423, 20 N. W. Rep. 744; *German American Bank v. Denmark*, 58 Iowa, 137, 12 N. W. Rep. 237; *Medley v. Tandy*, 85 Ky. 566, 4 S. W. Rep. 308; *Clark v. Barrett*, 19 Mo.

§ 742. Effect of releasing one or more of several parties.

The creditor will discharge sureties or reduce his recovery against them by releasing any party to whom they might have recourse for reimbursement or contribution after payment of the debt. Where the obligation is joint a release of one, whether principal or surety, will, at law, discharge all; but the rule is otherwise in equity.¹ The discharge of the principal will always discharge the sureties,² for he is bound to reimburse them; and if the creditor releases him, or he [570] makes a successful defense to the action on the merits, he is no longer under that obligation.³ Where a suit was brought against a sheriff and the two sureties on his official bond, on

App. 39; *Boatmen's Savings Bank v. Johnson*, 24 id. 316; *Sisk v. Rosenberger*, 82 Mo. 46; *Hickam v. Hollingsworth*, 17 id. 475; *Koenig v. Bramlett*, 20 Mo. App. 636; *Clark v. Osborn*, 41 Ohio St. 28; *Baker v. Kellogg*, 29 id. 663; *Meriden Silver Plate Co. v. Flory*, 44 id. 430, 7 N. E. Rep. 753; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 id. 492; *Darty v. Robinson*, 86 id. 382; *Shenandoah Nat. Bank v. Ayres*, 87 Iowa, 526, 54 N. W. Rep. 367; *Blanding v. Wilsey*, 107 Iowa, 46, 48, 77 N. W. Rep. 508; *Weir v. Dicker's Adm'r*, 11 Ky. L. Rep. 523 (Ky. Super. Ct.).

¹ *Rice v. Morton*, 19 Mo. 263; *State v. Matson*, 44 Mo. 305; *Towns v. Riddle*, 2 Ala. 694; *Woolley v. Louisville Banking Co.*, 81 Ky. 527, 539; *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. Rep. 586.

² A discharge under the bankrupt act of 1867 did not affect the sureties (*Cilley v. Colby*, 61 N. H. 63; *Bank v. Simpson*, 90 N. C. 467); though such discharge could not have been obtained but for the creditor's act. *Ex parte Jacobs*, L. R. 10 Ch. 211; *Sigourney v. Williams*, 1 Gray, 623; *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378. *Contra*, *Calloway v. Snapp*, 78 Ky. 561.

If the surety is fully indemnified against loss the release of his princi-

pal, without his consent and without payment, does not affect him. *Jones v. Ward*, 71 Wis. 152, 36 N. W. Rep. 711; *Fay v. Tower*, 58 Wis. 286, 16 N. W. Rep. 558. Nor will any act or omission of the creditor. *Crim v. Fleming*, 101 Ind. 154.

³ *Beale v. Cochran*, 18 Ga. 38; *McClosky v. Wingfield*, 29 La. Ann. 141.

In *Bank v. Robinson*, 13 Ark. 214, it was held that if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on the trial on a plea to the merits which would inure to the benefit of both if sued jointly, as a plea of payment or accord and satisfaction, such judgment in favor of the principal is not an estoppel against the plaintiff if pleaded by the surety in bar of the action against him. There is no privity between principal and surety, and the parties are not the same in the two suits; the questions in one are not precluded by the decision in the other. While it is true that satisfaction from either will conclude the creditor, and prevent his obtaining it again, yet he is not concluded by the decision in one case so that he may not, in the other, insist that he has not received satisfaction. See *McKellar v. Bowell*, 4 Hawks, 34;

the first trial judgment was recovered against all; the sheriff appealed, but the sureties did not, and on the final trial he was acquitted, and it was held that the first judgment could not be enforced against the sureties.¹ If, however, when the principal is released the right of action against the sureties is reserved, they are not discharged.² So if, in the discharge of one of several sureties, the right of action against the others is reserved, their rights are not affected by such discharge, for the discharged surety will still be liable for contribution.³ But without such reservation the discharge of one would be an injury to the others to the extent of such right to contribution. The release of one surety cannot be permitted to increase the obligation of the others; therefore, so much of the debt as the released party would otherwise have been bound

Douglass v. Howland, 24 Wend. 58; Jackson v. Griswold, 4 Hill, 528; Hudson v. Robinson, 4 M. & S. 475.

If a judgment is rendered against the maker of a non-negotiable note in proceedings supplementary to execution before notice is given of the assignment of the note, which judgment requires him to pay a certain portion of it to the judgment creditor's payee, such judgment is a defense *pro tanto* to the principal and his sureties in a subsequent action on the note by the payee or his assignee. Bostwick v. Bryant, 113 Ind. 448, 16 N. E. Rep. 378.

¹ Trotter v. Strong, 63 Ill. 272; State v. Matson, 44 Mo. 305; Brown v. Ayer, 24 Ga. 288; Rogers v. School Trustees, 46 Ill. 428; Tyner v. Hamilton, 51 Ind. 259; Stockton v. Stockton, 40 Ind. 225; Vose v. Florida R. Co., 50 N. Y. 369; McMillon v. McMillon, 7 Lea, 78; Coots v. Farnsworth, 61 Mich. 497, 28 N. W. Rep. 534.

² Boatmen's Savings Bank v. Johnson, 24 Mo. App. 316; Tobey v. Ellis, 114 Mass. 120; Mueller v. Dobschuetz, 89 Ill. 176; Stirewell v. Martin, 84 N. C. 4; Morse v. Huntington, 40 Vt. 488; Hood v. Hayward, 48 Hun, 330,

1 N. Y. Supp. 566; Smith v. Winter, 4 M. & W. 454; Boulton v. Stubbs, 18 Ves. 20; Kearsley v. Cole, 16 M. & W. 128; Owen v. Homan, 15 Jur. 339, 3 Eng. L. & Eq. 125; Ex parte Gifford, 6 Ves. 805; Note to Dunn v. Slee, 1 Holt's N. P. 399; Kirby v. Turner, 6 Johns. Ch. 242, Hopk. Ch. 309; Union Bank v. Beech, 3 H. & C. 672; Bateson v. Gosling, L. R. 7 C. P. 9; Hall v. Thompson, 9 Up. Can. C. P. 257; Green v. Wynn, L. R. 4 Ch. App. 204, L. R. 7 Eq. Cas. 28; Hubbell v. Carpenter, 5 N. Y. 171. See Austin v. Dorwin, 21 Vt. 38.

This rule governs where there is an agreement by the creditor not to sue the principal debtor within a stated time, and the right is reserved to sue the other parties who are bound. Kenworthy v. Sawyer, 125 Mass. 28; Hagey v. Hill, 75 Pa. 108, 15 Am. Rep. 583. And where there is an absolute obligation not to sue one of several sureties. Bowne v. Mount Holly Nat. Bank, 45 N. J. L. 360.

³ Clapp v. Rice, 15 Gray, 557, 77 Am. Dec. 387; Parmalee v. Lawrence, 44 Ill. 405; Thompson v. Lack, 3 C. B. 540, 54 Eng. C. L. 540.

to pay by way of contribution is discharged by his release.¹ A surety who assents to a change in the contract will be bound by the alteration; but a non-assenting co-surety will be discharged.²

In some states statutes have abrogated the rule that the voluntary release of one surety discharges the liability of his co-sureties. But it has been ruled in equity, notwithstanding, that where a levy made on the property of one surety by the request of a co-surety has been released by the creditor on the payment of the portion of the value of the property levied on, the other surety may claim the benefit of the full value of the property in diminution of his liability.³ A release under such a statute operates as a payment on the liability equal to the released surety's proportionate share thereof, which share is determined from the number of sureties and the amount of the total liability, and not from any agreement between the sureties fixing a different ratio of liability. It was not determined whether, in case of the insolvency of one of the unreleased sureties, those who are solvent may call on the surety who has been released for contribution; but, whether they may or not, the amount which the creditor may recover from those not released is not thereby reduced.⁴ Under a statute declaring that the settlement of a demand upon the receipt of money or other valuable consideration will bar an action upon it, the discharge of one of two joint debtors, the demand being outstanding, does not affect the other's liability.⁵

§ 743. Surety's right to defend between principals. A surety has the right for the protection of his own interest to defend a suit brought against his principal though not himself a party.⁶ When sued with the principal he has, of course, the

¹ Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; Jemison v. Governor, 47 Ala. 390; State v. Matson, 44 Mo. 305; Dodd v. Winn, 27 Mo. 501; Rice v. Morton, 19 Mo. 263; Sterling v. Forrester, 2 Bligh, 575; Hodgson v. Hodgson, 2 Keen, 704; Morgan v. Smith, 70 N. Y. 537; Deering v. Moore, 86 Me. 181, 29 Atl. Rep. 988, 41 Am. St. 534; Clark v. Mallory, 185 Ill. 227, 56 N. E. Rep. 1099, 83 Ill. App. 488.

² Mundy v. Stevens, 61 Fed. Rep. 77, 9 C. C. A. 366; Wolf v. Fink, 1 Pa. 435, 44 Am. Dec. 141; Crosby v. Wyatt, 10 N. H. 318.

³ Lower v. Buchanan Bank, 78 Mo. 67.

⁴ Walsh v. Miller, 51 Ohio St. 462, 38 N. E. Rep. 381.

⁵ Deering v. Moore, 86 Me. 181, 29 Atl. Rep. 988, 41 Am. St. 534.

⁶ Jewett v. Crane, 35 Barb. 208.

An indemnitor who is not per-

same right, and may set up any defense which pertains to the debt or demand. The payee of a note brought suit thereon for the use of a third person, who had become the owner, against one of the promisors, a surety; the consideration of the note was the sale of a tract of land by the payee to the principal. At the time of the sale there was an unsatisfied judgment against the vendor operating as a lien upon the land, and this judgment the beneficial plaintiff authorized the principal to discharge, promising to allow it as a credit against the note, and it was accordingly discharged. It was held that the promise to the principal inured to the surety; that it was a direct and original undertaking to allow the payment, not within the statute of frauds, and the instant it was made the note was extinguished *pro tanto*.¹ So where money was paid by a tenant for repairs which the landlord agreed to pay by deduction from the rent, it was held to be in effect a payment on account of rent, and as such should be allowed in favor of the surety.² He has a right to set up the defense that the contract was void in its inception, or any defense "inherent to the debt,"³ but not those which are personal to the debtor.⁴ He

mitted to furnish evidence in defense of his principal is not bound by the judgment. *Peterborough Real Estate Investment Co. v. Ireton*, 5 Ont. 47.

¹ *Cole v. Justice*, 8 Ala. 793.

² *Rosenbaum v. Gunter*, 3 E. D. Smith, 203.

³ *Conger v. Babbet*, 67 Iowa, 13, 24 N. W. Rep. 569; *Huntress v. Patton*, 20 Me. 28; *Denison v. Gibson*, 24 Mich. 187; *Morse v. Hovey*, 8 Paige, 197; *Carrol County Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. Rep. 313.

⁴ *Baldwin v. Gordon*, 12 Martin, 373; *Savage v. Fox*, 60 N. H. 17; *Wagoner v. Watts*, 44 N. J. L. 126; *Wiggins' Appeal*, 100 Pa. 155; *Winn v. Sanford*, 145 Mass. 303, 14 N. E. Rep. 119, 1 Am. St. 461; *Kimball v. Newell*, 7 Hill, 116; *Weed Sewing Machine Co. v. Maxwell*, 13 Mo. 486.

It is generally held that the de-

fense of duress at common law, where no statutory right has been violated, is personal to the individual who has been subjected to it. *Hanscombe v. Standing*, Cro. Jac. 187; *Wayne v. Sands*, 1 Freeman, 351; *Oak v. Dustin*, 79 Me. 23, 7 Atl. Rep. 815, 1 Am. St. 281; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Robinson v. Gould*, 11 Cush. 55.

There is an exception to the rule when the surety is a husband, wife, parent or child, and the principal is either of these. *Harris v. Carmody*, 131 Mass. 51, and cases there cited. And where a statutory right is violated. *Thomson v. Lockwood*, 15 Johns. 256; *Hawes v. Marchant*, 1 Curt. 136. And also where the indorser of a note becomes such without knowing that it was executed by the maker under duress at the hands of the holder. The indorser in such a case is deprived of his right

cannot, however, control the principal in respect to a defense which may be waived by his act. Thus, a surety to a bond for the purchase-money of a tract of land cannot set up [572] eviction by title paramount from the greater part of the tract, for the purpose of avoiding the contract, when the principal himself has acquiesced in a *pro tanto* abatement of the price.¹ The surety will not be precluded from making a defense merely because the principal will not join in it.² When the defense of usury is not available to the latter it cannot be made by the surety; as where the principal is prohibited by statute from setting up that defense.³ A bill was made by the principal in Ohio, taken to Virginia and there signed by the surety; it was usurious by the laws of Virginia but valid in Ohio, and it was held that the surety could not defend by recourse to the laws of Virginia.⁴

The failure of a surety to defend will not affect his right to indemnity unless it results from negligence in a case where an appearance would have been beneficial to the principal.⁵ The surety, when sued alone, may preserve his right to indemnity by giving his principal notice of the action and imposing upon him the responsibility of the defense. In such a case the principal is bound by the judgment.⁶ Where the surety so sued notifies his principal so as to enable him to defend, or to furnish the surety with a defense, the judgment is conclusive between them where there is no collusion; and, if satisfied by the surety, is the measure of damages against the principal. It would be iniquitous for the principal to stand by and see an excessive recovery against his surety, which he alone could prevent, and then set up the defense when his surety sues him.⁷ The surety's failure to defend or give the principal notice will

of subrogation. *Griffith v. Sitgreaves*, 90 Pa. 161. See as indicating a contrary view on the general proposition, *Strong v. Grannis*, 26 Barb. 152; *Osborn v. Robbins*, 36 N. Y. 365.

¹ *Commissioners v. Executors of Robinson*, 1 Bailey, 151.

² *Morse v. Hovey*, 9 Paige, 196.

³ *Rosa v. Butterfield*, 33 N. Y. 665; *Belmont Branch of State Bank v. Hovey*, 35 N. Y. 65; *Union Nat. Bank*

v. Wheeler, 60 N. Y. 612; *Savage v. Fox*, 60 N. H. 17. See *Merchants' Nat. Bank v. Commercial Warehouse Co.*, 49 N. Y. 635.

⁴ *Pugh v. Cameron*, 11 W. Va. 523.

⁵ *Doran v. Davis*, 43 Iowa, 86.

⁶ *Konitzky v. Meyer*, 49 N. Y. 571; *Hare v. Grant*, 77 N. C. 203; *Rice v. Rice*, 14 B. Mon. 417; *Thomas v. Beckman*, 1 B. Mon. 29; *Wallace v. Straus*, 113 N. Y. 238, 21 N. E. Rep. 66.

⁷ *Hare v. Grant*, 77 N. C. 203.

not prejudice his right to recover from the latter what he is compelled to pay unless he knows of a defense.¹

[573] § 744. **Surety may set up right of recoupment.** The weight of authority favors the right of the surety to set up the principal's defense consisting of a right of recoupment.² In the Michigan case cited the principal was sued with the surety on a note given for the price of personal property sold with warranty, and it was insisted that the two defendants were not entitled to recoup the damages arising on the breach of warranty on a sale to one. Christiancy, J., said: "If recoupment were allowed on the same principle as set-off merely, this objection would be insurmountable. A set-off is in the nature of a cross-action to the full extent; it does not deny the validity of any part of the plaintiff's claim or cause of action, but sets up a separate and independent claim against the plaintiff; and the defendant is entitled to judgment upon any surplus of his claims beyond those of the plaintiff. A defense by way of recoupment denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim, like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of, or connected with, the contract or transaction which forms the basis of the plaintiff's cause of action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. . . . Now the only consideration given for the note was received by . . . [one of the defendants.] [The other] . . . though a joint maker in form, would seem to have been, as between himself and the other defendant, but a surety; and it is difficult to discover any good reason why he should not be entitled to any defense connected

¹ Williams v. Greer, 4 Hayw. 235; 210, 20 Am. St. 543; Himrod v. Baugh, Stinson v. Brennan, Cheves, 15. See 85 Ill. 435; Hayes v. Cooper, 14 Ill. Harley v. Stapleton, 24 Mo. 248. App. 490; Brundridge v. Whitecomb,

² Andrews v. Varrell, 46 N. H. 17; 1 Chip. 180; Jarrett v. Martin, 70 N. Aultman & T. Co. v. Heffner, 67 Tex. C. 459; McHardy v. Wadsworth, 8 54, 62; Hollister v. Davis, 54 Pa. 508; Mich. 349; Waterman v. Clark, 76 Cole v. Justice, 8 Ala. 793; Becker v. Ill. 428. Northway, 44 Minn. 61, 46 N. W. Rep.

with the consideration which would be available to the real principal in the transaction had he made the note and been sued alone. If the consideration paid to the former inures to bind the latter, can there be any good reason why a want or failure of that consideration should not inure to his benefit? We can discover no more reason why the defense in the present case should not inure to the benefit of both defendants than if it had been a defense by way of payment, want [574] or failure of consideration for the note, or fraud in the sale for which the note was given. It prevents circuity of action, and accomplishes full justice to all the parties without the violation of any rule of law."

In New York¹ this defense, in a precisely similar case, except that the action was brought against an accommodation indorser alone, was excluded. Selden, J., said: "If we regard such defenses as resting upon a failure of consideration of the contract on which the plaintiff's action is founded, then, unquestionably, the defendant could avail himself of a breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defenses are regarded as the setting off of distinct causes of action one against the other then it is clear . . . that this defendant cannot avail himself of such defense." After remarking that there is no general concurrence of opinion, whether the reduction of the plaintiff's claim by recoupment rests upon partial failure of consideration or upon the setting off of distinct claims against each other,² he continued: "A careful consideration of the subject, I think, must lead to the conclusion that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the

¹Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355, approved in Lasher v. Williamson, 55 N. Y. 618. See Springer v. Dwyer, 50 N. Y. 19; Thalheimer v. Crow, 13 Colo. 397, 23 Pac. Rep. 779; Coffin v. McLean, 80 N. Y. 560; Harris v. Rivers, 53 Ind. 216.

²Citing McAllister v. Reab, 4 Wend. 483, 8 id. 109; Batterman v. Pierce, 3 Hill, 171, 177; Ives v. Van Epps, 22 Wend. 155; Nichols v. Dusenbury, 2 N. Y. 286; Van Epps v. Harrison, 5 Hill, 66; Barber v. Rose, id. 78; Basten v. Butter, 7 East, 479; Withers v. Greene, 9 How. 213.

defendant has, to set up his claim for damages by way of defense, or to resort to a cross-action to recover them. . . . In ordinary cases of breach of warranty . . . both contracts remain binding to their full extent; and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The 'cross-claims arising out of the same transaction compensate one another and the balance only is recovered.' It has always been optional, . . . since the doctrine of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action or to reserve his claim for a cross-action; and when he elected to recoup he could not . . . have a balance certified in his favor, nor could he maintain a subsequent action for such balance." He remarked that under the code of procedure a balance might doubtless be recovered, but that the right of election to set up a counter-claim in defense or to bring a cross-action still exists, and added that "it is not easy to reconcile with these established principles the right of the defendant in this suit to avail himself of the claim which . . . [the principal] . . . may have against the plaintiff on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and, not being due to the defendant, cannot be claimed by him.¹ 2. . . . [The principal] has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note or reserved for a cross-action. The defendant cannot make the election for him. 3. If the defendant has a right to set up the counter-claim and have it allowed in this action, it must bar any future action by [the principal] for the breach of warranty; and as no balance could be found in the defendant's favor he might thus bar a large claim in canceling a small one. . . . 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of [the principal], and all to remain unpaid, each of the indorsers would have the same rights as the defendants. If they were to set up the same defense, how would the con-

¹ Code, § 150; *Lemon v. Trull*, 13 How. Pr. 248, 16 id. 576, note.

flicting claims be reconciled?" If the principal and his surety are sued jointly a right of recoupment established by the former inures to the latter's benefit,¹ even if the surety, had he been sole defendant, could not have availed himself of the defense.² A surety cannot, in a suit to which the principal debtor is not a party, have an adjustment of an unliquidated claim for damages growing out of the non-execution of a contract between the debtor and the creditor, such claim not having been asserted by the debtor.³

It is a general rule of equity that a surety who is jointly bound with his principal may, independently of statute, offset against a suit for joint indebtedness his individual claim against the creditor where both he and the principal are insolvent.⁴ Such right is not affected by an assignment for the benefit of creditors.⁵

SECTION 2.

SURETY'S REMEDIES FOR INDEMNITY.

“ § 745. Action against principal for money paid. It [576] is an equitable principle of very general application that where one person is a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other, in equity and justice, ought to have paid, he is entitled to relief against the other who was,

¹ *Springer v. Dwyer*, 50 N. Y. 19; *Loring v. Morrison*, 15 App. Div. 498, 44 N. Y. Supp. 526; *Horton v. Dow*, 10 N. Y. St. Rep. 139.

² *Queen City Bank v. Brown*, 75 Hun, 259, 26 N. Y. Supp. 1016.

³ *Purdy v. Forstall*, 45 La. Ann. 814, 13 So. Rep. 95.

⁴ *Clark v. Sullivan*, 2 N. D. 103, 49 N. W. Rep. 416; *Merwin v. Austin*, 58 Conn. 22, 18 Atl. Rep. 1029, 7 L. R. A. 84; *Levy v. Steinbach*, 43 Md. 217; *Wulschnerv v. Sells*, 87 Ind. 75; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Rothschild v. Mack*, 42 Hun, 75; *Davidson v. Alfaro*, 80 N. Y. 660; *Coffin v. McLean*, 80 N. Y. 560; *Becker v. Northway*, 44 Minn. 61, 46 N. W. Rep. 210, 20 Am. St. 543; *Eigenmann v. Clark*,

21 Ind. App. 129, 51 N. E. Rep. 725; *Momsen v. Noyes*, 105 Wis. 565, 81 N. W. Rep. 860; *Mattingly v. Sutton*, 19 W. Va. 19; *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 87, 58 N. W. Rep. 826.

⁵ *St. Paul & M. Trust Co. v. Leck*, *supra*, citing *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. Rep. 648; *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. Rep. 295; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. Rep. 148; *Merwin v. Austin*, *supra*; *Waggoner v. Pater-son Gas Light Co.*, 23 N. J. L. 283; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. Rep. 822, 15 L. R. A. 710; *Barbour v. National Exchange Bank*, 50 Ohio St. 90, 33 N. E. Rep. 542, 20 L. R. A. 192.

in fact, the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery and substituted the equitable remedy of an action of *assumpsit* upon the common money counts for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it from the person who ought to have paid it in this equitable action of *assumpsit* as for money paid, laid out and expended for his use and benefit.¹ The law implies a promise by the principal to the surety to indemnify him by refunding all sums of money he may have to pay as such surety. There exists in the surety an equity from the time of his assuming that relation,² but no perfect right of action accrues until actual payment.³ But if there is an express agreement of indemnity made by the principal the surety must rely upon it; none is implied.⁴

[577] § 746. **Who is the principal.** The surety can maintain an action only against his principal and one whose legal liability^{*} is discharged. The law does not imply a promise by other

¹ Hunt v. Amidon, 4 Hill, 345, 40 Am. Dec. 283; Exall v. Partridge, 8 T. R. 308; Toussaint v. Martinnant, 2 id. 105; Taylor v. Mills, 2 Cowp. 525; Preslar v. Stallworth, 37 Ala. 402; Faires v. Cockerell, 88 Tex. 428, 436, 31 S. W. Rep. 190, 28 L. R. A. 528; Child v. Eureka Powder Works, 44 N. H. 354.

² Momsen v. Noyes, 105 Wis. 565, 81 N. W. Rep. 860.

³ Barney v. Grover, 28 Vt. 391; Sargent v. Salmond, 27 Me. 539; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Rice v. Southgate, 16 Gray, 142; Konitzky v. Meyer, 49 N. Y. 571; Ward v. Henry, 5 Conn. 595; Collins v. Boyd, 14 Ala. 305; Thompson v. Wilson, 13 La. 138; Goodwin v. Davis, 15 Ind. App. 120, 43 N. E. Rep. 881; Gieseke v. Johnson, 115 Ind. 308, 17 N. E. Rep. 573; Barth v. Graf, 101 Wis. 27, 38, 76 N. W. Rep. 1100; In re Hill's Estate, 67 Cal. 238, 7 Pac. Rep. 664.

As against a stranger or wrongdoer, a mortgagee who is secured as surety on notes of the mortgagor may hold the property, or, in a suit for its value, recover a sum sufficient to indemnify him, notwithstanding he has not paid the notes. Louden v. Vinton, 108 Mich. 313, 66 N. W. Rep. 222.

⁴ Toussaint v. Martinnant, 2 T. R. 105; Wesley Church v. Moore, 10 Pa. 273.

An illegal agreement by a public officer to deposit public funds in banks represented by his bondsmen, upon which deposits interest is to be paid, and in consideration of which agreement they signed his bond, is so blended with the officer's implied promise to indemnify his sureties against loss that the latter cannot be enforced. Estate of Ramsay v. Whitbeck, 183 Ill. 550, 56 N. E. Rep. 322.

persons who may be benefited by the payment.¹ There was accepted for the United States the individual bond of one of several partners for duties due from the firm. In this bond a surety was bound; and, having been compelled to pay, it was held that only the partner who was principal therein was liable to indemnify him. When the surety paid the money he discharged only the obligation in that bond; and the principal who executed the bond, and who was relieved by the payment, was alone liable to reimburse him.² Kent, C. J., said: "There is no privity between the parties but what arises from the bond. It would be refining upon the doctrine of implied *assumpsit*, and going beyond every case, to consider the surety—in a bond as having, by that act, a remedy at law against other persons for whom the principal in the bond may have acted as trustee. . . . The principal here was, as is stated, a surety for the debt of his firm; and that debt might perhaps have arisen by their being sureties for other persons still behind them. We can only look to the principal and surety in the bond, . . . and to the obligations resulting from that relation because the money was paid by the plaintiff in discharge of that bond and in exoneration of the personal representatives of . . . [the principal], who alone were legally responsible for the debt." But in an Ohio case, a Virginia case, and two Kentucky cases,³ a different, and, as it appears to the writer, a sounder, doctrine is advanced. In the former case one partner put the firm name to a note under seal; it was held that it should be presumed, in the absence of proof to the contrary, that it was given for a consideration received or to be received by the firm, and was intended and understood to bind it; that the seal was added in mere ignorance of the effect of so doing; and that, although the instrument must at law be considered as the deed of the partner only who sealed it, there being no proof of the assent of the other parties, yet, in equity, the firm became liable; and that conse-

¹ Tom v. Goodrich, 2 Johns. 213; Sluby v. Champlin, 4 id. 460; Marsh v. Hayford, 80 Me. 97, 13 Atl. Rep. 271. See Russell v. Annable, 100 Mass. 72.

² Tom v. Goodrich, *supra*.

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³ Purviance v. Sutherland, 2 Ohio St. 478; Burns v. Parish, 3 B.-Mon. 8; Weaver v. Tapscott, 9 Leigh, 424; Hikes v. Crawford, 4 Bush, 19. See McKee v. Hamilton, 33 Ohio St. 7.

[578] quently were there no evidence of the contract of suretyship other than that afforded by the instrument itself, and that the plaintiff executed it as surety, the presumption would be that he was surety, not of the principal in the note alone, but of the firm; that whether the firm was or was not bound to the obligee, yet the fair presumption from the testimony was that the surety became such at the request of the partner who signed the note, professing to act for and in behalf of the firm; and that his request under such circumstances, and in the absence of all proof that he alone was bound, was in law the request of the firm; and the relation of principal and surety was thereby created between them.¹ And it was also held that, though the liability of the other partners was merged at law, it was otherwise in equity, and therefore they were bound to indemnify the surety.²

When one of two sureties becomes such at the request of his co-surety, and upon his promise that he would be put to no loss, he may recover the whole of what he may have been compelled to pay from the co-surety; such promise may be shown by parol; it is not within the statute of frauds.³

§ 747. When right of action accrues. Ordinarily, where a principal has made default in the payment of the debt or performance of the contract, the surety need not wait for a suit to be brought, but may pay and discharge the debt as soon as the liability arises. Nor is it necessary to obtain leave of the principal; the law implies a request to the surety to do this in behalf of the principal, and he may maintain an action for it.⁴ The right exists immediately in favor of a surety when he has paid the debt, or any part of it, if it was due.⁵ He may maintain *assumpsit* after he has paid it, as for money [579] paid at the principal's request.⁶ When he pays the debt in installments, he is entitled to sue his principal for each in-

¹ See *Wharton v. Woodburn*, 4 Dev. & Bat. 507, approved in *Hurdle v. Hanner*, 5 Jones, 360; *Neal v. Lea*, 64 N. C. 678.

² See *James v. Bostwick*, Wright, 141; *Burns v. Parish*, 3 B. Mon. 8; *Hikes v. Crawford*, 4 Bush, 19.

³ *Preslar v. Stallworth*, 37 Ala. 402.

⁴ *Teberg v. Swenson*, 32 Kan. 224, 4 Pac. Rep. 83; *Hazelton v. Valentine*, 113 Mass. 472.

⁵ *Ritenour v. Mathews*, 42 Ind. 7.

⁶ *Davis v. Humphreys*, 6 M. & W. 153; *Ford v. Keith*, 1 Mass. 139, 2 Am. Dec. 4; *Warrington v. Farbor*, 8 East, 242.

stallment as soon as it is paid.¹ Without his special request the surety may pay the debt before it is due;² and after, but not before, sue for the money thus paid.³ But the surety must be legally required to pay. It seems he is not bound to set up the statute of limitations where it has not run against the principal.⁴ In *Norton v. Hall*⁵ a note was made by H., payable to F., and indorsed by the plaintiff as surety for the accommodation of both H. and F. When it fell due the plaintiff, not being able to pay it, at the request of the creditor, gave additional security by mortgage, which the creditor held until the plaintiff paid the note, more than six years after it became due. It was held that H. having failed to pay when due, the plaintiff had a right to make this arrangement for time with the creditor; that H. could not avail himself of the statute of limitations as a defense to a suit by the plaintiff, brought within six years from the time he had paid the note. When the liability of the surety has been in good faith continued for more than six years from the time the note became due, and payment is made by him, such continued liability carries with it the relation of principal and surety, and the liability of the principal to reimburse the surety for the money so paid by him. If at the time the payment is made the surety was legally bound to pay, he may recover from the principal debtor or a co-surety although when the payment was made the principal or co-surety was discharged from the debt by limitation.⁶

¹ *Weiler v. Henarie*, 15 Ore. 28, 13 Pac. Rep. 614; *Williams v. Williams*, 5 Ohio, 444; *Bullock v. Campbell*, 9 Gill, 182; *Davis v. Humphreys*, 6 M. & W. 153; *Hall v. Hall*, 10 Humph. 352; *Faires v. Cockerell*, 88 Tex. 428, 434, 31 S. W. Rep. 190, 28 L. R. A. 528.

² *Craig v. Craig*, 5 Rawle, 91; *White v. Miller*, 47 Ind. 385.

If the principal is not damaged thereby, as by being prevented from carrying out a compromise he has made with his creditors. *Barber v. Gillson*, 18 Nev. 89, 1 Pac. Rep. 452.

³ *Id.*; *Dennison v. Soper*, 33 Iowa, 183; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424.

⁴ *Shaw v. Loud*, 12 Mass. 447; *Hol-*

insbee v. Ritchey, 49 Ind. 261. But see *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Hatchett v. Pegram*, 21 La. Ann. 722; also *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. Rep. 594.

⁵ 41 Vt. 471.

⁶ *Faires v. Cockerell*, 88 Tex. 428, 434, 31 S. W. Rep. 190, 28 L. R. A. 528, citing *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178; *Boardman v. Paige*, 11 N. H. 431; *Crosby v. Wyatt*, 23 Me. 156; *Maxey v. Carter*, 10 Yerg. 521; *Wood v. Leland*, 1 Met. 388; *Preslar v. Stallworth*, 37 Ala. 402; *Reeves v. Pulliam*, 7 Baxter, 119; *Marshall v. Hudson*, 9 Yerg. 57.

§ 748. **Measure of recovery.** The implied undertaking or promise of the principal is one of indemnity; the surety has no right of action merely because the debt is not paid by the principal when due, nor until he has paid it or procured the discharge of the principal by assuming it himself.¹ Nor can [580] the surety recover any more than he has paid and interest thereon;² if he pays in a depreciated currency, as Confederate notes, he can recover from his principal only the market value of the payment at the time it was made, even though they were taken by the creditor at par.³ The rate of interest cannot exceed the legal rate though the securities to which the surety is subrogated bear a higher rate.⁴

¹ Ingalls v. Dennett, 6 Me. 79; Clark v. Foxcroft, 7 id. 348; Powell v. Smith, 8 Johns. 249; Shepard v. Shepard, 6 Conn. 37; Hearne v. Keath, 63 Mo. 84; Hoyt v. Wilkinson, 10 Pick. 31; Pigou v. French, 1 Wash. C. C. 278; Elwood v. Deifendorf, 5 Barb. 398; Reynolds v. Magness, 2 Ired. 26; Gillespie v. Creswell, 12 Gill & J. 36; Thompson v. Richards, 14 Mich. 172; Butler v. Ladue, 12 id. 173; Hall v. Nash, 10 id. 303; Paul v. Jones, 1 T. R. 599; Rodman v. Hedden, 10 Wend. 498; Taylor v. Mills, 2 Cowp. 525; Kraft v. Fancher, 44 Md. 204; Delaware, etc. Iron Co. v. Oxford Iron Co., 38 N. J. Eq. 151; Matthews v. Hall, 21 W. Va. 510; Tyree v. Parham's Ex'r, 66 Ala. 424.

² Martindale v. Brock, 41 Md. 571; Eaton v. Lambert, 1 Neb. 339; Bonney v. Seeley, 2 Wend. 481; Robinson v. Sherman, 2 Gratt. 178, 44 Am. Dec. 381; Hicks v. Bailey, 16 Tex. 229; Miles v. Bacon, 4 J. J. Marsh. 451; Snyder v. Blair, 33 N. J. Eq. 208; Hill's Estate, 67 Cal. 238, 7 Pac. Rep. 664; Waldrip v. Black, 74 Cal. 409, 16 Pac. Rep. 226; Goodwin v. Davis, 15 Ind. App. 120, 43 N. E. Rep. 881.

It is held in *Carpenter v. Minter*, 72 Tex. 370, 12 S. W. Rep. 180, 18 Am. St. 57, that where a note is paid by a surety he may recover

from its maker the same amount as the payee might; if the latter could have recovered attorneys' fees so may the former, although they were payable only in case suit should be brought, and the surety paid voluntarily. Compare *Acers v. Curtis*, 68 Tex. 423, 45 S. W. Rep. 551, stated in § 756. The contrary is held in *Indiana*, and for better reasons. *Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. Rep. 573.

³ *Feamster v. Withrow*, 9 W. Va. 296; *Butler v. Butler*, id. 674; *Jordan v. Adams*, 7 Ark. 348; *Kendrick v. Forney*, 22 Gratt. 748; *Edmunds v. Sheahan*, 47 Tex. 443; *Gillespie v. Creswell*, 12 Gill & J. 36; *Miles v. Bacon*, 4 J. J. Marsh. 457; *Crozier v. Grayson*, id. 514.

In *Southall v. Farish*, 85 Va. 403, 7 S. E. Rep. 534, 1 L. R. A. 641, an insolvent bank held judgments against a principal and his surety, and deposits of the latter worth sixty per cent. of their face value. These a third party contracted to take at par. The surety paid the judgments with his deposits under an agreement with the principal to pay their full value, which the former recovered.

⁴ *Faires v. Cockerell*, 88 Tex. 428, 437, 31 S. W. Rep. 190, 28 L. R. A. 528; *Bushnell v. Bushnell*, 77 Wis.

A payment made by a surety in compromise of his supposed liability upon a disputed claim against him and his principal may be recovered if there was no actual liability, and the principal was or is entitled to the benefit of the payment in discharge of the original claim against him.¹ He can only recover to the amount he has paid where he compounds a debt; and such will be the effect though he goes through the form of purchasing the demand and has it assigned to him. His relation of surety precludes him from speculating at the expense of his principal.²

435, 46 N. W. Rep. 442, 9 L. R. A. 411; Waldrip v. Black, 74 Cal. 409, 16 Pac. Rep. 226.

¹ Bancroft v. Dwinnell, 27 Vt. 668.

² Reed v. Norris, 2 Mylne & Cr. 361; Eaton v. Lambert, 1 Neb. 339; Coggeshall v. Ruggles, 62 Ill. 401; Pickett v. Bates, 3 La. Ann. 627; Crozier v. Grayson, 4 J. J. Marsh. 514. But see Blow v. Maynard, 2 Leigh, 29.

In Reed v. Norris, *supra*, a surety's representatives made an arrangement with the creditor's executors by which the debt for which the surety was bound with the principal was got rid of and discharged, and the question was whether the representatives of the surety's estate were entitled to demand more than they had actually paid, they having purchased the demand and taken an assignment. The lord chancellor said: "Now, if there had been no precedent on this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is en-

abled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation, and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract of indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and, instead of treating that settlement as a payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount, thus reliev-

[581] If the contract be tainted with usury and the surety has knowledge of it and pays the usury, it has been held that he cannot recover from the principal beyond what the creditor could have recovered.¹ Where, however, the creditor has recovered against the principal and surety a judgment which the surety has paid, the fact that part of the judgment is for usury will not avail the principal as a defense when sued by the surety [582] for indemnity;² and this is so though the judgment be confessed by the principal and surety.³ So where a note tainted with usury was signed by a surety who was then ignorant of that fact, and who paid it after he had knowledge of it, he was held entitled to recover unless he had been notified by the principal not to pay it. The court said no man is *bound* to take advantage of a penal law, and avoid a contract which he ought in equity to perform.⁴ But a surety who pays usurious interest to obtain time to pay his principal's debt cannot collect such excessive interest.⁵ A surety joined with his principal

ing himself from the situation in which he stands with his principal, and keeping alive the whole debt?" *Ex parte Rushforth*, 10 Ves. 420; *Butcher v. Churchill*, 14 id. 567; *Coggeshall v. Ruggles*, 62 Ill. 401; *Eaton v. Lambert*, 1 Neb. 339.

In *Flower v. Strickland*, 107 Mass. 552, B. indorsed A.'s promissory note, payable on time to B.'s order, for A.'s accommodation; and A. negotiated it to C. for its full amount. At the maturity of the note B., having been informed by A. that he could not pay it, took it up, paying C. therefor half of the amount thereof. It was held that B. could recover the full amount of the note of A. in an action upon the note as payee. The court said the plaintiff had the same right as any other person to purchase the note from the holder for such price as might be agreed on between them. If he purchased the entire interest of the holder in the note, he might recover the whole amount to his own use. Gray, J., said: "The defendants having received the whole

amount of the note at the time of its original negotiation, and being now no longer liable to any action by . . . [the holder, to whom plaintiff paid it], the amount of their liability in this action against them as makers of the note is not affected by the question how much the plaintiff paid to . . . [the holder], or whether the sum recovered will belong to . . . [such holder], or to the plaintiff." *Pinney v. McGregory*, 102 Mass. 186. *Contra*, *Pace v. Robertson*, 65 N. C. 550; *Burton v. Slaughter*, 26 Gratt. 920.

¹ *Jones v. Joyner*, 8 Ga. 562; *Mims v. McDowell*, 4 Ga. 182.

² *Wade v. Green*, 3 Humph. 547.

³ *Thurston v. Prentiss*, 1 Mich. 193.

⁴ *Ford v. Keith*, 1 Mass. 139, 2 Am. Dec. 4.

The principal cannot plead usury in defense of a mortgage given his surety as indemnity, the latter not being privy to the usurious contract. *Turman v. Looper*, 42 Ark. 500.

⁵ *Thurston v. Prentiss*, 1 Mich. 193; *Lucking v. Gegg*, 12 Bush, 298.

in making a note bearing eight per cent. interest. One of the sureties died before the maturity of the note. By a statute of Kentucky it was provided that "after the death of the payer or obligor of a contract for the loan or forbearance of money at a higher rate of interest than six per cent. per annum, such contract, after maturity, and any judgment rendered thereon, shall bear six per cent. per annum." Judgment had been obtained against the surety and surviving partner for the amount of the note at the stipulated rate of interest, which the surety paid, and then sought indemnity from the estate of the deceased partner. He insisted that, inasmuch as he was compelled to pay a greater rate of interest on account of his contract of suretyship, the law would imply a promise on the [583] part of the representative of his principal to indemnify him. But the court said: "To recognize this claim would be to defeat the operation of a plain and unmistakable provision of the act under which the original contract was entered into. The supposed hardship which it is insisted will result from a refusal to recognize it has no substantial existence. It is the duty of the surety to pay the debt at the maturity of the note.¹

In *Thurston v. Prentiss*, *supra*, a usurious loan was made by the principal, the usury being deducted from the loan. Judgments were confessed by the principal and a surety for the amount of the loan, including the usury, and another surety became security for stay of execution until the period of credit expired. The sureties paid the judgments to the creditor. In a suit by the principal debtor against the sureties, to be relieved from an indemnifying security to them, the court said: "Appellant (the plaintiff) did not interfere to protect them (the sureties) from paying either the amount actually loaned, or the usurious portion of it, and they were not bound to litigate the matter with . . . (the creditor) to get rid of the usury. Appellant might have done so, and he was the only person interested in reducing the amount to be paid; but he neg-

lected to interfere for the protection of his sureties, and . . . (one of them) was liable to have the judgment enforced against him. By his paying the whole, including the usury, the appellant became bound to refund, or allow the same amount in settlement with him."

¹This is probably incorrect. A surety does not owe to his principal the duty to pay the debt at maturity. He is bound to the creditor to do so, but the law cannot be said to impose that duty on the surety as one he owes to his principal, who, in case of such payment, is instantly under obligation to reimburse him. But under the statute of Kentucky, the estate of the principal could not be charged with interest beyond six per cent. after the maturity of the debt; the surety was bound to take notice of that statutory regulation. He could have saved himself from loss

If he had done this he would have stopped the accrual of interest against himself, and he would have been entitled to legal interest against the principal's estate on the sum paid for its benefit. He accepted indulgence from the common creditor with notice of the fact that the estate of the deceased debtor could not be required to pay a greater rate of interest than six per cent. per annum. He paid the additional interest for the indulgence extended to himself, and not for the use and benefit of . . . [his principal's] estate."¹

If there are several principals the surety may proceed against each of them for the recovery of the whole amount he has paid. "Each of the principals is debtor of the whole debt in favor of the creditor, and the person being surety for each of them has, by paying the debt, liberated each of them from the whole, and consequently has a right to conclude *in solido* against each of them for the reimbursement of the whole of what he has paid, with interest from the day of the demand. This rule prevails in both civil and common law."² It is an exception to the rule requiring all persons interested in the subject-matter to be joined in a suit in favor of sureties that one of several of them who has paid a joint debt may proceed against the principal without joining his co-sureties.³

§ 749. **Surety may compel debtor to pay.** It is an established rule of equity that when a debt falls due from a principal debtor the surety is entitled to compel him to pay it. This right may be exercised although the surety has not been disturbed. So long as the debt for which he is bound remains there is a cloud hanging over him which equity will remove by a proceeding in the nature of a bill *quia timet*.⁴ Where

by paying at once when the debt became due, and he subjected himself to the greater rate by voluntarily delaying payment.

¹ Lucking v. Gegg, 12 Bush, 298.

² Apgar's Adm'r v. Hiler, 24 N. J. L. 812; Overton v. Woodson, 17 Mo. 453; Clay v. Severance, 54 Vt. 300.

³ Dodd v. Wilson, 4 Dela. Ch. 108. See Madox v. Jackson, 3 Atk. 404.

⁴ Norton v. Reid, 11 S. C. 593; Antrobus v. Smith, 3 Meriv. 569; Pride v. Boyce, Rice Eq. 386, 33 Am. Dec.

84; King v. Baldwin, 2 Johns. Ch. 554; Ranelagh v. Hayes, 1 Vern. 189; Irick v. Black, 17 N. J. Eq. 189; Delaware, etc. Iron Co. v. Oxford Iron Co., 38 id. 151; Moore v. Topliff, 107 Ill. 241; Keokuk v. Love, 31 Iowa, 199; Harris v. Newell, 43 Wis. 687; Hayden v. Thrasher, 18 Fla. 795; Dobie v. Fidelity & Casualty Co., 95 Wis. 540, 70 N. W. Rep. 482, 60 Am. St. 135; Beaver v. Beaver, 23 Pa. 167; Roberts v. American Bonding & Trust Co., 83 Ill. App. 463; Street v.

there is an actual accrued debt and the surety admits liability for it he may compel the principal debtor to pay without proving that the creditor has refused to exercise his right to sue the debtor.¹ It was assumed in New York that a surety may always avail himself of this remedy after the debt has become due,² but it is now settled in that state that "there must be some specific equity beyond the mere relation of surety and creditor to entitle the surety to this relief."³ If a surety holds a mortgage given him by the principal as indemnity he may have foreclosure of it after the debt has become due, although he has not paid it.⁴ The foreclosure may be for the whole amount of the principal's liability, although the creditor's judgment against him is for a less sum.⁵

§ 750. Payment giving right to reimbursement. The usual remedy at common law has been an action of *assumpsit* for money paid to the defendant's use, though sometimes the action has been special. When it is for money paid a technical question may be raised whether the particular mode of payment will sustain that form of action. The more important inquiry is, what is payment which will entitle the surety to immediate recourse to the principal; and when made otherwise than in money, what is the measure of the surety's recovery against him.

It has been loosely said in a Vermont case that if a surety in any way extinguishes or pays the debt of the principal it is, as far as the latter is concerned, equivalent to paying money for his benefit and at his request, and the surety can [584] maintain general *assumpsit* against him for money paid.⁶ An extinguishment of the debt by the creditor at the request of the surety without actual payment in any form would cer-

Chicago Wharfing & Storage Co., 157 Ill. 605, 41 N. E. Rep. 1108.

¹ Mathews v. Saurin, 31 L. R. Ire. 181, following Ranelagh v. Hayes, 1 Vern. 189, and disapproving a suggestion made in Padwick v. Stanley, 9 Hare, 627.

² King v. Baldwin, 17 Johns. 386.

³ Marsh v. Pike, 1 Sandf. Ch. 210, 10 Paige, 595; Hayes v. Ward, 4 Johns. Ch. 131; Newcomb v. Hale, 90 N. Y. 326, 330, 43 Am. Rep. 173; In

re Babcock, 3 Story, 393; Wright v. Nutt, 3 Brown Ch. 326; Story's Eq., § 327.

⁴ McDaniel v. Austin, 32 S. C. 601, 11 S. E. Rep. 350; Bodkin v. Merit, 86 Ind. 560 (if the debt has come into judgment against the principal and surety and the former has no other property).

⁵ Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684.

⁶ Hullett v. Soullard, 26 Vt. 295.

tainly not be equivalent to payment by the debtor in money. He is entitled to recover the amount paid, not the amount extinguished.¹ The voluntary payment of the debt in property, real or personal, transferred to the creditor and received by him as payment;² or the seizure and sale of the surety's property at the instance of the creditor under execution will entitle the surety to maintain an action for money paid against his principal.³ In such cases the value of the property at the date of sale is properly the measure of damages, if it does not exceed the amount due in money to the creditor.⁴ Payment of the principal's debt by a stranger, if the latter has been reimbursed by the surety, gives him a right of action.⁵ A surety who furnishes to his principal money to pay the debt of the latter, and which is so paid, makes his principal his agent for the purpose of making payment, and thereby acquires the right to be subrogated to securities held by the creditor.⁶

If the surety surrenders notes executed by his principal he is entitled to recover their full value regardless of the solvency of their maker.⁷ If he pays when there is no legal duty upon him to do so he cannot claim reimbursement from his principal, nor contribution from a co-surety.⁸ Where a creditor re-

¹ *Bonney v. Seely*, 2 Wend. 481.

² *Ainslie v. Wilson*, 7 Cow. 668, 17 Am. Dec. 532; *Randall v. Rich*, 11 Mass. 494; *Bonney v. Seely*, *supra*.

Where the plaintiff and the defendant were co-sureties on two notes, on one of which judgment was obtained against both, and on the other against the plaintiff only, and after the levy of executions on the plaintiff's land he conveyed it to the defendant in consideration that he satisfy the judgments, which was done, the conveyance was such a payment as made the defendant liable to contribute his share of the debt secured to the plaintiff. *Frost v. Tracy*, 52 Mo. App. 308.

³ *Lord v. Staples*, 23 N. H. 448.

⁴ *Bonney v. Seely*, 2 Wend. 481; *Atherton v. Williams*, 19 id. 105; *Jones v. Bradford*, 25 Ind. 305.

In *Coleman v. Riggs*, 61 Iowa, 543,

16 N. W. Rep. 583, a surety on a stay bond was adjudged bankrupt, and his property sold to satisfy a judgment. The assignee regarded as worthless the claim against the judgment debtor, and its enforcement became barred by the statute. It was held that the surety might maintain an action against his principal, the measure of his recovery being the amount paid, not the value of the property sold.

⁵ *Harper's Adm'r v. McVeigh's Adm'r*, 82 Va. 751, 1 S. E. Rep. 193.

⁶ *Zuellig v. Hemerlie*, 60 Ohio St. 27, 53 N. E. Rep. 447, 71 Am. St. 707.

⁷ *Barber v. Gillson*, 18 Nev. 89, 1 Pac. Rep. 452.

⁸ *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Spillman v. Duff*, 15 B. Mon. 134; *Dawson v. Lee*, 83 Ky. 49; *Stone v. Hammell*, 83 Cal. 547, 23 Pac. Rep. 703, 17 Am. St. 272, 8 L. R. A. 425.

ceives the negotiable paper of the surety as full and absolute payment and satisfaction of the debt of the principal, and not as additional payment or collateral security, the surety may, without having first paid it, recover its amount of the principal.¹ But he does not become entitled to sue his principal upon the ground of his having discharged the indebtedness to the creditor by giving his own absolute obligation in payment thereof, so long as anything whatever remains to be done between him and the creditor to carry the engagement between them completely into effect.² When the surety [585] has assumed the debt in other forms he has been allowed to recover of the principal without otherwise paying it; as where he has secured it by mortgage and the principal has been released;³ where he has replevied a judgment, and thereby discharged it.⁴ The surety on an administrator's bond, after a breach, was appointed administrator in place of his principal, and as such indorsed on the bond a receipt of money from himself for which his principal was in default, and included it in the inventory of assets in his hands; and it was held that an action would lie immediately by him against the principal for the amount so recognized as paid to his use.⁵

In England it has been held that where a surety procured a

¹ *Witherby v. Mann*, 11 Johns. 518; *Ripley v. Moseley*, 57 Me. 76; *Anthony v. Percifull*, 8 Ark. 494; *Little v. Little*, 13 Pick. 426; *Day v. Stickney*, 14 Allen, 255; *Pearson v. Parker*, 3 N. H. 366; *Rodman v. Hedden*, 10 Wend. 498; *Lee v. Clark*, 1 Hill, 56; *Cornwall v. Gould*, 4 Pick. 444; *Doolittle v. Dwight*, 2 Met. 561; *Douglass v. Moody*, 9 Mass. 548; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *Hearne v. Keath*, 63 Mo. 84; *Howe v. Buffalo, etc. R. Co.*, 37 N. Y. 297; *Elwood v. Deifendorf*, 5 Barb. 398; *Bonney v. Seely*, 2 Wend. 481; *Van Ostrand v. Reed*, 1 id. 424, 19 Am. Dec. 529; *In re Morrill*, 2 Sawyer, 356; *Bone v. Torrey*, 16 Ark. 83; *Neale v. Newland*, 4 Ark. 506; *Mims v. McDowell*, 4 Ga. 182; *Lyon v. Northrop*, 17 Iowa, 314; *Barclay v. Gooch*, 2 Esp. 571; *Houston v. Fellows*, 27 Vt. 634; *Stubbins v.*

Mitchell, 82 Ky. 535; *Bowers v. Cobb*, 31 Fed. Rep. 678; *Sapp v. Aiken*, 68 Iowa, 699, 28 N. W. Rep. 24; *Rizer v. Cullen*, 27 Kan. 339; *Ryan v. Krusor*, 76 Mo. App. 496; *Smith v. Mason*, 44 Neb. 610, 63 N. W. Rep. 41; *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. Rep. 408. Compare *White v. Miller*, 47 Ind. 385; *Romine v. Romine*, 59 id. 346; *Stone v. Hammell*, 83 Cal. 547, 23 Pac. Rep. 703, 17 Am. St. 272, 8 L. R. A. 452; *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, id. 307; *Lynch v. Hancock*, 14 S. C. 66.

² *Bank v. Gifford*, 79 Iowa, 300, 44 N. W. Rep. 558; *Hearne v. Keath*, 63 Mo. 84.

³ *McVicar v. Royce*, 17 Up. Can. Q. B. 529.

⁴ *Burns v. Parish*, 3 B. Mon. 8.

⁵ *Hazelton v. Valentine*, 113 Mass. 472.

discharge of the obligation of his principal by giving his own bond for the debt he could not, thereupon, before paying the bond, maintain an action against his principal for money paid.¹ Lord Ellenborough, C. J., said: "There is no pretense for considering the giving of this new security as so much money paid for the defendant's use." He added, apparently in deference to a previous case:² "Supposing even the case of the note or bill of exchange, as the current representative of money, to have been rightly decided; still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." A similar decision was made in a later case.³ One of the makers of a joint and several note, after the same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was paid on the bond, and it was held that until payment made upon it he could not maintain an action for money paid in order to recover contribution from any of the other makers of the note. Bayley and Abbott, JJ., were at first inclined in favor of recovery on the ground that the court might properly consider the extinguishment of the debt as equivalent to money paid for the defendant's use; that on that ground the bond was [586] given as money and the defendant had the benefit of it as money; but on considering the circumstances, and the previous case of *Taylor v. Higgins*, they finally decided that the action was not maintainable. Bayley, J., said: "The plaintiff in this case has paid no money. It is said, indeed, that he has given what is equivalent to it, and that it ought to be considered for this purpose as money; so it was held in *Barclay v. Gooch*.⁴ But in *Taylor v. Higgins* the court, having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events, conflicting authorities on the point, the last of which is in favor of the defendant. In *Taylor v. Higgins* the old bond was delivered up, and the new one accepted as payment and satisfaction of the old debt. . . . Then, as the authorities differ, it becomes necessary to look at the reason of the thing. No money has yet come out of the plaintiff's pocket; *non constat* that any ever will; for if he recovers from the defendant in

¹ *Taylor v. Higgins*, 3 East, 169.

² *Barclay v. Gooch*, 2 Esp. 571.

³ *Maxwell v. Jameson*, 2 B. & Ald. 51.

⁴ 2 Esp. 571.

the present action, still it is possible that he may never pay it to [the creditor.] Then the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond he may then have his remedy against Jameson for his contribution." The whole court seem to have proceeded upon the authority of *Taylor v. Higgins*, and the reason given by the court which decided that case. Holroyd, J., said: "In order to support this action the debt must have been extinguished by an actual or virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment; and in order to have made the giving of the bond operate as a virtual payment the defendant must be shown to have been a party to that transaction, which was not the case." The opinions in this case are based on the apparent assumption that the bond of one of the debtors extinguished the old debt as against the other; but Abbott, J., said, incidentally, it was doubtful. It was held in *White v. Cuyler*¹ that where a wife and a surety entered into a covenant with the plaintiff, which the wife failed to perform, and suit was brought [587] in *assumpsit* against the husband, that covenant would not lie, for the wife had no authority to bind him by deed; and that the covenant of the surety did not by operation of law extinguish the debt of the principal. .

§ 751. **Same subject.** These cases have been supposed to recognize a distinction between negotiable paper given by a surety in payment of the principal's debt and other forms of agreement or obligation for that purpose, based on the idea that negotiable paper is a representative of money, and that a bond is nothing like it. Such a distinction cannot be maintained; neither is money; but each has a money value; and if property may be accepted in lieu of money as a payment, and the discharge of a debt in this manner by a surety will sustain an action for money paid, why should not a payment made by the delivery of a bond, note or other valuable promise to pay money? Several American cases have recognized this distinction, though not uniformly upon the same ground.² These, as

¹ 6 T. R. 176.

anan, 3 Ind. 47; *Romine v. Romine*, 59

² *Petres v. Harmon*, 8 Blackf. 112, id. 346; *Campbell v. Jones*, 4 Wend. 44 Am. Dec. 738; *Bennett v. Buch-* 306; *Cumming v. Hackley*, 8 Johns.

well as the English cases which they purport to follow, appear to turn on the technical point that payment of the debt by the surety with any new security, other than negotiable paper, will not support the action for *money paid*.¹ Where the plaintiff gave his promissory note for an executory consideration which failed, and the defendant, the payee, sold the note and got his pay for it, but it did not appear how or in what form, it was held that the plaintiff's action for money had and received was maintainable. The note was treated as having gone into the hands of an innocent holder, and the proceeds in the defendant's hands were, therefore, money had and received to the plaintiff's use.² An insurance broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium; and then alleged that in consideration of the premises and of such covenant the policy was effected. The broker having become bankrupt without having paid the premium to the company, it was held that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay. This recovery was allowed under a declaration which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies; but it was declared that the plaintiffs were not entitled to recover such sums under the count for money paid because the broker had not actually paid the sums, or done anything which was equivalent to payment. Bayley, J., said: "Then it is necessary to consider in what situation the broker

202; *Boulware v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117; *Morrison v. Berkey*, 7 S. & R. 238; *Sayre v. King*, 17 W. Va. 562.

This distinction is founded upon no apparent good reason. *Stone v. Hammell*, 83 Cal. 547, 23 Pac. Rep. 703, 17 Am. St. 272, 8 L. R. A. 425.

¹ The execution by an insolvent principal and one of several sureties

of their note, in lieu of a former note, does not entitle such surety to contribution from the other sureties upon the original note. *Bell v. Boyd*, 76 Tex. 133, 13 S. W. Rep. 232; *Ryan v. Krusor*, 76 Mo. App. 496.

² *Colville v. Besly*, 2 Denio, 139; *Van Ostrand v. Reed*, 1 Wend. 424, 19 Am. Dec. 529; *Chapman v. Shaw*, 5 Me. 59.

stands in order to ascertain whether he is not entitled to call on the assured for the premiums. The underwriters have a claim upon him for the full amount of the premiums; and if that be so he ought to recover those premiums from those persons who have had the benefit of the policies." Parke, J., said: "He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any recourse to the defendants for the premiums, and in consequence the defendants are liable to pay a sum of money to the plaintiffs."¹

§ 752. Liability of principal for surety's costs. On the subject of the principal's liability for costs incurred by the surety, it should be borne in mind that, as between them, it is for the default of the principal that the surety is proceeded against by the creditor. It is not a surety's duty to his principal, but the principal's duty to the surety as well as to the other contracting party, to fulfill the contract by which they are bound. Hence, it is but just that if the surety is sued upon that contract the principal shall be liable to him for the costs which he may have to pay in consequence of such suit, [589] and so the law declares.² And this principle applies to accommodation parties to commercial paper,³ but not between other parties primarily and secondarily liable.⁴ If a surety knows that a claim made by a creditor of his principal is just, he has no right to contest a suit brought against him and litigate the same. If he does, and fails, he cannot recover of his principal the costs so incurred. He is only entitled to recover the costs of a judgment by default⁵ and the costs of execution.

¹Power v. Butcher, 10 B. & C. 329.

²Boyd v. Myers, 12 Lea, 175; Bennett v. Dowling, 22 Tex. 660; Apgar v. Hiler, 24 N. J. L. 812; Preslar v. Stallworth, 37 Ala. 402; Hulett v. Soullard, 26 Vt. 295; Wynn v. Brooke, 5 Rawle, 106; McKee v. Campbell, 27 Mich. 497.

³Baker v. Martin, 3 Barb. 634; Hubbly v. Brown, 16 Johns. 70;

Jones v. Brooke, 4 Taunt. 464; Mott v. Hicks, 1 Cow. 513.

⁴Dawson v. Morgan, 9 B. & C. 618; King v. Phillips, Pet. C. C. 350.

⁵Holmes v. Weed, 24 Barb. 546; Short v. Galloway, 11 Ad. & E. 28. See Whitworth v. Tilman, 40 Miss. 76; Robinson v. Sherman, 2 Gratt. 178, 44 Am. Dec. 381; Redfield v. Haight, 27 Conn. 31.

These latter, it has been held, could not be recovered,¹ but it is believed the surety has the same right to costs incurred on an execution as in obtaining judgment; one equally with the other is the expense of the coercive measures of the creditor to make the money in consequence of the principal's default. Redfield, C. J., said: "If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment, and was levied upon his land, he must lose all costs recovered and the expenses of the levy because he did not pay the principal debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered [by the surety of the principal] as money paid, so equally may the costs."² Whether a surety may defend, and thus increase the costs at the expense of his principal, will, as in other cases of recovery over, depend on the reasonableness [590] of his conduct in doing so and the expenditures made.³ Where he persists in making a defense after being notified by the principal that none exists, and contrary to his express wishes, he does so at his peril.⁴

§ 753. Principal not liable for consequential damages. In an early Massachusetts case, disclosing extraordinary facts, the extent of a surety's redress against the principal was very clearly defined.⁵ The plaintiff signed a bond as surety for one of the defendants for the payment of duties at a custom-house in 1814. The British forces took possession of the custom-house and the bond, after which a monition was posted up directing the obligors to appear at Halifax and show cause why they should not be held to pay the bond to the captors;

In *Steinhart v. Doellner*, 34 N. Y. Super. Ct. 218, it was held that where a surety allowed a suit to go by default without notice to his principal, he should only recover the costs incident to the service of the summons; he should have notified his principal, and thus enabled him to settle without further costs.

¹ *Emory v. Vinall*, 26 Me. 235.

² *Hulett v. Soullard*, 26 Vt. 295;

Norfolk v. American Steam Gas Co., 108 Mass. 404.

³ See § 82; *Downer v. Baxter*, 30 Vt. 467; *Thomson v. Taylor*, 11 Hun, 274; *Bennett v. Dowling*, 22 Tex. 660; *Whitworth v. Tilman*, 40 Miss. 76; *Cranmer v. McSwords*, 26 W. Va. 412; *May v. May*, 19 Fla. 373; *Dubois v. Hermann*, 56 N. Y. 673; *Slingerland v. Bennett*, 66 id. 611.

⁴ *Beckley v. Munson*, 22 Conn. 299.

⁵ *Hayden v. Cabot*, 17 Mass. 169.

this was followed by the issue of a *capias* against them; the plaintiff fled to avoid the process; he went with his family to Boston and remained for a year or more; he was a merchant of respectable standing and large business; had many debts due him which were probably lost by reason of his absence. There was a written promise of the defendant to save the plaintiff harmless from any loss he might sustain by signing the bond. The court held that all the indemnity which a surety in a bond for the payment of money can claim from the principal is the amount he has paid on account of the bond, with all such reasonable expenses as he may have been obliged to incur; not such extraordinary and remote expenses as might have been prevented by its payment. Parker, C. J., said: "The common construction of such a contract is that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt. But extraordinary expenses [591] which might have been avoided by payment of the money or remote and unexpected consequences are never considered as coming within the contract. Thus, if a surety, by reason of being obliged to pay money for his principal, becomes embarrassed in his business, and is finally obliged to abandon it, it is not expected that the principal will be held to indemnify him for his consequential misfortune. It is not the natural and necessary effect of his becoming surety, but is occasioned by his undertaking to do what he was not in a condition to perform. So any loss or expense occasioned by an attempt to avoid payment of an obligation cannot have been contemplated by the parties as a subject of indemnity; the true meaning of the contract being that if the surety pays voluntarily he shall be reimbursed; if he is compelled by suit to pay he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in

prison,¹ or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity, because they might be avoided by payment which he must be considered as stipulating that he was able to make. The indefinite nature and extent of such damages as are claimed in the present action is also a sufficient objection to the character of the action itself. If a surety who flies to avoid payment can recover an indemnity for all the consequences of his flight, such as the loss of business, loss of debts, expenses of removing and supporting his family, the principal would have no means of protecting himself against extravagant claims; so that the danger would rather lie in having a surety than in becoming one, which has heretofore been thought to be attended with the most hazard."²

§ 754. Contribution between co-sureties. The right of one surety to call upon his co-surety for contribution arises from a principle of equity growing out of the relation which the parties have assumed towards each other. It has been sup-
[592] posed not to result from any implied contract between them, but to be based upon an acknowledged principle of natural justice which requires that those who voluntarily assume a common burden should bear it in equal proportions.³

¹ Powell v. Smith, 8 Johns. 249.

² Vance v. Lancaster, 3 Hayw. 130.

³ Porter v. Horton, 80 Ill. App. 333; Deering v. Moore, 86 Me. 181, 29 Atl. Rep. 988, 41 Am. St. 534; Barge v. Van Der Horck, 57 Minn. 497, 59 N. W. Rep. 630; Frost v. Tracy, 53 Mo. App. 308; Ryan v. Krusor, 76 Mo. App. 496; Bank v. Opera House Co., 23 Mont. 34, 75 Am. St. 499, 57 Pac. Rep. 445; Smith v. Mason, 44 Neb. 610, 63 N. W. Rep. 41; Ladd v. Chamber of Commerce, 37 Ore. 49, 60 Pac. Rep. 718; Graves v. Smith, 4 Tex. Civ. App. 537, 23 S. W. Rep. 603; Liddell v. Wiswell, 59 Vt. 365; Deering v. Earl of Winchelsea, 1 Cox, 318; Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76; White v. Banks, 21 Ala. 705, 56 Am. Dec. 283; Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Dent v. King, 1 Ga. 200, 44 Am.

Dec. 638; Warner v. Morrison, 3 Allen, 566; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669; Roberts v. Adams, 6 Porter, 361, 31 Am. Dec. 694; Wells v. Miller, 66 N. Y. 255; Conolly v. Dolan, 22 R. I. 60, 46 Atl. Rep. 36.

Hence the obligations growing out of the relation are not affected by the discharge in bankruptcy of one surety when his co-surety made the payment subsequent to such discharge. Liddell v. Wiswell, 59 Vt. 365.

The fact that one of several sureties on a bond is surety on the note by which the debt secured by the bond is evidenced does not make that surety liable for the entire debt as between him and the other sureties. Johnson v. Hicks' Guardian, 97 Ky. 116, 30 S. W. Rep. 3.

This equity attaches when the relation commences, and may at once be invoked when one surety has been compelled to pay the debt,¹ or has paid it without compulsion,² but not before.³ It is a right, however, now recognized and enforced at law, because the equitable principle has been so long and so generally acknowledged and applied that persons in placing themselves under circumstances to which it applies may be supposed to act under contract implied from the universality of that principle.⁴ By becoming sureties each impliedly promises the others, in contemplation of law, that he will faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal;⁵ in other words, that he will pay his proportion of the debt if the principal neglects to pay it, or will save his co-surety harmless from injury by being obliged, through the former's neglect, to pay more than his proper portion of it. The obligation does not arise solely out of the consideration that the surety so liable has been relieved of a burden, but it arises also from

¹ *Wayland v. Tucker*, 4 Gratt. 267, 50 Am. Dec. 76.

Contribution may be compelled without proof of a request from co-obligors or any of them to pay. *Hoyt v. Tuthill*, 33 Hun, 196.

"There is no contractual relation between sureties enabling one to discharge a common obligation at his own pleasure and in his own way, and thereby bind the other. The whole right of contribution rests upon the doctrine of compulsory payment. Where one surety is compelled to pay, the non-paying surety is required to contribute in proportion to the benefit received by him. But this obligation is raised by the necessity which the paying surety was under of making the payment, and therefore he can have no contribution unless his payment was compulsory." *Ladd v. Chamber of Commerce*, 37 Ore. 49, 63, 60 Pac. Rep. 713, citing *Halsey v. Murray*, 112 Ala. 185, 20 So. Rep. 575; *Bancroft v. Abbott*, 3 Allen, 524; *Skrainka v.*

Rohan, 18 Mo. App. 340; *Hollinsbee v. Ritchey*, 49 Ind. 261.

² *Mason v. Pierron*, 69 Wis. 585, 34 N. W. Rep. 921.

A co-surety need not wait to be sued if he is bound to pay the debt, but when it is due, to save costs and expenses, may pay it and have contribution. *State v. Blakemore*, 7 Heisk. 651; *Douglass v. Wilson*, 3 Tenn. Cas. 561.

A payment made after demand and suit threatened is not a voluntary payment, and entitles the surety making it to contribution. *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. Rep. 275.

³ *Gourdin v. Trenholm*, 25 S. C. 362, 377.

⁴ *Lansdale v. Cox*, 7 T. B. Mon. 401; *Bachelor v. Fiske*, 17 Mass. 464; *Norton v. Coons*, 6 N. Y. 33; *Agnew v. Bell*, 4 Watts, 31; *Craythorne v. Swinburn*, 14 Ves. 160; *Paulin v. Kaighn*, 29 N. J. L. 480.

⁵ *Hickborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 562.

the consideration that he engaged to indemnify his co-surety against loss arising from neglect to pay his own share in case of the principal's delinquency.¹ It is on this theory of the relation of sureties to each other that the estate of a deceased surety is usually bound to contribute to the discharge of a liability which occurred subsequent to his death.² The legal action for contribution may be maintained though the insolvency of the principal is neither averred nor proved.³ In equity the rule is otherwise.⁴ There is force in the statement of an author that "as the right to contribution is grounded upon the same reasons, both at law and in equity, it seems that the rule should be the same in both jurisdictions."⁵ "The right of a surety to contribution for costs and expenses incurred in defending a suit depends on the question whether the defense was prudent. If it was, the expenses of the defense may be recovered, and there seems to be no difference in principle between costs and counsel fees in this respect."⁶ In another case the rule is thus vindicated: While it is true a surety is not bound to await the bringing of suit by the cred-

¹ Crosby v. Wyatt, 23 Me. 156; Howe v. Ward, 4 id. 195; Bradley v. Burwell, 3 Denio, 61; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515.

² Johnson v. Harvey, *supra*; Bradley v. Burwell, 3 Denio, 61; Ramskill v. Edwards, 31 Ch. Div. 100; Aikin v. Peay, 5 Strobb. 15, 53 Am. Dec. 684; Conover v. Hill, 76 Ill. 342; Stephens v. Meek, 6 Lea, 266; In re Blumen, 13 Fed. Rep. 623. *Contra*, Waters v. Riley, 2 H. & G. 305, 18 Am. Dec. 302.

³ Boutin v. Etsell, 110 Wis. 276, 85 N. W. Rep. 964; Smith v. Mason, 44 Neb. 610, 63 N. W. Rep. 41; Goodall v. Wentworth, 20 Me. 322; Rankin v. Collins, 50 Ind. 158; Sloo v. Cool, 15 Ill. 47.

⁴ 1 Brandt on Suretyship & G. (2d ed.), § 290, and cases cited.

⁵ *Id.*

⁶ Connolly v. Dolan, 22 R. I. 60, 46 Atl. Rep. 36, citing Fletcher v. Jackson, 23 Vt. 581; Davis v. Emerson,

17 Me. 64; Wagenseller v. Prettyman, 7 Ill. App. 192; Bright v. Lennon, 83 N. C. 183; Backus v. Coyne, 45 Mich. 584, 8 N. W. Rep. 694; Gross v. Davis, 87 Tenn. 226, 11 S. W. Rep. 92; Van Winkle v. Johnson, 11 Ore. 469, 472; Brandt on Suretyship & G., § 283. The following cases were referred to as sustaining the view that such expenses are not recoverable unless they had been authorized by the surety from whom recovery is sought, or were incurred in a suit to which such surety was a party: Knight v. Hughes, 3 C. & P. 467; John v. Jones, 16 Ala. 454 [but see Carter v. Fidelity & Deposit Co., 134 Ala. 369, 32 So. Rep. 632]; Greely v. Dow, 2 Met. 176; Warner v. Morrison, 3 Allen, 566; Newcomb v. Gibson, 127 Mass. 396; Boardman v. Paige, 11 N. H. 431; Hayes v. Morrison, 38 N. H. 90. See § 756 as to the basis of contribution, and for other cases sustaining and denying the liability to contribute.

itor in order to entitle him to contribution, we know of no rule which compels him to accept the amount claimed by the creditor as just and correct, nor of any rule which makes his determination of the validity or amount of the debt conclusive upon his co-surety. If the creditor having a claim against several sureties may select the one he wishes to sue, and the one sued is limited in his right of contribution to the actual default of the principal, exclusive of the costs of suit, he can by his selection, to the extent of such costs, make a victim of the surety sued, and thus make the common burden personal oppression. We think the true rule is that where the surety obtains any advantage from the suit, or where, although the resistance of the suit was unsuccessful, there were reasonable grounds of defense, if the defendant acted as a prudent man would, in the light of facts and circumstances showing a probability of success in whole or in part, the surety sued should be entitled to include the costs and damages of the suit in his claim for contribution against his co-sureties. His co-sureties ought not and cannot complain, for the burden of paying the debt rested equally upon them, and they could have prevented suit or even stopped it after its commencement by paying the demand of the creditor.¹

§ 755. **Who are co-sureties.** All sureties of the same principal in respect to the same debt or liability are not co-sureties. It is not sufficient that both parties are sureties; they must occupy the same position in respect to the principal, and without equities between themselves giving advantage to one over the other.² A surety in a note cannot claim contribution from an indorser as such,³ but proof, and even parol proof, is admissible to show that they are co-sureties.⁴ [593] Where one indorses a note before it is issued he is, *prima facie*, a guarantor, and may treat all the makers as principals

¹ Carter v. Fidelity & Deposit Co., 134 Ala. 369, 32 So. Rep. 632.

² Rosenbaum v. Goodman, 78 Va. 121; Moore v. Moore, 4 Hawks, 358; Wells v. Miller, 66 N. Y. 255; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995; Chapeze v. Young, 87 Ky. 476, 9 S. W. Rep. 399; Adams v. Flanagan, 36 Vt. 400.

³ Titcomb v. McAllister, 81 Me. 399, 17 Atl. Rep. 315.

⁴ Houck v. Graham, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. Rep. 594; Knopf v. Morel, 111 Ind. 570, 13 N. E. Rep. 51; Nurre v. Chittenden, 56 Ind. 462; Dawson v. Petway, 4 Dev. & Batt. 396; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. Rep. 408, 76 Am. St. 559.

for his indemnity, though he knew a part were sureties; the actual relation of such indorser to the other parties may be shown by parol.¹ So it may be shown that though two persons signed the same obligation as sureties for a third, one of them did so at the request of the principal and the other as surety of the first surety, and thus that they were not co-sureties as between themselves. In that case the first surety stands in the relation of principal to the second surety, and is responsible to him for whatever he is compelled to pay, and has in no event any claim against him for contribution.²

An agreement made between parties prior to or contemporaneously with their executing a written obligation as sureties by which one agrees to indemnify the other from loss does not contradict the terms nor vary the legal effect of the written obligation, and such agreement may be proved by parol evidence. Such promise, although not in writing, is a bar to an action by the party making it against his co-surety for contribution.³ In *Longley v. Griggs*⁴ the plaintiff, as surety, was one of the makers of a note and paid it; the defendant was a guarantor by indorsement on its back before it was delivered to the payee. The note was given in payment of a similar note made by the same parties and indorsed by the defendant as surety. It was contended that he was liable to contribution because he indorsed the old note as surety, and the same relationship continued after the new note was given. It was held, however, that he did not continue in the same relation to the note. He made a new engagement, and had a right to do so; he did it by filling up the indorsement with the engagement of a guarantor merely.

One who becomes surety in the course of legal proceedings against the principal has no right of contribution against the [594] original surety for the debt; but on the contrary, the latter is entitled to be subrogated to the creditor's right against

¹ *Hamilton v. Johnson*, 82 Ill. 39; *Keith v. Goodwin*, 31 Vt. 268; *Longley v. Griggs*, 10 Pick. 121; *Montgomery v. Page*, 29 Ore. 320, 44 Pac. Rep. 689, and cases cited. See § 730.

² *Cutter v. Emery*, 37 N. H. 567; *Byers v. McClanahan*, 6 Gill & J. 250;

Harris v. Warner, 13 Wend. 400; *Thompson v. Sanders*, 4 Dev. & Batt. 404; *Carter v. Black*, id. 425; *Hayden v. Thrasher*, 18 Fla. 795.

³ *Barry v. Ransom*, 12 N. Y. 462.

⁴ 10 Pick. 121.

such later surety, as in the case of bail, bonds for prison bounds, on appeal or injunction.¹

A judgment having been recovered against one surety and an execution levied on his property, he executed a forthcoming bond with another of the sureties, against whom no judgment had then been obtained, as his surety. After the bond was forfeited it was ruled that the surety in the forthcoming bond, having paid the debt, was entitled to contribution from the other sureties in the original obligation.² It was held also to be a general rule that if one surety is insolvent his share shall be apportioned among the solvent sureties; but the surety in the forthcoming bond having, by executing it, released the property of the principal in the bond, and that principal having become insolvent, his surety was not entitled to recover from the other sureties in the original bond any part of the share of his principal in the forthcoming bond as one of the sureties in the original; and held, further, that the surety in the forthcoming bond was not entitled to a decree for the costs of awarding the execution on that bond either against the principal in the original or his sureties, but only against the principal in the forthcoming bond.³

W., a deputy of L., sheriff, gave a bond to his principal with five sureties for the faithful discharge of his duties; L. not being satisfied with this security, W. and three other persons as his sureties gave a second bond to L. with like condition, a memorandum being indorsed on this second bond at the time of its execution, in conformity with a previous agreement, that L. should not resort to the second bond for indemnity for the misconduct of the deputy so long as the sureties in the first bond should be residents of the state and it should ap-

¹ Briggs v. Hinton, 14 Lea, 233; Rosenbaum v. Goodman, 78 Va. 121; Chaffin v. Campbell, 4 Sneed, 184; Mitchell v. De Witt, 25 Tex. Supp. 180, 78 Am. Dec. 561; Osborne v. Cunningham, 4 Dev. & Batt. 423; Hartwell v. Smith, 15 Ohio St. 200; Brandenburg v. Flynn, 12 B. Mon. 397.

² In Shufelt v. Moore, 93 Mich. 564, 53 N. W. Rep. 722, after judgment against the maker and indorser of a note, the maker requested the indorser to indorse a second note to raise money to pay the judgment, and he refused to do so unless the maker secured a co-indorser, which he did, both indorsing the note. They thereby became co-sureties.

³ Preston v. Preston, 4 Gratt. 88, 47 Am. Dec. 717; Dunlap v. Foster, 7 Ala. 734; Hammock v. Baker, 3 Bush, 208; Smith v. Bing, 3 Ohio, 33; Hartwell v. Smith, 15 Ohio St. 200.

pear that he could be indemnified without recourse to the sureties in the second bond. L. recovered a judgment on the [595] first bond against the sureties therein bound for the amount of damages sustained by him by reason of the deputy's misconduct in office; held, that the sureties in the first bond had no right to contribution from the sureties in the second.¹

There is an exception in cases of tort² to the rule that defendants standing *equali jure* are bound to contribute. But it is not universally true that there is no contribution between trespassers or wrong-doers. If one of several parties who have engaged in an act which, when done, appears to them right and lawful, but which turns out to be an injury to some third party, pays the damages which such third party may recover on account of the injury so done, he may maintain a suit for contribution; and all parties to the transaction may be compelled to pay their just proportions respectively of the sums so paid. As decided in *Adamson v. Jarvis*³ the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the party seeking redress must be presumed to have known that he was doing wrong. When the parties think they are doing a legal and proper act contribution will be compelled; but when they are conscious that they are doing a wrong the courts will not interfere.⁴

To produce equality and give sureties a reciprocal right of contribution, the legal character and effect of their undertakings should be in substance the same; they should be bound to the performance of the same duty, or the payment of the same debt, and in favor of the same party. When this is the case they are co-sureties whether they all sign the same instrument, or sign different instruments, at the same or different times.⁵

¹ *Harrison v. Lane*, 5 Leigh, 414, 27 Am. Dec. 607.

² *D-nt v. King*, 1 Ga. 200, 44 Am. Dec. 638.

³ 4 Bing. 66, approved in *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] App. Cas. 318.

⁴ *Grimes v. Taylor*, 93 Ill. App. 494, and local cases cited; *Achison v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663. See § 764.

The distinction stated in the text

is not always borne in mind. *Block v. Estes*, 92 Mo. 318, 4 S. W. Rep. 731.

⁵ *Somers v. Johnson*, 57 Vt. 274; *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177, 7 S. E. Rep. 204; *Stevens v. Tucker*, 87 Ind. 109; *Young v. Shunk*, 30 Minn. 503, 16 N. W. Rep. 402; *Perrins v. Ragland*, 5 Leigh, 552; *Whiting v. Burke*, L. R. 6 Ch. 342, affirming L. R. 10 Eq. Cas. 539; *Kellar v. Williams*, 10 Bush, 216; *Deering v. Earl of Winchelsea*, 2 B. & P. 270;

The guardian of a minor who had given a guardianship bond in the form required by law was subsequently required, in view of a late increase of the estate, to give a new bond [596] in a larger penal sum than the first; such bond was accordingly filed with a new surety. It was held that both bonds were valid, and the sureties in them co-sureties; that, being bound in different sums, they were, as between themselves, compellable to contribute in proportion to the different penalties in their respective bonds.¹ Though a surety upon such a bond, after being discharged under a statute, remains liable to the ward for any past default of his principal, he is not liable to a surety of the latter upon a second bond who has answered for such default in consequence of a liability attached by statute to the second bond. The liability of the second surety is primary as between himself and the first surety, and he has no right either of indemnity or contribution from the latter.²

Where several principals become bound for the same debt they stand in the relation of co-sureties.³ Where a debt is contracted by several persons for a common purpose, and one of them pays the whole of it, he may sue each of the others separately at law for his aliquot share thereof.⁴ Six persons drew a bill of exchange upon which money was received by them; at the same time they executed an instrument in which

Woodworth v. Bowes, 5 Ind. 276; Breckenridge v. Taylor, 5 Dana, 110; Bosley v. Taylor, id. 157, 30 Am. Dec. 667; Craig v. Ankeney, 4 Gill, 225; Norton v. Coons, 3 Denio, 130; Warner v. Morrison, 3 Allen, 566; Stout v. Vanse, 1 Rob. (Va.) 169; Bentley v. Harris, 2 Gratt. 357; Harris v. Ferguson, 2 Bailey, 397; Cobb v. Haynes, 8 B. Mon. 137; Bell v. Jasper, 2 Ired. Eq. 597; Bright v. Lennon, 83 N. C. 183; Robinson v. Boyd, 60 Ohio St. 57, 53 N. E. Rep. 494; Chaffee v. Jones, 19 Pick, 260; Kehnast v. Daum, 6 Ohio Dec. 401; Brooks v. Whitmore, 142 Mass. 399, 8 N. E. Rep. 117; Odom v. Odom, 2 Baxt. 446.

¹ Loring v. Bacon, 3 Cush. 465; Armitage v. Pulver, 37 N. Y. 494;

Stevens v. Tucker, 87 Ind. 109; Cobb v. Haynes, 8 B. Mon. 137; Pickens v. Miller, 83 N. C. 543; Bell's Adm'r v. Jasper, 2 Ired. Eq. 597; Dentley v. Harris' Adm'r, 2 Gratt. 358 (additional injunction bond); Keuter v. Thompson, 13 Bush, 287 (additional official bond); Thompson v. Dekum, 32 Ore. 506, 52 Pac. Rep. 517; Rudolf v. Malone, 104 Wis. 470, 80 N. W. Rep. 743.

² Little v. Bennett, 94 Ga. 405, 21 S. E. Rep. 62.

³ Chipman v. Morrill, 20 Cal. 130; Hetfield v. Dow, 27 N. J. L. 540; Crafts v. Mott, 4 N. Y. 603; Hayes v. Morrison, 38 N. H. 90.

⁴ Parker v. Ellis, 2 Sandf. 223.

they recited that the bill was drawn for the mutual benefit of all the parties to it, and that each would bear an equal proportion in its payment, each paying his separate portion. It was held that each was surety for the others for all above his own share in the bill; that they were co-sureties for all above the sum they were individually liable for.¹

Indorsements upon negotiable paper for the accommodation of the drawer import not a joint but a several and successive liability, each indorser being responsible to all who succeed him.²

§ 756. Basis of contribution. Co-sureties are always supposed to assume the same risk, and to stand relatively to the principal in the same situation; neither obtaining any benefit by the transaction, and each equally subjecting himself to responsibility.³ Where one surety, without the knowledge of his co-surety, by previous arrangement with the principal debtor, received one-half of the sum borrowed, he was denied [597] contribution from the other surety who undertook the responsibility in confidence that his associate was equally with him exposed to risk.⁴

If a surety is entitled to contribution his right of recovery, and the amount to which he is entitled from his co-sureties, are based on and governed by the maxim that "equality is equity." Where all are solvent, each is responsible to his co-

¹ *Martin v. Baldwin*, 7 Ala. 923.

² *Bank of United States v. Beirne*, 1 Gratt. 239, 42 Am. Dec. 551; *McCarty v. Roots*, 21 How. 432; *Spence v. Barclay*, 8 Ala. 581; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Sherrod v. Rhodes*, 5 Ala. 683; *McDonald v. Magruder*, 3 Pet. 470; *Harrah v. Doherty*, 111 Mich. 175, 69 N. W. Rep. 242; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. Rep. 308; *Egbert v. Hanson*, 34 N. Y. Misc. 596, 70 N. Y. Supp. 333; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. Rep. 109. But see *Daniel v. McRae*, 2 Hawks, 590, 11 Am. Dec. 787; *Richards v. Simms*, 1 Dev. & Bat. 48; *Currier v. Fellows*, 27 N. H. 366.

³ *Hoover v. Mowrer*, 84 Iowa, 43, 50

N. W. Rep. 62, 35 Am. St. 293; *Buckler v. Rogers*, 6 Ky. L. Rep. 451 (Ky. Super. Ct.); *McPherson v. Talbott*, 10 Gill & J. 499, 32 Am. Dec. 191.

⁴ *McPherson v. Talbott*, *supra*; *Carr v. Smith*, 129 N. C. 232, 39 S. E. Rep. 831.

Where a surety received security against his liability as such and was liable to his co-sureties for the fund realized therefrom, he was entitled to be credited for attorney fees paid in defending his title to the property held as security, and for the money used to extinguish prior liens thereon; but was not entitled to be paid an indebtedness due him individually from the principal. *Hoover v. Mowrer*, *supra*.

surety for an aliquot proportion of the money for which they were bound, ascertained by the number of sureties.¹ If one of several has paid the entire debt, or more than his share of it, each of the others is severally liable for his proportion, to which interest may be added.² The sureties upon one or more of the several bonds of an executor will not be compelled to contribute with the surety on another bond to the payment of an amount charged against him for interest on money loaned to the latter surety. In other words, a surety is not liable for the unlawful acts of his co-surety.³ If, after each surety has contributed his share of the debt, to one of them is refunded the amount paid by him, he is answerable to the others for a ratable share of it.⁴ And where one has been obliged to pay costs to the creditor, he may recover from his co-surety the same proportion of them as of the debt paid.⁵ The failure to pay the debt which occasioned the costs is to be imputed to all who were liable and sued; and the extent of their neglect is to be measured by the respective proportions which they were bound to pay in reference to each other at the time of the suit brought. They were bound to contribute each his proper share towards

¹ *Faires v. Cockerell*, 88 Tex. 428, 437, 31 S. W. Rep. 190, 28 L. R. A. 528; *Scott v. Rowland*, 14 Tex. Civ. App. 370, 37 S. W. Rep. 380; *Smith v. Mason*, 44 Neb. 610, 63 N. W. Rep. 41; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. Rep. 92; *Rodgers v. McClure*, 4 Gratt. 81, 47 Am. Dec. 715; *Davies v. Humphreys*, 6 M. & W. 153; *Norton v. Coons*, 3 Denio, 130, 6 N. Y. 33; *McDonald v. Magruder*, 3 Pet. 470.

On the deposit of securities by two persons for the indemnification of a surety, and the payment of the liability from those deposited by one alone, he may enforce contribution in proportion to the relative amount of the securities furnished by him. *Springs v. Brown*, 97 Fed. Rep. 405.

² *Acers v. Curtis*, 68 Tex. 423, 4 S. W. Rep. 551; *Miles v. Bacon*, 4 J. J. Marsh. 463; *Gibbs v. Bryant*, 1 Pick. 118; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. Rep. 92; *Curtis v. Banker*, 136 Mass. 355; *Faurot v. Gates*, 86 Wis.

569, 57 N. W. Rep. 294; *Sloan v. Gibbs*, 56 S. C. 480, 35 S. E. Rep. 408, 76 Am. St. 559 (at the legal rate although the plaintiff had paid a higher rate); *Smith v. Mason*, 44 Neb. 610, 63 N. W. Rep. 41. See § 748.

³ *Thompson v. Dekum*, 32 Ore. 506, 52 Pac. Rep. 517; *Eshleman v. Bolenius*, 144 Pa. 269, 22 Atl. Rep. 758.

⁴ *Smith v. Hicks*, 5 Wend. 48. See *Gould v. Fuller*, 18 Me. 364.

⁵ *Hayes v. Morrison*, 38 N. H. 90; *Davis v. Emerson*, 17 Me. 64; *Carter v. Fidelity & Deposit Co.*, 134 Ala. 369, 32 So. Rep. 632.

Although the co-surety was not served with process. *Van Winkle v. Johnson*, 11 Ore. 469, 50 Am. Rep. 495.

But he cannot recover attorneys' fees stipulated for in a note unless he has paid them to the holder. *Acers v. Curtis*, 68 Tex. 423, 4 S. W. Rep. 551. But see *Carpenter v. Minster*, 72 Tex. 370, 12 S. W. Rep. 180.

the debt; and the costs which resulted from their neglect to pay it must be apportioned among them in proportion to the measure of neglect imputable to them. The same equitable principles which govern among co-promisors in reference to the debt for which they are jointly liable apply in case of costs recovered in a judgment against them jointly for non-payment of their joint debt.¹ So a surety may recover in a suit against a co-surety a proportionate share of the taxable costs which he was compelled to pay in the suit against himself, for each is equally in fault for not paying the debt;² and also for costs and [598] expenses of defending a suit if the defense is reasonably and judiciously made.³ Where one of the sureties paid the debt and took an assignment of the mortgage by which it was in part secured, he was allowed against his co-surety a commission of five per cent. on the value of the premises, and the expenses of foreclosure and sale.⁴ But it has been held in New Hampshire that unless there is some agreement, there is no right to contribution in respect to other expenses than the costs collected in a suit against a surety. In the absence of any agreement to that effect either of the parties incurring expense in defending the suit does so on his own account. The fact that others have a common interest with him in the defense will not of itself authorize him to incur expense upon their joint account.⁵

§ 757. Insolvency of co-surety. In equity an insolvent surety is ignored in the apportionment of the debt among the sureties; so that if one has paid the debt and sues for contribution, the amount which the insolvent should pay must be

¹ Hayes v. Morrison, 38 N. H. 90.

² Wynn v. Brooke, 5 Rawle, 106; Kemp v. Finden, 13 M. & W. 421; Briggs v. Boyd, 37 Vt. 534; Gross v. Davis, 87 Tenn. 226, 11 S. W. Rep. 92; Boutin v. Etsell, 110 Wis. 276, 85 N. W. Rep. 964, limiting Shepard v. Pebbles, 38 Wis. 374; Backus v. Coyne, 45 Mich. 584, 8 N. W. Rep. 694. See § 754. See *contra*, Knight v. Hughes, 3 C. & P. 467; Bosley v. Taylor, 5 Dana, 157, 30 Am. Dec. 667; McKenna v. George, 2 Rich. Eq. 15.

Contribution was decreed as to

traveling expenses in Preston v. Campbell, 3 Hayw. 20.

³ Gross v. Davis, 87 Tenn. 226, 11 S. W. Rep. 92; Curtis v. Banker, 136 Mass. 355; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Marsh v. Harrington, 18 Vt. 150. See *Comegys v. State Bank*, 6 Ind. 357; *Walker v. Hatton*, 10 M. & W. 249; *Greely v. Dow*, 2 Met. 176; *Penley v. Watts*, 7 M. & W. 601.

⁴ *Livingston v. Van Rensselaer*, 6 Wend. 63.

⁵ Hayes v. Morrison, 38 N. H. 90.

shared and borne by the others, as though such insolvent had never been bound.¹ But at law in some states this equity has not yet been adopted, and the amount is ascertained which each co-surety should contribute without regard to the insolvency of any one or more of the sureties.² In other states this principle of equity is in force at law.³ A surety who has removed from the state is considered insolvent.⁴ On the question of contribution between co-sureties, partners who signed in the partnership name are to be regarded as but one surety.⁵

§ 758. Indemnification of surety by principal. It is no objection to an action for contribution that the plaintiff has received a partial indemnity from the principal by an assignment of property; the assignment inures to the benefit [599] of all the sureties, and the defendant is liable for his proportion of the balance paid by the plaintiff beyond the indemnity.⁶ The right of a surety who pays a judgment against his principal to contribution from his co-surety is not lost because he has accepted a conveyance of land from the principal, to be sold and the proceeds applied to the payment of such sum as the surety to whom the conveyance was made shall be obliged to make, the balance to be paid to the principal. Such trans-

¹ *Gross v. Davis*, 87 Tenn. 226, 11 S. W. Rep. 92; *Riley v. Rhea*, 5 Lea, 116; *McKenna v. George*, 2 Rich. Eq. 15; *Rynearson v. Turner*, 52 Mich. 7, 17 N. W. Rep. 219; *Stewart v. Goulden*, 52 Mich. 143, 17 N. W. Rep. 731; *Samuel v. Zachery*, 4 Ired. 377; *Parker v. Ellis*, 2 Sandf. 223; *Sloan v. Gibbes*, 56 S. C. 480, 491, 35 S. E. Rep. 408, 76 Am. St. 559; *Smith v. Mason*, 44 Neb. 610, 616, 63 N. W. Rep. 41; *Henderson v. McDuffee*, 5 N. H. 38; *Acers v. Curtis*, 68 Tex. 423, 4 S. W. Rep. 551; *Young v. Lyons*, 8 Gill, 162.

The agreement of the parties may, of course, vary this rule. See *Harrison v. Kirk's Adm'r*, 8 Ky. L. Rep. 779 (Ky. Super. Ct.).

² *Riley v. Rhea*, *Samuel v. Zachery*, *supra*; *Cobb v. Haynes*, 8 B. Mon. 137; *Dodd v. Winn*, 27 Mo. 501.

³ *Gross v. Davis*, *supra*; *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. Rep. 680; *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177; *Currier v. Baker*, 51 N. H. 613; *Bosley v. Taylor*, 5 Dana, 147; *Harris v. Ferguson*, 2 Bailey, 397; *Strong v. Mitchell*, 19 Vt. 644; *Magruder v. Admire*, 4 Mo. App. 133.

⁴ *Liddell v. Wiswell*, 59 Vt. 365, 8 Atl. Rep. 680; *Boardman v. Paige*, 11 N. H. 431; *Faurot v. Gates*, 86 Wis. 569, 57 N. W. Rep. 294, citing the text; *Voss v. Lewis*, 126 Ind. 155, 25 N. E. Rep. 892; *Burroughs v. Lott*, 19 Cal. 125; *Young v. Clark*, 2 Ala. 264; *Bushnell v. Bushnell*, 77 Wis. 436, 46 N. W. Rep. 442.

⁵ *Chaffee v. Jones*, 19 Pick. 260.

⁶ *Boughner v. Hall*, 24 W. Va. 249; *Bachelder v. Fiske*, 17 Mass. 463; *John v. Jones*, 16 Ala. 454.

action is merely a transfer of the property in trust for the benefit of both sureties.¹

Where a surety had a deed of trust of certain property as an indemnity executed by the principal, and the surety neglected to have it registered, and the property was sold by other creditors, it was held that he lost his right to contribution.² To the extent that such security would save the sureties from loss, neglect of the surety in preserving, or his voluntary act in relinquishing, it will detract from his right to contribution.³ And the presumption is that the securities surrendered are of the value expressed upon their face, and the burden of showing that they were not rests upon the party surrendering them.⁴ A surety may take securities from his principal to indemnify himself; and if he brings an action against his co-surety for contribution the fact of his having such securities will not bar a recovery; but after such recovery the defendant is entitled to enforce his right of subrogation, and so obtain the benefit of the securities. If before action brought for contribution securities held for indemnity are converted into money, it is a payment *pro tanto* to the surety by the original debtor, and so far an extinguishment of the liability. A co-surety sued for contribution may show that money has been so realized.⁵ Whatever advantage or benefit results to one

¹ Roeder v. Niedermeier, 112 Mich. 608, 71 N. W. Rep. 154.

² Pool v. Williams, 8 Ired. 286.

³ Taylor v. Morrison, 26 Ala. 728, 62 Am. Dec. 747; Teeter v. Pierce, 11 B. Mon. 399; Ramsey v. Lewis, 30 Barb. 403; Roberts v. Sayre, 6 T. B. Mon. 188; Currier v. Fellows, 27 N. H. 366; Goodloe v. Clay, 6 B. Mon. 236; Chilton v. Chapman, 13 Mo. 470; Steele v. Mealing, 24 Ala. 285; Schmidt v. Coulter, 6 Minn. 492; Roberts v. Cooper's Assignee, 12 Ky. L. Rep. 712 (Ky. Super. Ct.).

⁴ Paulin v. Kaighn, 29 N. J. L. 480; Fielding v. Waterhouse, 40 N. Y. Super Ct. 424.

⁵ Roberts v. Jeffries, 80 Mo. 115; Wolcott v. Hagerman, 50 N. J. L. 289, 13 Atl. Rep. 605; Keiser v. Beam, 117 Ind. 31, 19 N. E. Rep. 534; Tolle v.

Boeckeler, 12 Mo. App. 54; Whiteman v. Harriman, 85 Ind. 49; Shaeffer v. Clendenin, 100 Pa. 565; Boughner v. Hall, 24 W. Va. 249; Simmons v. Camp, 71 Ga. 54; Scribner v. Adams, 73 Me. 541; McMahon v. Fawcett, 2 Rand. 514, 14 Am. Dec. 796; Paulin v. Kaighn, 29 N. J. L. 480; Anthony v. Percifull, 8 Ark. 494; Dering v. Earl of Winchelsea, 1 Cox, 318; Steel v. Dixon, 17 Ch. Div. 825 (even though the receiving of such security was a condition by which alone the surety was induced to become such, and his co-sureties were ignorant of its being given); Berridge v. Berridge, 44 Ch. Div. 168; Mueller v. Barge, 54 Minn. 314, 56 N. W. Rep. 36; Barge v. Van Der Horck, 57 Minn. 479, 59 N. W. Rep. 630; Urbahn v. Martin, 19 Tex. Civ. App. 93, 46 S. W. Rep. 291. See

surety from his dealings as such with the common debtor or creditor inures to the benefit of his co-obligors.¹ Hence, a surety who has paid a judgment and, pursuant thereto, has obtained a sale of his principal's property, and become the purchaser of it at a nominal price, may be charged in the adjustment of his claim against his co-surety with its fair value;² and if a surety who has received funds from his principal makes a profit on them, this will lessen the amount he may recover from a co-surety.³ There are, however, some limitations upon this right. If indemnity is furnished one surety by a stranger to the contract the co-sureties have no claim thereto.⁴ A surety who is fully indemnified cannot claim contribution.⁵ It has also been held that it is not inequitable, under some circumstances, for a debtor to make specific pledges of his own property, limited to the personal indemnity of a single surety, without the benefit of participation or subrogation, as when the surety's liability is contingent upon conditions not common to his co-sureties, and which may never become absolute.⁶

The right of a co-surety to claim the benefit of security given to his fellow is subject to the superior claim of the creditor to the benefit of all securities given by the principal debtor to a surety for the payment of the debt. The creditor's right does not rest upon any liability of the debtor to him, or upon any peculiar relation growing out of the suretyship, but upon the principle that the surety, being the creditor's debtor, and in

Smith v. Steele, 25 Vt. 427, 60 Am. Dec. 276; White v. Banks, 21 Ala. 705, 56 Am. Dec. 283. Compare Morrison v. Taylor, 21 Ala. 779; Goodloe v. Clay, 6 B. Mon. 236; Ramsey v. Lewis, 30 Barb. 403.

¹ Owen v. McGehee, 61 Ala. 440; Simmons v. Camp, 71 Ga. 54; Agnew v. Bell, 4 Watts, 31.

² Sanders v. Weelburg, 107 Ind. 266, 7 N. E. Rep. 573.

³ Simmons v. Camp, 71 Ga. 54.

⁴ Leggett v. McClelland, 39 Ohio St. 624.

⁵ Reinhart v. Johnson, 62 Iowa, 155, 17 N. W. Rep. 452; Gibson v. Shehan,

5 D. C. App. Cas. 391, 28 L. R. A. 400.

⁶ Per Matthews, J., in Hampton v. Phipps, 108 U. S. 260, 265, 2 Sup. Ct. Rep. 622, referring to Hopewell v. Cumberland Bank, 10 Leigh, 206. See Moore v. Moore, 4 Hawks, 358.

"A co-surety who is also surety for the same principal to a third person has a right to take indemnity from said principal against loss on said liability to such third person, and the other co-surety has no right to participate in such indemnity." Urbahn v. Martin, 19 Tex. Civ. App. 93, 97, 46 S. W. Rep. 291, citing Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361.

fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor.¹ This principle applies where the security is given for mere indemnity,² and the creditor's right is not barred though the statute has run on the note indemnified against nor because the mortgage has been foreclosed by one to whom it has been assigned.³ But it does not extend to a security given by one surety to his co-surety to secure him against loss by reason of having assumed that relation.⁴ According to some authorities the creditor can only reach securities held by the surety as indemnity by way of subrogation after he has actually or constructively been damnified.⁵ But the weight of authority is to the effect that an assignment of securities by the principal to his surety for that purpose raises an implied trust in favor of the creditor, which, on the maturity of his debt, he may enforce, whether the surety has been damnified or not, and whether the latter or his principal, either or both, are insolvent.⁶ In a suit against one of two several sureties on a bond he may, his co-bondsman consenting, set off a judgment in favor of the latter against the plaintiff.⁷

After the principal's debt is paid by the sureties in the proportions for which they are liable the equities between them as co-sureties cease and each is an independent creditor of the principal for the amount he has paid. If one of the sureties thereafter receives indemnity from the principal the others are

¹ Per Gray, J., in *Keller v. Ashford*, 133 U. S. 610, 623, 10 Sup. Ct. Rep. 494. See *Tolle v. Boeckeler*, 12 Mo. App. 54.

² *Keene Five Cents Savings Bank v. Herrick*, 62 N. H. 174.

³ *Holt v. Penacook Savings Bank*, 62 N. H. 557.

⁴ *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. Rep. 622. See *Bowditch v. Green*, 3 Met. 360.

⁵ *Rankin v. Wilson*, 47 Iowa, 463; *Carpenter v. Bowen*, 42 Miss. 28; *Pool v. Doster*, 57 id. 258; *Hopewell v. Cumberland Bank*, 10 Leigh, 206.

⁶ Per Powers, J., in *Morrill v. Mor-*

rill, 53 Vt. 74, 38 Am. Rep. 659, citing *New Bedford Inst. v. Bank*, 9 Allen, 175; *Kramer's Appeal*, 37 Pa. 71; *Rice's Appeal*, 79 id. 168; *Seibert v. True*, 8 Kan. 52; *Ohio L. Ins. Co. v. Ledyard*, 8 Ala. 866; *Moore v. Moberly*, 7 B. Mon. 299; *Curtis v. Tyler*, 9 Paige, 432; *Ten Eyck v. Holmes*, 3 Sandf. Ch. 428; *Parris v. Hulett*, 26 Vt. 308; *Brandt on Suretyship & G.*, § 283; 1 *Story's Eq. Jur.*, § 499. To the same effect is *Kelly v. Herrick*, 131 Mass. 373.

⁷ *Hibert v. Lang*, 165 Pa. 439, 30 Atl. Rep. 1004.

not entitled to share in it.¹ An assignment made to indemnify a surety against loss does not inure to the benefit of one who thereafter became bound with the assignee as surety for the assignor.²

§ 759. Accrual of right of action; voluntary payment.

No suit against a co-surety for contribution can be maintained unless the plaintiff has paid more than his share of the debt.³ Parke, B., said: "This appears to us to be very reasonable; for if a surety pays part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety who might [600] himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-security would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until he has paid more than his proportion, either of the whole debt, or that part of the debt which remains unpaid of the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that he has no equity to receive a contribution, and consequently no right of action which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, has paid a portion of the debt, and the principal, within six years, has paid the residue, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal; for until the latter date it does not appear that the surety has paid more than his share. . . . The right of action having been once established, it seems clear that when a surety has paid more than his share every such payment ought to be reimbursed by those who have not paid theirs in order to place him on the same footing.⁴ If a surety satisfies a debt or dis-

¹ *Urbahn v. Martin*, 19 Tex. Civ. App. 93, 97, 46 S. W. Rep. 291; *Hall v. Cushman*, 16 N. H. 462; *Allen v. Wood*, 3 Ired. Eq. 386; *Harrison v. Phillips*, 46 Mo. 520. 337, 5 Am. Rep. 669; *Morgan v. Smith*, 70 N. Y. 537; *Roberts v. Jeffries*, 80 Mo. 115; *Glasscock v. Hamilton*, 62 Tex. 143; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. Rep. 92; *Gourdin v. Trenholm*, 25 S. C. 362; *Hampton v. Phipps*, 108 U. S. 260, 2 Sup. Ct. Rep. 622; *Pegram v. Riley*, 88 Ala. 399, 6 So. Rep. 753.

² *Roberts v. Cooper's Assignee*, 12 Ky. L. Rep. 712 (Ky. Super. Ct.).

³ *Ex parte Gifford*, 6 Ves. 805; *Smith v. State*, 46 Md. 617; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. Dec. 497; *Camp v. Bostwick*, 20 Ohio St. 153.

⁴ *Davies v. Humphreys*, 6 M. & W.

charges a liability at a discount, he can only claim contribution on the basis of the amount he actually pays;¹ but if the entire debt is satisfied the right to contribution exists though the payment made was less in amount than the surety would have been liable for if the full amount of the claim had been collected.²

One of two sureties of an insolvent administrator bought up legacies, for which the sureties were bound, at a discount, and it was held that he could only charge his co-surety for his proportion of what was paid for the legacies and of the expense of purchasing them.³ And if the payment is made in property or in depreciated currency doubtless the same rule should apply between co-sureties as between surety and principal.⁴ Nor can a surety claim contribution until he has actually made payment; and what is payment between surety and principal is such between surety and surety.⁵ If payment of more than is due is made a co-surety is not bound for the excess.⁶ If the debt is due any surety may pay it voluntarily, and hold his co-sureties for their respective portions; but if the principal is solvent contribution cannot be enforced.⁷ A [601] surety released by the creditor with the consent of his co-surety is not liable for contribution.⁸ If a surety discharge one of his co-sureties such discharge is equivalent only to pay-

¹ *Sinclair v. Redington*, 56 N. H. 146. See *Comegys v. State Bank*, 6 Ind. 357.

² *Stallworth v. Preslar*, 34 Ala. 507; *Boutin v. Etsell*, 110 Wis. 276, 85 N. W. Rep. 964.

³ *Tarr v. Ravenscroft*, 12 Gratt. 642.

In *New Bedford Inst. v. Hathaway*, 134 Mass. 69, the holder of a note, by arrangement with a solvent surety thereon, proved it against the insolvent estate of another surety, and assigned his note and his claim against such estate to the solvent surety, who paid him in full. It was held in equity that the surety could prove only one-half the claim against the estate of his co-surety, although he would not receive more than one-half of what he had paid if he was

allowed to prove to the full amount. But see *Hess' Estate*, 69 Pa. 272; *Ex parte Stokes*, De Gex, 618. The last case is inconsistent with *Keith v. Forbes*, 3 Paton, 350; *Ex parte Elton*, 3 Ves. 238.

⁴ See §§ 748, 750; *Edmunds v. Shehan*, 47 Tex. 443; *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh. 558.

⁵ §§ 750, 751; *Chandler v. Brainard*, 14 Pick. 285; *Atkinson v. Stewart*, 2 B. Mon. 348; *Pinkston v. Talliaferro*, 9 Ala. 547; *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, id. 307; *White v. Carlton*, 52 Ind. 371.

⁶ *Briggs v. Hinton*, 14 Lea, 233.

⁷ *Glasscock v. Hamilton*, 63 Tex. 143.

⁸ *Bouchaud v. Dias*, 3 Denio, 238.

ment of his share.¹ A surety who voluntarily pays money on a void note or obligation is not entitled to contribution.² So one of two sureties who pays a judgment obtained against himself, on a cause of action which was barred as to the other or himself at the date of the judgment, cannot claim contribution.³ But if a suit be brought against one of two sureties on a note before the statute of limitations could be successfully interposed as a defense by either, and judgment is obtained after the time when the statute would have furnished a defense in a suit then commenced, and this judgment is satisfied, the right to contribution is not barred.⁴ The legal rights of sureties as against each other are not governed by the *lex loci contractus*; hence if, after an action against them is barred by the law of the state in which all the parties to the debt are resident, one of the sureties voluntarily, but in good faith, goes into another state where there is no defense to the demand and judgment is there rendered against him, he may compel his co-surety to contribute.⁵ If the estate of a deceased surety is discharged from liability to a creditor on account of the debt not being presented within the period allowed by law for that purpose it is still liable to contribution in favor of a surety who afterwards pays the debt.⁶ A surety is not bound to defeat a suit on his contract because of an alteration in it. As to co-sureties who signed it after it was changed he may enforce contribution. They were liable to the payee and the waiver of their co-surety's rights did not injure them. He is also liable for his proportion.⁷ The right of action by the surety for contribution does not accrue at the breach of the contract with the creditor, but upon his payment of the money.⁸ The common law, which has adopted

¹Currier v. Baker, 51 N. H. 613; Cutter v. Emery, 37 N. H. 567; Boardman v. Paige, 11 id. 437.

²Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Glasscock v. Hamilton, 62 Tex. 143, 153.

³Glasscock v. Hamilton, *supra*; 337, 5 Am. Rep. 669.

⁴Cochran v. Walker's Ex'rs, 82 Ky. 220, 56 Am. Rep. 891; Houck v. Graham, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. Rep. 594.

⁵Cocke v. Hoffman, 5 Lea, 105, 40 Am. Rep. 23; ⁶Reeves v. Pulliam, 9 Baxter, 153; Shelton v. Farmer, 9 Bush, 314. ⁷Wood v. Leland, 1 Met. 387; Evans v. Evans, 16 Ala. 465.

⁸Glasscock v. Hamilton, *supra*;

the equitable principle of contribution by allowing an action upon an implied *assumpsit*, confines the remedy to those cases in which there is a just and equitable ground for contribution.¹ It has been denied where the surety who seeks contribution is indebted to the principal for more than he has paid,² or has been otherwise reimbursed.³

§ 760. **Conclusiveness of judgment.** If a surety has no notice of a suit against a co-surety he is not bound by the judgment therein.⁴ But a joint judgment against the sureties is [602] conclusive as between themselves that a cause of action exists against them.⁵ A judgment against one is also conclusive against another if he is notified and has an opportunity to defend.⁶ And where a judgment has been recovered against a part of the sureties and they have paid it, it is competent evidence of the amount they were obliged to pay though not of their liability.⁷ The sureties on the bond of an assignee are concluded by the findings of the court as to the amount, unaccounted for, that came to the hands of the assignee, and which he was ordered to pay over, and cannot attack such findings in a collateral proceeding to recover on the bond.⁸

SECTION 3.

EXPRESS INDEMNITIES.

§ 761. **Damage the gist of the action.** An agreement to indemnify against or save harmless from damages is not broken unless there has been actual loss or injury from the

¹ Russell v. Faylor, 1 Ohio St. 337, 59 Am. Dec. 631; McCrary v. Parks, 18 Ohio St. 1.

² Bezzell v. White, 13 Ala. 422. But see O'Brien v. Karing, 57 N. Y. 649.

³ Mason v. Lord, 20 Pick. 447.

⁴ Annett v. Terry, 35 N. Y. 256; Briggs v. Boyd, 37 Vt. 534; Thomas v. Hubbell, 35 N. Y. 120.

If a suit against all but one of several sureties is compromised by a judgment for a less sum than the principal is liable for, a co-surety not sued and not included in the compromise is not bound to contribute

to the reimbursement of the others. Glasscock v. Hamilton, 62 Tex. 143.

⁵ Knopf v. Morel, 111 Ind. 570, 13 N. E. Rep. 51; Waller v. Campbell, 25 Ala. 544.

⁶ Love v. Gibson, 2 Fla. 598.

⁷ Glasscock v. Hamilton, *supra*; Preslar v. Stallworth, 37 Ala. 402; Leake v. Covington, 99 N. C. 559, 6 S. E. Rep. 241; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98.

⁸ Moulding v. Wilhartz, 169 Ill. 422, 48 N. E. Rep. 189, 67 Ill. App. 659; Thompson v. Dekum, 32 Ore. 506, 52 Pac. Rep. 517, 753.

cause against which the indemnity is given.¹ In such cases damages are the gist of the action, and no cause of action arises until there is a breach resulting in actual injury.² The agreement for indemnity, however, may be so drawn that, though intended exclusively as such, it will admit of a technical breach before there is cause for the recovery of substantial damages; in other words, before the event occurs against which the agreement is intended to protect. Such would be a note given as indemnity, but payable before a cause of action for indemnity had accrued. A suit could be maintained, but only nominal damages could be recovered, for the true consideration and purpose of the note would be open [603] to proof.³ If, however, actual damages are sustained at any time before the trial they may be proved and the recovery increased accordingly.⁴ A covenant against incumbrances is

¹ *Gardner v. Cooper*, 9 Kan. App. 587, 58 Pac. Rep. 230; *Spencer Savings Bank v. Cooley*, 177 Mass. 49, 58 N. E. Rep. 276; *Eldridge v. Crow*, 7 N. Y. Misc. 150, 27 N. Y. Supp. 362; *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. Rep. 545, 40 C. C. A. 530; *Henry v. Hand*, 36 Ore. 492, 59 Pac. Rep. 330; *Barth v. Graf*, 101 Wis. 27, 76 N. W. Rep. 1100; *Oaks v. Scheifferly*, 74 Cal. 478, 16 Pac. Rep. 252; *Little v. Ragan*, 83 Ky. 314; *Selover v. Harpending*, 18 Abb. New Cas. 252; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. Rep. 861; *Staats v. Herbert*, 4 Del. Ch. 508; *Churchill v. Hunt*, 3 Denio, 326; *Aberdeen v. Blackmar*, 6 Hill, 324; *Coe v. Rankin*, 5 McLean, 354; *Wicker v. Hoppock*, 6 Wall. 94; *Little v. Little*, 13 Pick. 426; *Crippen v. Thompson*, 6 Barb. 532; *Conner v. Bean*, 43 N. H. 202; *Lott v. Mitchell*, 32 Cal. 23; *Gardner v. Cleveland*, 9 Pick. 336; *Hall v. Creswell*, 12 Gill & J. 38; *Lyman v. Lull*, 4 N. H. 495; *Jeffers v. Johnson*, 21 N. J. L. 73; *Chace v. Hinman*, 8 Wend. 452; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150; *Gennings v. Norton*, 35 Me. 308; *Churchill v. Moore*, 15 Kan. 255; *Ewing v. Reilly*,

34 Mo. 113; *Douglass v. Clark*, 14 Johns. 177; *Hussey v. Collins*, 30 Me. 190; *Scott v. Tyler*, 14 Barb. 202; *Abeles v. Cohen*, 8 Kan. 180; *Jones v. Childs*, 8 Nev. 121. See *Conkey v. Hopkins*, 17 Johns. 113.

² *Id.* Sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship until such loss has occurred; nor has the defendant in the replevin suit who recovered a judgment against the plaintiff therein, though the sureties and the judgment debtor be insolvent, and the judgment be otherwise uncollectible. *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. Rep. 295.

³ *Boynton v. Twitty*, 53 Ga. 214.

⁴ *Haseltine v. Guild*, 11 N. H. 390; *Osgood v. Osgood*, 39 id. 209; *Anthony v. Percifull*, 8 Ark. 494; *Boynton v. Twitty*, 53 Ga. 214; *Day v. Stickney*, 14 Allen, 255; *Witherby v. Mann*, 11 Johns. 518; *Cornwall v. Gould*, 4 Pick. 444; *Douglass v. Moody*, 9 Mass. 548; *Child v. Eureka Powder Works*, 44 N. H. 354; *Asendorf v. Meyer*, 8 Daly, 278; *Miller v.*

an instance of such an agreement for indemnity of which there may be a technical breach giving a right to recover nominal damages before actual injury;¹ and so is a covenant in a bond to secure the performance of a building contract to the effect that the contractor should pay all bills for material and labor.²

In all cases of conditions or covenants to indemnify and save harmless from damages the proper plea is *non damnificatus*, and then the maintenance of the action depends on the proof of damages.³ But it is otherwise where the condition or agreement is to discharge or acquit the plaintiff from some particular thing, for there the defendant must set forth affirmatively the special manner of performance.⁴

The authorities are by no means uniform in the construction of agreements of similar nature and words in determining whether they shall be deemed to be contracts of indemnity merely, or agreements against the existence of a certain condition, or requiring some positive act of performance. If the contract deviates the least from a simple one to indemnify against damages, even though indemnity is the sole object of it, and where actual loss may be sustained in consequence of a breach, it is generally treated as belonging to the latter [604] class, and damages are recovered accordingly.⁵ Where

Miller Knitting Co., 23 N. Y. Misc. 404, 52 N. Y. Supp. 184.

¹ Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Brooks v. Moody, 20 Pick. 474; Van Slyck v. Kimball, 8 Johns. 198; Stannard v. Eldridge, 16 id. 254; Dana v. Goodfellow, 51 Minn. 375, 53 N. W. Rep. 656. See Clayton v. Franco-Texan Land Co., 15 Tex. Civ. App. 365, 39 S. W. Rep. 645, denying a recovery because no lien had been paid by the purchaser.

² Karr v. Peter, 60 Ill. App. 209.

³ 1 Saund. 117, note 1; Hulland v. Malken, 2 Wils. 126; Cox v. Joseph, 5 T. R. 397; Archer v. Archer, 8 Gratt. 539; Holmes v. Rhodes, 1 Bos. & P. 640 and note; Harmony v. Bingham, 12 N. Y. 113; Thomas v. Allen, 1 Hill, 146.

⁴ Id.; Cro. Eliz. 94; Port v. Jackson, 17 Johns. 239; Andrus v. Waring, 20 id. 153; Coombs v. Newton, 4 Blackf. 120; McClure v. Erwin, 3 Cow. 332; Woods v. Rowan, 5 Johns. 42; Wright v. Chapin, 87 Hun, 144, 33 N. Y. Supp. 1068.

⁵ Conner v. Bean, 43 N. H. 202; In re Negus, 7 Wend. 502; Gilbert v. Wiman, 1 N. Y. 553; Hall v. Nash, 10 Mich. 303; Churchill v. Moore, 15 Kan. 255; Dye v. Mann, 10 Mich. 291; Jarvis v. Sewall, 40 Barb. 449; Webb v. Pond, 19 Wend. 423; Jones v. Child, 8 Nev. 121; Lewis v. Crockett, 3 Bibb, 196; Rawson v. Copland, 2 Sandf. Ch. 254; Willett v. Stewart, 43 Barb. 98; Churchill v. Hunt, 3 Denio, 326; Jeffers v. Johnson, 21 N. J. L. 73; McDonald v. Bauskett, 10 Rich.

the undertaking is simply to indemnify against damages and a cause of action exists, the measure of damages is the actual injury of the kind indemnified against; where the undertaking is to acquit and discharge the promisee, or that some act or event shall or shall not transpire, the damages will be ascertained with reference to the benefit or immunity the promisee would have received if the contract had been performed.¹ In the former case the principle is adhered to that compensation will be limited to actual injury; but in the latter not only will such compensation be given, but in many cases it will be allowed for probable injury.² Some of the cases in which damages for such probable injury are allowed will hereafter be referred to.

§ 762. **What may be recovered.** The damages allowable on express agreements for indemnity will depend on the scope of the undertaking; they can only be such as naturally and proximately proceed from the cause referred to in it.³ When the indemnity is general against the costs and expenses of a certain act, or "against all actions, suits, costs, damages and demands whatsoever for or by reason or on account thereof," it extends to the costs of defending a groundless suit for the act, in which the indemnified party succeeded;⁴ and so where the obligation is "for the payment of such sum as may from any cause be adjudged against the plaintiff."⁵ The words "all costs whatsoever" to which the officer "may be liable," and all the costs which he may be "obliged by law to pay any person or persons," include counsel fees reasonably incurred,⁶ as do words binding the sureties to hold the indemnitee harmless, as well as other expenses incurred by the vendee in pro-

178; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150; *Stroh v. Kimmel*, 8 Watts, 157; *Penny v. Foy*, 8 B. & C. 11; *Warwick v. Richardson*, 10 M. & W. 284; *Pond v. Warner*, 2 Vt. 532; *Morrison v. Berkey*, 7 S. & R. 238; *Mechanics' Savings Bank v. Thompson*, 58 Minn. 346, 59 N. W. Rep. 1054.

¹ *Wicker v. Hoppock*, 6 Wall. 94.

² *Gilbert v. Wiman*, 1 N. Y. 552.

³ *Hallock v. Belcher*, 42 Barb. 199; *Niagara Falls Paper Co. v. Lee*, 20

App. Div. 217, 47 N. Y. Supp. 1; *Buck v. Morrow*, 2 Tex. Civ. App. 361, 21 S. W. Rep. 398, citing the text.

⁴ *Trustees of Newburgh v. Galatian*, 4 Cow. 340; *Chamberlain v. Beller*, 18 N. Y. 115; *Chilsons v. Downer*, 27 Vt. 536.

⁵ *Jordan v. La Vine*, 15 Ore. 329, 15 Pac. Rep. 281; *Carlton v. Dixon*, 14 Ore. 294, 12 Pac. Rep. 394.

⁶ *Lindsey v. Parker*, 142 Mass. 582, 8 N. E. Rep. 745; *McKenzie v. Underwood*, 21 D. C. 126.

protecting the property purchased, the title to which was covered by the bond of indemnity.¹ Where the indemnity was against "any loss, cost or damage legally incurred by reason of said suretyship," the court said that it seems certain enough that the legal or court costs, including the damages on affirmance of the judgment in the appellate court, are included. These costs and damages are the precise liabilities against paying which the indemnitee provided by obtaining this bond. This cost and expense the indemnitor could have stopped at any time by paying the debt his intestate had bound himself to pay or even by notifying the appellee not to prosecute the appeal unless at his own expense. The general rule seems to be that in cases of this kind all such costs may be recovered when nothing appears to indicate bad faith in making the defense. But the general rule seems otherwise when it comes to extraordinary costs, such as attorneys' fees, etc.; and certainly in the absence of a showing that these fees were incurred for the benefit or attempted benefit of the estate, or at the instance of the executor, the indemnitor should not be held bound for them. Unless he encouraged or directed a continuation of the defense by appeal, or upon the whole case such a course appeared palpably to be to his advantage, such extraordinary costs are not chargeable to him.² Under an agreement to indemnify for any loss that may be sustained by reason of becoming surety on a recognizance, there may be a recovery of the cost of taking judgment.³ In Mississippi, no fraud, wilful wrong, malice or oppression being shown, an attachment bond conditioned to save the sheriff harmless against all damages which he may sustain in consequence of the seizure or sale of property does not cover attorneys' fees and expenses incurred in sustaining the issue, such as hotel bills, traveling expenses, telegrams, etc.⁴ The language "to indemnify" in a bond given an officer who had levied on property claimed by a stranger to the action covers costs and attorneys' fees incurred in con-

¹ Kern v. Creditors, 49 La. Ann. 886, 22 So. Rep. 40.

² Brandts' Ex'r v. Donnelly, 94 Ky. 129, 21 S. W. Rep. 534.

³ Keesling v. Frazier, 119 Ind. 185, 21 N. E. Rep. 552.

⁴ Brinker v. Leinkauff, 64 Miss. 236, 1 So. Rep. 170; Moore v. Lowrey, 74 Miss. 413, 21 So. Rep. 237, and cases cited.

sequence of a suit against the officer for the recovery of the value of such property, the principal in the bond having failed to make defense.¹ On the breach of a bond to keep a building free from liens the owner may recover his costs and expenses in defending foreclosure suits, in connection with the sum paid to remove the liens.² The breach of a condition in a contract for the sale of property that the vendees are "to be defended from trouble about patents" authorizes the recovery of costs in infringement suits brought against them, as well as the amount paid for the services of an attorney.³

The damages recoverable must be of the nature contemplated by the agreement, as well as the proximate consequence of the cause stated. A plaintiff in a writ of attachment, desiring to attach goods which had been put on board a vessel, gave a bond to her owner conditioned to pay "all expenses, damages and charges which might be incurred by the owner or master of the schooner, or to which they might be subjected for unloading said goods from said vessel, and for all necessary detention of said vessel for said purpose." It was [605] held that the obligee was not entitled to recover upon the bond, in addition to the expenses, damages and charges directly and immediately incurred by him in unloading the merchandise from the schooner, compensation for legal expenses to which he was subjected in defending a suit commenced against the schooner by the consignee of the goods in another state.⁴ A bond given by an administrator to save his sureties "from any loss or error which might arise from or be caused by said administration" does not make him liable for expenses incurred by them in an effort to secure their discharge, or to compel the obligor to account.⁵ Under a stipulation assuming all liability for and indemnifying the obligor's employer against "any damages arising from injuries sustained by mechanics, laborers or other persons by reason of accidents or otherwise," there is no duty to respond for the negligence of the obligee's employees.⁶ The sureties on an

¹ *Brotton v. Lunkley*, 11 Wash. 531, 40 Pac. Rep. 140.

⁴ *Hallock v. Belcher*, 42 Barb. 199.

² *Henry v. Hand*, 36 Ore. 492, 501, 59 Pac. Rep. 330.

⁵ *Boyle v. Boyle*, 106 N. Y. 654, 12 N. E. Rep. 709.

⁶ *Manhattan R. Co. v. Cornell*, 54

³ *Grant v. Lawrence*, 79 Hun, 565, 22 N. Y. Supp. 901.

Hun, 292, 7 N. Y. Supp. 557.

indemnity bond preliminary to the issue of an attachment are not liable for the sheriff's wilful conversion of the goods without their knowledge or consent.¹ A bond conditioned to save a sheriff harmless from suits, actions, costs, by reason of executing a writ of attachment, does not cover liability for the defendant's loss of interest on money attached, the running of interest being suspended during the pendency of the action.²

An agreement to keep harmless and pay all damages in case of levying on and selling certain property on an execution was held to apply, though the property was replevied before sale; the officer was entitled to recover the costs, attorney fees, and expenses of defending the replevin suit, as well as the damages adjudged therein, although the principal obligor alone had notice of the commencement and pendency of such suit.³ It was considered that the bond was intended to indemnify the officer for taking and holding, and also for selling, the property. It was deemed proper also to allow the costs and expenses of defending the suit, because, as the court say, "the obligors had notice of the suit, and had agreed that it should be defended." And they add, "clearly this entitled the constable, if he chose to do so, to defend the suit and recover from the obligors his costs, attorney fees and expenses. Nothing less than this would be an indemnity, according to the terms of the bond, and notice to one of the joint obligors was sufficient."⁴ If two or more executions are levied on the same property and the officer is indemnified by separate bonds, each obligor is liable for the entire damages; they cannot be apportioned in the ratio of the execution debts; neither can the damages be mitigated by showing that the owner of the property might have recovered it, and so would have been damaged only to the extent of a disturbed possession and casual injury to it.⁵ The obligors in a bond given to indemnify an officer for making an attachment are not liable for a loss resulting from his negligence in the care of the attached property; but if the plaintiff in the attachment is, at his request, appointed keeper of the

¹ Dawson v. Baum, 3 Wash. T'y, 464, 19 Pac. Rep. 46; Bowe v. Wilkins, 105 N. Y. 322, 11 N. E. Rep. 839.

³ Finckle v. Evan, 25 Ohio St. 82.

⁴ Id.

² Clement v. Courtright, 9 Pa. Super. Ct. 45.

⁵ Hill v. Mudd, 9 Ky. L. Rep. 59 (Ky. Super. Ct.).

property and a loss results through his negligence, his liability as principal in the bond is not thereby diminished; but the surety is entitled to a deduction on account of the loss. But no deduction is to be made because of the omission of the indemnified officer to pay a judgment recovered against him by a mortgagee of the attached property in an action for its conversion.¹ In a late English case it appeared that the assignee of a lease undertook to indemnify the assignor against breaches of the covenants and conditions under which the latter held the premises. No assignment was executed, but the indemnifying party entered and held possession until the agreement expired; he let the premises fall out of repair, and the assignor was sued by his landlord for such dilapidations. After the assignee had notice of the action the assignor paid money into court, which the jury found to be sufficient. It was held in an action brought by him against his assignee on his promise of indemnity that the plaintiff was entitled to recover as damages the extra costs necessarily incurred by him over and above the taxed costs paid to him in defending the former action.²

An interesting case on this point occurred in Maine, [606] and appears to have been decided on thorough consideration. It was an action of debt on a bond conditioned "to fully indemnify and save harmless" the plaintiff "from all loss, damage and harm whatsoever by reason of a suit for the infringement of any patent in selling paper collars which the plaintiff has had or may hereafter have" of the defendants, and "to pay all fair and reasonable charges for expenses in defending said suit." The case is thus stated by the court: "In 1867 the plaintiff, a dealer in gentlemen's clothing, was the agent of the defendants in Maine for the sale of paper collars; the Union Paper Collar Company commenced a suit against the plaintiff for an alleged infringement of their patent in the sale of these collars, and on December 17, 1867, attached upon their writ in that suit the plaintiff's entire stock of goods, of the value of \$2,750; the plaintiff immediately notified the defendants of the attachment and used his best efforts to procure the release of his stock from the attachment; but he was

¹ Briggs v. McDonald, 166 Mass. 37, 43 N. E. Rep. 1003.

² Howard v. Lovegrove, 40 L. J. (Ex.) 33, L. R. 6 Ex. 43, 23 L. T. (N. S.) 396, 19 Week. Rep. 188.

unable to do so until January 6, 1868, when he succeeded in procuring receiptors only by mortgaging the stock to secure them; the plaintiff incurred reasonable and necessary expenses in two visits to the defendants in New York, the last time with counsel, resulting in the giving of the bond in suit; the plaintiff contracted a severe illness on his return from New York, in consequence of which his store remained closed until the 1st of February, 1868; his business credit, which was previously good, was destroyed by the attachment; he has been obliged to retain the greater part of the goods mortgaged to secure his receiptors, and the goods have depreciated twenty-five per cent.; he lost the profits of his store during the time that it remained closed, and they have been greatly diminished since on account of the reduction of the stock caused by the attachment and mortgage, and the consequent loss of credit. The suit of the Union Paper Collar Company against the plaintiff is still pending and undecided, and the plaintiff has actually paid nothing as yet on account of it, except as above stated, though he has become liable for counsel fees to a considerable amount." The court held the plaintiff entitled to recover damages, first, for the depreciation of his stock of goods while necessarily withheld from sale by the attachment [607] made on the writ in the suit for infringement of the patent; second, for the reasonable debt contracted, though not paid, for the services of counsel in defending the suit; and third, for the reasonable expenses of himself and counsel incurred in relieving his stock from the attachment; also, that no damages were recoverable, first, for loss of probable profits during the time the plaintiff's stock was under the control of the attaching officer; second, the loss of probable net profits while the store remained closed in consequence of the plaintiff's illness, contracted while trying to relieve the stock from the attachment; third, for the diminution of profits consequent upon the reduction of the stock; fourth, for the prospective damages arising from the loss of mercantile credit caused by the attachment; and fifth, for the expenses of the plaintiff and his counsel in procuring the defendants to enter into the bond in suit.¹

¹ Ripley v. Mosely, 57 Me. 76. Burrows, J., said: "The language of the bond is general and comprehensive, and the plaintiff is entitled to recover all damages which he can legally be deemed to have suffered

§ 763. Same subject. If the indemnified party, for [608] the cause indemnified against, suffers judgment and makes a payment upon it;¹ if his property becomes incumbered and

by reason of the suit, together with the expenses incurred in defending it, so far as they are found 'fair and reasonable;' these last being expressly provided for. We think that under the latter clause in the condition, the debt contracted by the plaintiff to counsel for services in defending the suit against him, *though not yet paid*, is a proper subject for allowance in making up the damages. The course pursued was undoubtedly contemplated by both parties. The defendants do not appear to have employed any counsel to defend the suit; and they bound themselves to pay 'all just and reasonable charges for the expenses in defending.' Ripley was to be saved harmless, not only from any judgment that the Union Paper Collar Co. might recover against him for damages and costs, but also from expense in defending the suit. He has not been saved harmless in the matter of these expenses, but has been forced to incur an indebtedness which the defendants should have provided means to discharge. . . . Lyman v. Lull, 4 N. H. 495. . . . Nor do we think it can be maintained that the depreciation of the plaintiff's stock, while it has been necessarily withheld from sale on account of the attachment, is not a legitimate subject of damages recoverable here. The attachment of the stock

was a natural and common incident of the suit. The plaintiff did his best to procure its release, but, was unable to effect it on any terms which permitted him to make sale of the goods. This depreciation is a matter capable of being definitely ascertained. The loss is neither speculative nor dependent upon contingencies, and is one of the natural and direct results of the suit. The plaintiff's stock has been taken from him. In the natural course of things, it is diminished in value by the lapse of time. It is a loss to him as much as if a portion of it were sold. And we are of opinion that the reasonable expense of himself and counsel, incurred by the plaintiff in the effort to release his property from attachment, is also recoverable; but not that which was incurred for the purpose of procuring the defendants to enter into the contract of indemnity.

"And with regard to all the other items which go to make up the damages assessed, we think them either too remote and uncertain, or too much complicated with other intervening efficient causes to be allowed in this suit. They do not seem to us to be either the direct and natural consequences of the suit, or to be such losses as may reasonably be supposed to have been in the contemplation of both parties at the time

¹ Valentine v. Wheeler, 116 Mass. 478; White v. French, 15 Gray, 339; Moule v. Garret, 41 L. J. (Ex.) 63, L. R. 7 Ex. 101; Wallace v. Gilchrist, 24 Up. Can. C. P. 40; Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74; Anthony v. Percifull, 8 Ark. 474; Brooklyn v. Brooklyn R. Co., 57 Barb. 497; Hold-

gate v. Clark, 10 Wend. 216; English v. Grant, 102 Ga. 35, 29 S. E. Rep. 157; Gamble v. Cuneo, 21 App. Div. 413, 47 N. Y. Supp. 548, affirmed without opinion, 163 N. Y. 634; Union Guaranty & Trust Co. v. Robinson, 79 Fed. Rep. 420, 24 C. C. A. 650 (and costs and interest).

he pays the incumbrance;¹ or is subjected to service or trouble or any expense² within the scope of the agreement he may [609] recover damages for the same.³ So if the party lose

the agreement was entered into. No small part of them accrued by reason of other efficient proximate causes, the force and effect of which cannot be estimated; nor can the damages accruing from the combination be apportioned. The object of the bond was to reimburse the plaintiff for so much property as should be taken from him by reason of the suit and for the expenses of defending it. It cannot be so extended as to relieve the plaintiff from all the consequences of his unfortunate or unwise management since, though he may have fallen into the mistakes or met with the misfortunes in consequence of the suit operating as a remote cause. But the damages thence resulting are consequences of consequences, and not legally computable. Very manifestly, if there were no other elements of uncertainty, this should prevent the allowance made for loss of probable profits during the time the store remained closed in consequence of the plaintiff's illness contracted on his return from New York; for the diminution of profits consequent upon the reduction of his stock; and for the speculative damages arising from loss of mercantile credit. Much of the reasoning in *Hayden v. Cabot*, 17 Mass. 169, is applicable in this case."

Under a bond given to obtain the right to enter upon land and lay a gas line, and conditioned to pay "all damages of whatsoever nature and kind that may be suffered or sustained," there may be a recovery for the loss of trade brought about by the enforced removal of the obligee's place of business. *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. 170, 16 Atl. Rep. 763.

¹ *Webb v. Pond*, 19 Wend. 423; *Smith v. Compton*, 3 B. & Ad. 407; *Henry v. Hand*, 36 Ore. 492, 59 Pac. Rep. 330.

² *Nutt v. Merrill*, 40 Me. 237; *Jarvis v. Sewall*, 40 Barb. 449; *Lyman v. Lull*, 4 N. H. 495; *French v. Parish*, 14 id. 497; *Smith v. Compton*, 3 B. & Ad. 407; *Fisher v. Fallows*, 5 Esp. 171; *Mott v. Hicks*, 1 Cow. 513; *Short v. Kalloway*, 11 A. & E. 28; *Orr v. Bigelow*, 20 Barb. 21; *Trustees of Newburgh v. Galatian*, 4 Cow. 340; *Hayden v. Hill*, 52 Vt. 259; *Milk v. Waite*, 18 Abb. New Cas. 236 (expense of arresting absconded defendant).

³ In *Scott v. Tyler*, 14 Barb. 202, the bond sued on recited that an execution had been placed in the hands of the obligee, the plaintiff. Assheriff, and by virtue of it, his deputy had levied on certain goods and chattels claimed by one Disbrow, who was not the execution debtor, and who had replevied the same from the plaintiff, and that action was pending. The condition was that in case the plaintiff should defend that suit, then if the obligors should indemnify and save harmless the obligee from "all costs charges and expenses which he shall incur in defending," the obligation to be void. It was held to be the intention of the parties to limit the obligation to the expenses of the defense, strictly, and that the damages and costs recovered by Disbrow were not embraced. The plaintiff incurred costs and expenses which he had assumed to pay, but had not paid, amounting to \$112.25. These were also disallowed because they had not been paid. *Strong, J.*, said: "If the obligation of the defendants is to indemnify and

property by breach of the agreement to indemnify,¹ he will be entitled, among other damages, to recover its value. A landlord who has bound himself to pay his tenant any and all losses occasioned by the sale of the leased premises is liable for the expenses and losses of the lessee sustained in holding his cattle on the commons pending a diligent effort to secure a pasture in place of that of which he has been deprived.² Indemnity "from any and all loss, damage and liability whatsoever arising from or by reason of any debts or contracts, maritime or otherwise," involving vessels sold by the indemnitor, includes damages resulting from one of the vessels being libeled, regardless of whether the contract under which she was libeled was valid or not.³ Such indemnity was given by the vendors of three vessels, which it was claimed had been and were intended to be used as consorts, only one of which was libeled. At the time she was libeled it did not appear that it was the owner's intention to tow her with the steamer purchased as one of the three vessels, or that another steamer could not have been procured to tow her. Hence the vendee could not recover damages for the alleged detention of such steamer and the other of the three vessels, that not being shown to have been the direct, necessary and natural result of the detention of the vessel libeled.⁴ As is elsewhere⁵ pointed out the damages resulting from a trespass are sometimes measured by the benefit received by the trespasser. Indemnitors against a trespass have been subject to that measure of liability. The bond sued on was given by sureties for trespassers in ac-

save the plaintiff harmless from *charge* or *liability*, he is entitled to recover to the extent of the charges of his attorneys, his liability therefor being established; but, if it is to indemnify and save harmless from loss or expenses, he must fail, no loss or expense within the terms of the bond being proved." This decision on this point covers debatable ground; and there is an irreconcilable conflict in the cases relating to it. It is believed that there is a preponderance of authority against the above ruling, not only in cases of in-

demnity, but other cases where expenses constitute an item of damages.

¹ *Sanders v. Hamilton*, Mart. & Hayw. 458; *Ackerman v. King*, 29 Tex. 291; *Crump v. Picklin*, 1 Pat. & Heath, 201.

² *Buck v. Morrow*, 2 Tex. Civ. App. 361, 21 S. W. Rep. 398.

³ *Niagara Falls Paper Co. v. Lee*, 20 App. Div. 217, 47 N. Y. Supp. 1; *Home Ins. Co. v. Watson*, 59 N. Y. 390.

⁴ *Niagara Falls Paper Co. v. Lee*, *supra*.

⁵ § 1014.

cordance with an order suspending a judgment restraining the latter from floating logs upon a stream on the plaintiff's land. Such order was granted as a favor to the trespassers to extricate them from a position of peculiar hardship. The indemnity was against "any and all damages and loss whatsoever." It covered the tollage or reasonable value of the use of the river for the purpose of floating logs, and was not limited to the damage done to the banks of the river and the property of the plaintiff adjacent thereto.¹ The makers of a bond given in a civil action for the arrest of a person who bind themselves to pay all costs and damages sustained in consequence of the arrest or imprisonment are liable on the rendition of judgment in favor of the person imprisoned for the mental anguish and physical illness caused by the arrest and imprisonment, and also for the customary attorneys' fees in procuring his discharge. It is presumed that the purpose of the bond was known and that it would probably cause detention and imprisonment. "Such deprivation of liberty, humiliation, disappointment, mortification and disgrace would naturally cause great mental distress, and might naturally result in sickness. Such an undertaking is not like an attachment bond or a contract involving money or property considerations simply. The undertaking involved the liberty of a woman, and the persons who made it should have anticipated that the consequences of their act would be different from those of a bond involving money or property merely. When a person enters into a contract which, if violated, may be expected to cause mental distress and may naturally result in physical indisposition and illness, it must be presumed that he contracted with reference to the payment of damages of that character."²

The extent of recovery upon an express indemnity is not affected by the fact that other parties than the indemnitor shared the benefits of the act indemnified against. Thus, a sheriff was put to expense and costs, covered by a bond of indemnity, in a successful defense of an action brought against

¹ *De Camp v. Bullard*, 159 N. Y. 450, 54 N. E. Rep. 26, affirming 33 App. Div. 627, 53 N. Y. Supp. 1102. *v. Wright*, 125 Ind. 536, 25 N. E. Rep. 822, 21 Am. St. 249, 9 L. R. A. 514; *Western U. Tel. Co. v. Broesche*, 72

² *Vanderberg v. Connolly*, 18 Utah, 112, 54 Pac. Rep. 1097, citing *Renihan* St. 843. *Tex.* 654, 10 S. W. Rep. 784, 13 Am.

him by a claimant of goods attached; and it was held that he was entitled to recover the whole amount upon the bond, and not merely a proportional part, though other creditors who did not indemnify him received the surplus proceeds after satisfying the indemnifying creditor.¹ The terms "damages, costs and expenses," in a covenant of indemnity against the payment of a demand, do not cover a premium or bonus which the party is compelled to pay to raise the amount of the demand.² Where indemnitors are brought in as parties by the sheriff in an action against him for levying writs of attachment upon property not owned by the defendant named therein, they will be deemed to be before the court only for the purpose of enabling the sheriff to enforce his rights against them; in such action their liability cannot exceed the penalty of their bond.³ In New York the execution of a bond indemnifying a sheriff against damages resulting from an unlawful levy and sale of property made by him presumptively establishes the liability of the obligors as principals for the original trespass committed by the sheriff. On the substitution of the indemnitors as defendants in place of the sheriff their liability is not limited to the sum for which they would have been liable in an action by him upon their bond, but rests upon their participation in the original trespass.⁴ The mere fact that the plaintiff has commenced an action against the sheriff for a greater sum than is specified in the undertaking, it is said, would seem to be no reason why the indemnitors, the real parties in interest, should not be substituted as defendants in place of the sheriff. The sureties had knowledge of the obligation they assumed when they executed the bond, and they became liable for the entire amount of the damage sustained by the claimant in consequence of the retention of the specific property levied upon by the sheriff under the attachment; and the plaintiff cannot complain of the substitution of these defendants in place of the sheriff, as he had no-

¹ Chamberlain v. Beller, 18 N. Y. 115; Brotton v. Lunkley, 11 Wash. 581, 40 Pac. Rep. 140, citing the text.

² Low v. Archer, 12 N. Y. 277.

³ Leshar v. Getman, 30 Minn. 321,

15 N. W. Rep. 309; Stevens v. Wolf, 77 Tex. 215, 14 S. W. Rep. 29.

⁴ Dyett v. Hyman, 129 N. Y. 351, 29 N. E. Rep. 261, 26 Am. St. 533; Cassani v. Dunn, 44 App. Div. 248, 60 N. Y. Supp. 756.

tice of the amount of the undertaking and an opportunity to examine the sureties to see that they were of sufficient responsibility to respond to any damage that he might sustain in consequence of the sheriff's holding the property as the property of the defendant in the attachment suit.¹

If there are several writs and bonds and the sheriff is charged as for a conversion in a sum exceeding the gross amount of the penalties in all the bonds the obligors in each will be charged to the extent of the penalties in their respective bonds.² The liability of the indemnitors of a sheriff who wrongfully seizes property under an attachment when he held another bond at the time of the levy and subsequently received other bonds in other actions is not limited to the proportion which their bond bore to the whole amount of the bonds held by him. The attachment debtor may regard the creditors in the proceeding as joint trespassers, and proceed against one, several or all of them for his whole damages.³ But such liability does not extend to cases in which creditors act independently of each other, and in which valid liens have been obtained equal in amount to the value of the property, and judgments pursuant thereto have been recovered. In such a case the indemnitor's liability is limited to the residue of the property which was not subject to the prior seizures.⁴ If property conveyed in trust to indemnify a surety is wrongfully sold his damages are not measured by the net proceeds of the sale and interest thereon, but by its market value at the time his right to have it sold accrued.⁵ One who agrees to save another harmless from any judgment that might be rendered against him in a pending suit is not liable for a sum offered by him in compromise of the suit, such offer being refused and judgment having gone in favor of the other party.⁶

¹ *Cassani v. Dunn*, *supra*.

² *Leshner v. Getman*, 30 Minn. 321, 15 N. W. Rep. 309.

³ *Root v. Chandler*, 10 Wend. 110, 25 Am. Dec. 546; *Walker v. Wonderlick*, 33 Neb. 504, 50 N. W. Rep. 445; *Watmough v. Francis*, 7 Pa. 206, 219; *Posthoff v. Bauendahl*, 43 Hun, 570. See *Lovejoy v. Murray*, 3 Wall. 1.

⁴ *Lee v. Maxwell*, 98 Mich. 496, 57

N. W. Rep. 581, quoting the text; *Davidson v. Dallas*, 8 Cal. 227, 254; *Posthoff v. Schreiber*, 47 Hun, 593. See § 140.

⁵ *Bush v. Haeussler*, 31 Mo. App. 47; *Woolner v. Spalding*, 65 Miss. 204, 3 So. Rep. 583.

⁶ *Bedford v. Blythe*, 74 Miss. 720, 21 So. Rep. 919.

§ 764. Contribution or indemnity between wrong-doers.

Though it is a well-settled principle that there is no con- [610] tribution or indemnity between wrong-doers, this principle does not apply where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of the law;¹ or where the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known to the person employed to be wrongful to a third person.² A promise to indemnify another for committing a wilful and wicked trespass is not binding; but a contract to save harmless one who, from good motives, did an act for his employer which, contrary to his expectations, happened to be an injury to a third person, will be enforced; and any amount which may be recovered by the injured party from such employer he may recover on the indemnity.³

§ 765. Contracts varying from indemnity, but intended as such. Contracts are often made, the general purpose of which is indemnity, but which are not merely to save harmless or to indemnify against damages, but provide against the cause of damage; they are contracts for the prevention of damage. Of this nature are contracts to indemnify against the bringing of actions, or the existence of debts or liabilities, or the occurrence of particular facts from which injury is apprehended. Such contracts may relate to existing actions, debts and liabilities, and require their discontinuance or discharge, or to the preservation of the rights of the indemnified party, and be intended to indemnify or save him harmless by restraining acts which would impair or destroy such rights. It is held in England and in the upper Canadian province that where the undertaking is to save harmless, or protect against all actions or debts which the promisee may become liable to pay, the consequence follows that where judgment has been obtained against him in such action, or upon any

¹ Spalding v. Oakes, 42 Vt. 343; Haven, etc. Co., 27 Conn. 158; Selz Grimes v. Taylor, 93 Ill. App. 494.

² Ives v. Jones, 3 Ired. 538; Miller v. Rhoades, 20 Ohio St. 494; Stone v. Hooker, 9 Cow. 154; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Hamden v. New

v. Guthman, 62 Ill. App. 624; Farwell v. Becker, 129 Ill. 261, 21 N. E. Rep. 792, 16 Am. St. 267, 6 L. R. A. 400. See § 755.

³ Id.

such debt or liability, he is entitled to recover the whole amount of the judgment against the covenantor, although he [611] may not himself have paid the debt or any part of it.¹ But the rule supported by the greater number of cases in our courts, and which most accords with the sound principle of allowing compensation only for actual loss, as well as limiting the damages to the extent of the breach of contract, is that where the contract is to save harmless from actions, debts, costs and expenses, it is a mere indemnity against damages, and there is no cause of action until damages are suffered, and then the recovery is limited to them.² It has been held, however, in some American cases that a covenant to save harmless from all suits is broken by the commencement of a suit;³ that when a covenant is made to indemnify against a debt or duty which may accrue in the future a liability to suit is a breach, and recovery may be had to the extent of the debt or duty to which the indemnity applies,⁴ or as ascertained by a judgment, though no part of it has been paid nor any actual injury suffered.⁵

Where the contract is more than for indemnity against damages, as where a party stipulates against the doing of certain acts, or the existence of certain conditions, or for pay-

¹Smith v. Teer, 21 Up. Can. Q. B. 412; Spence v. Hector, 24 id. 277; Loosemore v. Radford, 9 M. & W. 657; Warwick v. Richardson, 10 id. 284; Carr v. Roberts, 5 B. & Ad. 78; Smith v. Howell, 6 Ex. 739.

²Aberdeen v. Blackmar, 6 Hill, 324; Crippin v. Thompson, 6 Barb. 532; Lott v. Mitchell, 32 Cal. 23; Donely v. Rockefeller, 4 Cow. 253; Hussey v. Collins, 30 Me. 190; Coe v. Rankin, 5 McLean, 354; Conner v. Bean, 43 N. H. 202; Douglass v. Clark, 14 Johns. 177; Churchill v. Moore, 15 Kan. 255; Jeffers v. Johnson, 21 N. J. L. 73; McDonald v. Bauskett, 10 Rich. 178; Selover v. Harpending, 54 N. Y. Super. Ct. 251; Sinsheimer v. Tobias, 53 id. 508; Trinity Church v. Higgins, 48 N. Y. 537; National Bank v. Bigler, 83 id. 51, 61.

³Wilson's Adm'r v. Bowens, 2 T. B. Mon. 86.

⁴Robertson v. Morgan's Adm'r, 3 B. Mon. 207; Chase v. Hinman, 8 Wend. 452; Rockefeller v. Donnelly, 8 Cow. 623.

⁵Carmen v. Noble, 9 Pa. 366; Fish v. Dana, 10 Mass. 46; Webb v. Pond, 19 Wend. 423; Gilbert v. Wiman, 1 N. Y. 550; Jones v. Childs, 8 Nev. 121; In re Negus, 7 Wend. 499; Kirksey v. Friend, 48 Ala. 276; Conkey v. Hopkins, 17 Johns. 113; Jarvis v. Sewall, 40 Barb. 449; Banfield v. Marks, 56 Cal. 185; McBeth v. McIntyre, 57 id. 48; Martin v. Bolenbaugh, 42 Ohio St. 508; Conner v. Reeves, 103 N. Y. 527, 9 N. E. Rep. 439; Kohler v. Matlage, 72 N. Y. 259; Merchants' & Manufacturers' Nat. Bank v. Cumings, 149 N. Y. 360, 44 N. E. Rep. 173.

ment or performance of any kind, then damages are not the gist of the action, and the value of performance will measure the amount recoverable for the breach. Thus, for example, a contract to pay a debt or to discharge a liability then existing, no time being specified, is a promise to pay it when due, forthwith or within a reasonable time, if already [612] due.¹ The promisee on breach of such contract is entitled to recover the amount of the debt and interest, though he has not paid it or any part of it, if it is a debt the discharge of which would be beneficial to him.² The measure of damages

¹ *Campbell v. Baker*, 46 Pa. 243; *Roberts v. Riddle*, 79 id. 468; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Lathrop v. Atwood*, 21 Conn. 117; *Wilson v. Stillwell*, 9 Ohio St. 468, 75 Am. Dec. 477; *Gilbert v. Wiman*, 1 N. Y. 550.

² *Id.*; *Banfield v. Marks*, 56 Cal. 185; *Trinity Church v. Higgins*, 48 N. Y. 532; *Belloni v. Freeborn*, 63 id. 383; *Stout v. Folger*, 34 Iowa, 71, 11 Am. Rep. 138; *Jeffers v. Johnson*, 21 N. J. L. 73; *Dayton v. Gunnison*, 9 Pa. 347; *Wilson v. Stillwell*, 9 Ohio St. 468, 75 Am. Dec. 477; *Kettle v. Lipe*, 6 Barb. 467; *Raymond v. Cooper*, 8 Up. Can. C. P. 388; *Braman v. Dowse*, 12 Cush. 227; *Churchill v. Hunt*, 3 Denio, 321; *Nutt v. Merrill*, 40 Me. 237; *Dye v. Mann*, 10 Mich. 291; *Hall v. Nash*, id. 303; *Dorsey v. Dashiell*, 1 Md. 198; *Conkey v. Hopkins*, 17 Johns. 118; *Kip v. Brigham*, 7 id. 168; *Sprague v. Seymour*, 15 id. 474; *Fish v. Dana*, 10 Mass. 46; *Thomas v. Allen*, 1 Hill, 146; *Lathrop v. Atwood*, 21 Conn. 117; *Ketcham v. Jauncey*, 23 id. 123; *Merriman v. Pine City Lumber Co.*, 23 Minn. 314; *Gage v. Lewis*, 68 Ill. 604.

In *Gilbert v. Wiman*, 1 N. Y. 550, *Pratt, J.*, said: "Perhaps there is no branch of law concerning which the decisions of our courts have been more fluctuating than in relation to damages, especially in relation to the

damages arising upon contracts in the nature of contracts of indemnity. According to strict legal principles, a court of law, it would seem, should only give actual compensation for actual loss; and such is the rule in relation to contracts of indemnity against damages merely. *Aberdeen v. Blackmar*, 6 Hill, 324; *Jackson v. Post*, 17 Johns. 432. . . . But in personal contracts, when the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is the sole object of the contract, and where in consequence of the primary liability of other persons actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined towards fixing the rule to be one of actual compensation for probable loss; so that in contracts of that character it may now be considered a general rule, both in this country and in England. *Thomas v. Allen*, 1 Hill, 146; *Holmes v. Rhodes*, 1 B. & P. 638; *Hodgson v. Bell*, 7 T. R. 97; *Post v. Jackson*, 17 Johns. 239. For instance, in an action on a covenant that a bond or other debt upon which a covenantee is liable shall be paid when due, or on a day certain, it has been long settled that the plaintiff may recover the full amount of his liability, although it is evident from the terms of the contract that it was

on the breach of an undertaking to discharge the duties of a surviving partner is the amount which would have been received if there had been faithful performance.¹ A promise to pay a debt due a third person is not restricted in any way by a further promise to indemnify such person and save him harmless.²

[613] § 766. **Same subject.** The amount of the debt agreed to be paid is not the measure of damages if the promisee is not liable for the debt assumed and cannot gain by its payment, nor be prejudiced by its non-payment. Where a party owning land which is subject to a mortgage for the payment of which he is not personally bound sells and conveys it subject to the mortgage, which the grantee engages to pay, this agreement is construed as a mere declaration that the property was conveyed to him subject to the lien of the mortgage thereon, and that the general covenants of seizin and warranty in the conveyance are not intended to extend to this particular incumbrance, of which the grantee assumed the payment in case he should wish to retain the title of the land conveyed to him.³ Such a grantor, to whom the promise to pay such a mortgage is made, having no effect on its payment beyond the effect of such payment on the covenants for title, the agree-

intended merely as an indemnity and although the parties primarily liable are abundantly able to pay. *Mann v. Eckford's Ex'rs*, 15 Wend. 502; *Ex parte Negus*, 7 id. 499; 7 T. R. 97; 2 M. R. 181. Indeed, the late supreme court have gone so far in some recent cases as to allow a full recovery when it did not appear that the plaintiff was liable at all, or could be injured by a breach of the contract; the court deciding that they had a right to infer that the plaintiff had some interest in having the debt discharged, or he would not have made the contract. *Thomas v. Allen*, 1 Hill, 146; *Tyler v. Ives*, MS. Sup. Court, 1839. That the plaintiff had some interest in such a case would be probable; but that he had an interest to the full amount of the original indebtedness in the absence of proof,

seems to be rather a violent presumption; such, however, is the effect of these decisions. In the last case cited above, *Ives* covenanted with *Tyler* that *Raynor* should pay up and discharge a bond and mortgage upon certain lands. There was no evidence to show that *Tyler* had any interest in the lands, or in the discharge of the bond and mortgage, or was in any manner liable upon the same, yet the court held that he was entitled to recover the full amount of the bond."

¹ *Miller v. Kingsbury*, 28 Ill. App. 532, 128 Ill. 45, 21 N. E. Rep. 209.

² *Locke v. Homer*, 131 Mass. 93, 109, 41 Am. Rep. 199; *Shattuck v. Adams*, 136 Mass. 34.

³ *Halsey v. Reed*, 9 Paige, 446; *Trotter v. Hughes*, 12 N. Y. 74.

ment is construed to accomplish what such facts indicate was the intention of the parties; and is restricted to secure the promisee just the benefit which would accrue to him from the payment agreed to be made — exemption as to that debt from liability on those covenants. If, however, the grantor of lands burdened with an incumbrance is personally liable for the debt so secured and the grantee agrees to pay it, then an actual discharge of that debt is necessary to the grantor's indemnity; and the agreement to pay it will be construed to extend his exoneration. In the former case the failure of the grantee to pay the mortgage would be no actual injury to the grantor; but in the latter case it would; and he is allowed to recover damages measured by the amount of the debt. In that case the mortgagor may by subrogation in equity also enforce [614] the obligation in his own favor.¹ Where the vendee pays all the purchase-money and on an independent consideration, as a secured note of the vendor, assumes a mortgage debt on the land, such note is to be considered as indemnity to the vendee for any loss he may sustain by paying the debt or by the foreclosure of the mortgage. The amount for which such note was given will be treated as a penalty, and the recovery upon it be limited to the sum paid to remove the incumbrance.² One who has conveyed land without other covenants than to protect and save the grantee harmless in his possession and ownership against a mortgage upon that and other land, given by a former owner, is liable for the price for which he sold the land, and his liability could not be lessened because his grantee became possessed of the certificate of sale, there being no redemption from the foreclosure sale, and the value of the land included in the certificate, other than that conveyed by the grantee to his grantor, being more than the sum paid for the certificate.³

The recovery of damages to the amount of the debt by the promisee who has not paid it, but is only liable for it, or has a beneficial interest in having it paid, has sometimes been referred to as compensation allowed for only probable injury.

¹ Id.; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Rawson's Adm'r v. Copland*, id. 251.

² *Citizens' State Bank v. Pettit*, 85 Mo. App. 499.

³ *Dana v. Goodfellow*, 51 Minn. 375, 53 N. W. Rep. 656.

It is not such in any just sense. Such agreements must have a consideration; the promisor, in contemplation of law, has received such value that it is a just and legal duty he has assumed to pay the debt, and the benefit of its cancelment by payment to the promisee will equal its amount; and by necessary consequence, its non-payment is a legal detriment and injury to the same amount.

The sale of land subject to a mortgage for which the seller is liable and which the buyer agrees to pay is an apt illustration. An owner of land sells it; he owes a debt which is secured on the land. If he gets the full value of the land he can pay off the debt and discharge the incumbrance at once. He is then exonerated from that debt; his creditor has his dues, and the purchaser has only paid for the land. On the other hand, if the seller leaves so much of the purchase-money in the hands of the buyer as is equal to the incumbrance, on his agreement to pay the debt, so long as the buyer retains the money after the debt is due, he retains money equal in amount to that due for the land, and which he had agreed with the seller to pay for his benefit. In the same sense, whenever one undertakes by an original agreement to pay another's debt, the latter suffers the injury at once when a default in making the payment occurs. The damages are to be estimated not exceptionally, but on the general principle of allowing the injured party compensation equal to the benefit he would derive from performance. It has been suggested that in such a case the promisee may never be compelled to pay the debt; that is not the proper test of injury to him. After such a contract he has a right to have his debt paid; and to be morally and legally exonerated by payment; not merely to be indemnified [615] in a perpetual delinquency to his creditor. Trover will lie by a maker for conversion of his note which he has paid, or one tortiously diverted from the use for which it was made.¹ In such a case it is equally true that the maker may never be called on to pay; but that consideration does not prevent a recovery for the face of the note where the maker is exposed to injury to that amount.

¹ Decker v. Mathews, 12 N. Y. 313; v. Dearth, 43 Vt. 98; Stone v. Clough, Buck v. Kent, 3 Vt. 99, 21 Am. Dec. 41 N. H. 290; Neal v. Hanson, 60 Me. 576; Park v. McDaniels, 37 Vt. 594; 84; Otisfield v. Mayberry, 63 Me. Pierce v. Gilson, 9 Vt. 216; Spencer 197.

Courts of law are not adapted like courts of equity to do complete justice to all parties interested in such cases; that is, to protect the defaulting party by requiring the money so recovered to be applied to the debt, though its payment may be important to him. This, however, has been done in some cases.¹

§ 767. **Effect of judgment.** "The covenantor in an action on a covenant of general indemnity against judgments is concluded by the judgment recovered against the covenantee from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant to depend upon the result of the retrial of an issue which as against the covenantee had been conclusively determined in the former action, 'always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.'"² A judgment by default is covered by an indemnity against judgments.³ Where it is taken by the consent of the obligee, its force as evidence against the sureties is presumptive only; they may show that it was not founded upon any legal liability or not to the extent it goes. In the absence of such evidence the amount of the judgment is the sum the obligee is entitled to recover.⁴ But it has been held a good defense to a bond indemnifying a constable against damages, costs and judgments which he might become liable for on account of the sale of attached property that through gross

¹ *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140, 20 Am. Rep. 372; *Wilson v. Stillwell*, 9 Ohio St. 467, 75 Am. Dec. 477.

² *Conner v. Reeves*, 103 N. Y. 527, 530, 9 N. E. Rep. 439; *Martin v. Bolenbaugh*, 42 Ohio St. 508; *Kansas City, etc. R. Co. v. Southern R. News Co.*, 151 Mo. 373, 390, 52 S. W. Rep. 205, 74 Am. St. 545, 45 L. R. A. 380; *Union Guaranty & Trust Co. v. Robinson*,

79 Fed. Rep. 420, 24 C. C. A. 650; *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436.

³ *Lee v. Clark*, 1 Hill, 56; *Aberdeen v. Blackmar*, 6 id. 324; *Annett v. Terry*, 35 N. Y. 256.

⁴ *Conner v. Reeves*, *supra*; *Lindsey v. Parker*, 142 Mass. 582, 8 N. E. Rep. 745; *Kansas City, etc. R. Co. v. Southern R. News Co.*, *supra*.

laches he failed to inform the attaching creditor of a suit by a third party to recover the attached goods and permitted such party to take judgment by default in pursuance of an understanding between them.¹ Good faith and fair dealing require that a person indemnified, if requested, should give the indemnitors a right to present any defense in the action against him, and if he refuses or prevents them from so doing he cannot say that the indemnitors have not been injured or that the judgment determines their liability.² One who is bound to pay such a sum as the obligee may obtain judgment for in another action may give evidence of the facts on which such action was brought for the purpose of showing that there was no substantial cause of action and that the judgment was allowed to be entered through collusion and fraud.³

¹ *Armour Packing Co. v. Orrick*, 4 Okl. 661, 46 Pac. Rep. 573.

³ *Hutchison v. Hooker*, 2 N. Z. L. R. (Sup. Ct.) 134.

² *Wheeler v. Sweet*, 137 N. Y. 435, 33 N. E. Rep. 483.

CHAPTER XVIII.

AGENCY.

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SECTION 1.

PRINCIPAL AGAINST AGENT.

§ 768. The reciprocal obligations of principal and agent. Agency is founded upon a contract, either express or implied, by which one party confides to the other the management of

some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it.¹ The contract embraces reciprocal obligations between the parties, and either may have redress in damages for their violation. An agent who has no interest is bound to obey the instructions of his principal as a paramount duty, and do the business placed in his hands with diligence and fidelity; he must also exercise a reasonable degree of skill and good judgment, according to the delicacy and importance of his undertaking.² Infractions of his contract are also instances of failure in duty; and the principal has an election to [2] sue on the contract or for negligence as a tort.³ But except where the dereliction is aggravated by fraud, the measure of damages is the same whether the action is in one form or the other, and is equally governed by the contract.⁴ The agent is an employee, and therefore entitled to compensation; he acts in the place of his principal and to effectuate his purposes, and has a right to indemnity; his functions are of a fiduciary nature, and he is subject to the rigid rules which apply to trustees. In respect of the matter of his agency he can accept no inconsistent employment, nor act for his own benefit to the injury of his principal. Any advantage gained by the agent, whether it is the fruit of performance or of violation of duty, whether the agent acts by appointment or is a mere volunteer,⁵ belongs to his principal.⁶ Thus, an agent charged with the

¹ 2 Kent's Com. 612; Mechem on Agency, § 1.

² Redfield v. Davis, 6 Conn. 438; Marshall v. Ferguson, 94 Mo. App. 175; § 771.

³ Ashley v. Root, 4 Allen, 504.

⁴ Bank v. Brown, 3 Wend. 158; Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Pinkerton v. Manchester R., 42 N. H. 424; Birdsell Manuf. Co. v. Brown, 96 Mich. 213, 52 N. W. Rep. 801.

⁵ Salsbury v. Ware, 183 Ill. 505, 56 N. E. Rep. 149.

⁶ James T. Hair Co. v. Daily, 161 Ill. 379, 43 N. E. Rep. 1096; Judevine v. Hardwick, 49 Vt. 180; Fish v. Seeberger, 154 Ill. 30, 39 N. E. Rep. 982;

Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. Rep. 236; Jansen v. Williams, 36 Neb. 869, 55 N. W. Rep. 279, 20 L. R. A. 207; Nading v. Howe, 23 Ind. App. 690, 55 N. E. Rep. 1032; Kinney v. Mahoning Mills, 13 Pa. Super. Ct. 573; Rich v. Black, 173 Pa. 92, 33 Atl. Rep. 880; Helberg v. Nichol, 149 Ill. 249, 37 N. E. Rep. 63; Lyon v. Worcester, 49 Ill. App. 639; Hewitt v. Young, 82 Iowa, 224, 47 N. W. Rep. 1084; Rorebeck v. Van Eaton, 90 Iowa, 82, 57 N. W. Rep. 694; Thayer v. Hoffman, 53 Kan. 723, 37 Pac. Rep. 125; Oliver v. Lansing, 48 Neb. 338, 67 N. W. Rep. 195; Wheeler v. Bell, 88 Hun, 100, 34 N. Y. Supp. 1150; McKinley v. Williams,

duty of paying taxes on land cannot acquire title thereto at a tax sale of it.¹ If he takes a deed in his own name he holds the land as trustee for his principal and must account for the net profits he receives.² The treasurer of a bank was instructed to sell its property at not less than a price designated. He became the purchaser at that price, which was less than its market value. The difference between the two sums was recovered by the bank; but it was not entitled to the profits realized from the property after the sale.³ An agent who takes advantage of the confidence reposed in him by his principal to profit at the expense of the latter can only be relieved of liability to the extent to which a clear preponderance of the evidence shows that he ought to be relieved.⁴

74 Fed. Rep. 94, 20 C. C. A. 312, and cases cited; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Lafferty v. Jelley*, 22 Ind. 471; *Mauran v. Warren*, 2 Low. 53; *Bruce v. Davenport*, 36 Barb. 349; *Morrison v. Ogdensburgh, etc. R. Co.*, 52 Barb. 173; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Parker v. Nickerson*, 112 Mass. 195; *Hunsaker v. Sturgis*, 29 Cal. 142; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Bain v. Brown*, 56 N. Y. 285; *Greentree v. Rosenstock*, 61 N. Y. 583; *Segar v. Edwards*, 11 Leigh, 218; *Mechem on Agency*, §§ 455-457, 469; *Vreeland v. Van Blarcom*, 35 N. J. Eq. 530; *Greenfield Savings Bank v. Simons*, 133 Mass. 415; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Adams v. Sayre*, 70 Ala. 318; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Savage v. Savage*, 12 Ore. 459, 8 Pac. Rep. 754; *Kramer v. Winslow*, 130 Pa. 484, 18 Atl. Rep. 923, 17 Am. St. 782; *Crump v. Ingersoll*, 44 Minn. 84, 46 N. W. Rep. 141; *McNutt v. Dix*, 83 Mich. 328, 10 L. R. A. 660, 47 N. W. Rep. 212. See *Ætna Ins. Co. v. Church*, 21 Ohio St. 492; *Ingersoll v. Starkweather*, Walk. Ch. 346; *McKinley v. Irvine*, 13 Ala. 681; *Banks v. Judah*, 8 Conn. 145; *Church v.*

Sterling, 16 Conn. 388; *Sturdevant v. Pike*, 1 Ind. 277; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Moore v. Mandelbaum*, 8 Mich. 433; *Moore v. Moore*, 5 N. Y. 256; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Shannon v. Marmaduke*, 14 Tex. 217; *Walker v. Palmer*, 24 Ala. 358; *Hitchcock v. Watson*, 18 Ill. 289; *Kimber v. Barber*, L. R. 8 Ch. App. 56; *Turnbull v. Garden*, 38 L. J. (Ch.) 331.

¹ *McMahon v. McGraw*, 26 Wis. 614; *Fountain Oil Co. v. Phelps*, 95 Ind. 271; *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. Rep. 211; *Murdoch v. Milner*, 84 Mo. 96.

² *Collins v. Rainey*, 42 Ark. 531.

In Arkansas the deed will be canceled on the principal making reimbursement to his agent. *Id.* But in Iowa the principal must pay the same amount to his agent on account of taxes paid by the latter subsequently to his purchase, as he would have been liable for if such payment had not been made. *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. Rep. 211.

³ *Greenfield Savings Bank v. Simons*, 133 Mass. 415.

⁴ *Oliver v. Lansing*, 48 Neb. 338, 67 N. W. Rep. 195.

Where, by departing from the instructions of his principal, the agent obtains a better result than would have been obtained by following them, the principal may claim the advantage, though the agent contributed his own funds or responsibility in producing that result, and the principal incurred no risk or expense. The plaintiff's intestate, D., having a policy of insurance upon his life, agreed with the company for its surrender and a return to him of the premium notes held by it, which notes for that purpose had been sent to the company's agent to be delivered up. D. intrusted the policy to the defendant as his agent, with instruction to surrender it [3] for cancellation. Defendant surrendered the policy, but, before the notes had been canceled or surrendered, applied to have it renewed for himself and one G. The agent thereupon returned the notes to the company, with the statement that D. wished to renew and that defendant and G. were to help him. A renewal policy was thereupon issued for the benefit of defendant and G. The premiums were thereafter paid by them, as were also D.'s premium notes, less the dividends credited thereon. G. assigned his interest to the defendant, and upon the death of D. the defendant collected and received the amount of the policy. In an action to compel him to account it was held that, by accepting the renewal policy, the defendant must be deemed to have adopted the instrumentalities by which it was obtained, and was bound by the representation made by the agent to the company; that, aside from this, the defendant while acting as agent having acquired, by departing from his instructions, a benefit, a part of the consideration for which proceeded from his principal, the plaintiff had a right to adopt his acts and to call him to account for the profits derived from the transaction.¹

§ 769. Same subject. So long as property or money belonging to the principal can be traced and distinguished in the hands of the agent, his representatives or assignees, the principal is entitled to recover it, unless it has been transferred for value without notice.² In respect to third persons the

¹ Dutton v. Willner, 52 N. Y. 312. See Ackenburgh v. McCool, 36 Ind. 473; Bain v. Brown, 7 Lans. 506, 56 N. Y. 285.

² Overseers of Poor v. Bank, 2 Gratt. 547, 44 Am. Dec. 399; Denston v. Perkins, 2 Pick. 86; Atkinson v. Ward, 47 Ark. 533, 2 S. W. Rep. 77.

agent is identified with his principal, and for the most part incurs no personal responsibility when he acts, in the making and execution of contracts, in the latter's name. The agent may, however, make himself a party, and assume liabilities as such by failing to disclose his principal, or to act in his name when a disclosure of his identity has been made.

An agent derives possession from his principal or by virtue of his employment and cannot dispute his title.¹ Thus money borrowed for a public object, and on the credit of the county, by an agent of the board of supervisors under a resolution passed by them without authority, but not in violation of public policy or any positive statute, may be recovered [4] from the hands of such agent by the board, and their want of authority to make the loan is no defense.² An agent must account to his principal until the true owner appears and establishes his title or right.³ An auctioneer sued for the proceeds of goods intrusted to and sold by him cannot set up title in himself as a defense or in mitigation of damages.⁴ But an agent is not precluded from proving that the principal obtained the goods by fraud, where the rightful owner has given notice of his rights.⁵

It is an agent's duty to give the principal necessary information of what transpires in the agency, to enable him to protect his interests,⁶ to keep proper accounts and to render them on, and under certain circumstances without demand.⁷ The principal has a right to act on the assumption that the agent's reports made and accounts rendered are correct, and the latter will not be at liberty to dispute them.⁸ Thus trover was

¹ Placer County v. Astin, 8 Cal. 303; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robert. 160.

² Supervisors v. Bates, 17 N. Y. 242.

³ Bain v. Clark, 39 Mo. 252; Aubery v. Fiske, 36 N. Y. 47; Floyd v. Bovard, 6 W. & S. 75; Bevan v. Cullen, 7 Pa. 281; Ledoux v. Anderson, 2 La. Ann. 553; Ledoux v. Cooper, id. 586.

⁴ Osgood v. Nichols, 5 Gray, 420.

⁵ Hardman v. Willcock, 9 Bing. 382, note.

⁶ Jansen v. Williams, 36 Neb. 869, 55 N. W. Rep. 279, 20 L. R. A. 207.

⁷ Elliott v. Walker, 1 Rawle, 126;

Peterson v. Poignard, 8 B. Mon. 309; Brown v. Arrott, 6 W. & S. 402; Forrester v. Bordman, 1 Story, 43; Ruffner v. Hewitt, 7 W. Va. 585; Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. 590; Terwilliger v. Beals, 6 Lans. 403; State Ins. Co. v. Jamison, 79 Iowa, 245, 44 N. W. Rep. 371; Western Union Cold Storage Co. v. Winona Produce Co., 197 Ill. 457, 64 N. E. Rep. 496.

⁸ Vantries v. Richey, 8 W. & S. 87; Boston Carpet Co. v. Journeay, 36 N. Y. 384.

brought for two insurance policies by the principal, a master of a vessel, against his agents, who were insurance brokers, and who had written the plaintiff that they had got two policies, one on account of his clothes and wages, and another on account of the owners, underwritten by N. A loss having happened, the defendants produced a policy underwritten by S., insuring only the ship, in which plaintiff had no interest. Lord Mansfield said: "I shall consider the defendants as the actual insurers." The defense attempted was that the letter was written by defendants' clerk through mistake, and that trover would not lie for that which never existed, but it was held that the defendants could not contradict their own representation.¹

[5] Where, on the proofs presented, a factor, as defendant, was liable for a loss occasioned by his negligence, the *onus* of proving the actual loss was held to be on him, and not upon the principal; in the absence of such proof, the full value of the goods, or at least of the money produced by their sale, might be adopted as the measure of damages.²

§ 770. **Agent's particular duties and liabilities.** The particular duties of agents are various, depending on the nature of their agency; and breaches of duty will vary accordingly. The general rules of compensation, however, are the same as to all, but they have a special application according to the duty in the particular instance and the peculiar facts which constitute a breach. And whether the duty is such as is im-

¹ *Harding v. Carter*, 11 Petersdorff's Abr. 400.

In *Shaw v. Picton*, 4 B. & C. 715, Bayley, J., said: "It is quite clear that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been re-

ceived and never will be received, and to claim reimbursement in respect to those sums for which he had previously given credit, I think that when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again."

² *Brown v. Arrott*, 6 W. & S. 402; *Beckman v. Shouse*, 5 Rawle, 179, 28 Am. Dec. 653; *Beardslee v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596; *Clark v. Miller*, 4 Wend. 628.

plied by the situation and the usages and course of business, or such as may be imposed by instructions, the agent is liable for all losses which result from his failure to fulfill his obligations. He is liable for at least nominal damages for any breach of his agreement or duty; for the law presumes some damage from every violation of contract.¹

Where the principal suffers actual injury he is entitled to full indemnity.² An examination of the cases will show that the general principle that the injured party is entitled to re- [6] cover such a sum in damages as will place him in as favorable condition as he would have been in had the contract and duty been fulfilled is peculiarly applicable.³ But such damages must be a proximate consequence of the agent's breach of duty or such as it may reasonably be supposed were within the contemplation of the parties. The injury need not proceed directly from his act or omission; but if it does not there must be an immediate practical dependence for exemption therefrom on some act which it was his duty to perform; or the exposure to the loss which occurs from an independent cause must proceed directly from some act which was a departure from the line of the agent's duty, or from his omission of some act which it was his duty to perform to avoid such exposure or to provide indemnity against its possible consequences.⁴ This

¹ Frothingham v. Everton, 12 N. H. 239; Blot v. Boiceau, 3 N. Y. 78; Marzetti v. Williams, 1 B. & Ad. 415; ch. 2.

² Brown v. Arrott, 6 W. & S. 402; Frothingham v. Everton, 12 N. H. 239; Amory v. Hamilton, 17 Mass. 103; Harvey v. Turner, 4 Rawle, 223; Wilson v. Greensboro, 54 Vt. 533; Triggs v. Jones, 46 Minn. 277, 48 N. W. Rep. 1113; Bancroft v. Scribner, 72 Fed. Rep. 988, 21 C. C. A. 352; Marshall v. Ferguson, 94 Mo. App. 175.

³ Magnin v. Dinsmore, 62 N. Y. 85, 20 Am. Rep. 442; Blood v. Wilkins, 3 Iowa, 565. In the last case the grantee of lands agreed to discharge tax liens thereon with money furnished by the grantor. The latter supposed that he had done so. The

damages were measured by the value of the land when the time of redemption from the tax sale expired.

If the principal knew that the agent had not paid the taxes the doctrine of preventable damages would have made it his duty to pay them, in which event the liability of the agent would have been for the money received and interest thereon.

⁴ In Boyd v. Fitt, 14 Irish C. L. (N. S.) 43, the defendant agreed to act as the Glasgow agent of the plaintiff, who was a cattle and provision dealer in Dublin. The contract provided that the defendant should open a cash account at a bank in G. to the amount of £500, to be used at any time in honoring and retiring plaintiff's cash orders; also that no order would be drawn with-

may be made clearer by some illustrations. A plaintiff put lime on the defendant's barge to be conveyed from the Medway to London. The master deviated unnecessarily from the usual course, and during the deviation a tempest wet the lime, and the barge taking fire thereby, the whole was lost. It was held the law implied a duty on the owner of a vessel, whether a general ship or one hired for the special purpose of the voyage, to proceed, without unnecessary deviation, in the usual course. On the point whether the damage was so proximate to the defendant's breach of that duty as to be the subject of an action, Tindal, C. J., said: "It was not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same whether the loss was immediately by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. But the objection taken is that there is no natural or necessary [7] connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have

out the defendant having in his hands the full amount necessary to meet it. While he had sufficient funds to meet an order and upon the day it fell due he absconded from G., and the order was dishonored and returned to D. It was proved that in consequence of this the plaintiff's trade in G. was suspended; that his business in D. was seriously im-

paired, and that he lost the agency of an Australian firm. It was held, after full consideration, that none of these heads of damage were too remote. See *Larios v. Bonany y Gur-ety*, L. R. 5 P. C. 347; *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 538, 22 So. Rep. 976, stated in § 776.

been captured if in her proper course. And yet in *Parker v. James*,¹ where a ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had not been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."²

§ 771. **Same subject.** A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interest,³ or from allowing moneys to remain in the hands of a sub-agent after he is informed of his receipt of them.⁴ Neither the ignorance of the principal nor the omission to call at once on the sub-agent for money in his hands is the immediate cause of loss; but the want of timely notice prevents the principal exerting himself when exertion is [8] necessary to prevent loss, and the failure to take moneys from the hands of a sub-agent leaves them exposed to the consequences of his insolvency or want of fidelity. An agent who unreasonably neglects to inform his principal of the receipt of money is chargeable with interest, although he acts in good faith.⁵

¹ 4 Camp. 112.

² *Davis v. Garrett*, 6 Bing. 716. See *Wallace v. Swift*, 31 Up. Can. Q. B. 523.

³ *State Ins. Co. v. Jamison*, 79 Iowa, 245, 44 N. W. Rep. 371, quoted from *infra*, this section.

⁴ *Brown v. Arrott*, 6 W. & S. 402; *Taylor v. Knox*, 1 Dana, 395; *Clark v. Bank*, 17 Pa. 322.

⁵ *Dodge v. Perkins*, 9 Pick. 368; *Clark v. Moody*, 17 Mass. 145; *Fish v. Seeberger*, 154 Ill. 30, 39 N. E. Rep. 982.

A judgment creditor agreed, in lieu of her judgment, to accept the bond of another, conditioned to provide for and maintain her during life, or to pay her, if she preferred it, \$150 per annum; the bond to be secured by mortgage on the land of the obligor. A person employed to prepare the instruments and to have the mortgage entered of record, withheld it therefrom until the property became otherwise incumbered by claims to an amount beyond its value and the debtor became insolvent. In an action on the case by the party injured, it was held she could recover from the agent all that she had lost by his default,—all that the mortgage, if duly recorded, would have been worth to her.¹ The liability of agents charged with the duty to procure insurance, and who fail therein, is another example of loss from exposure arising from their omission to perform an act to provide indemnity against its possible consequences.² An agent who neglects to pay taxes and misappropriates money received for that purpose is liable for the rate of interest imposed upon the owner for their non-payment, and for other proximate consequences, as the expense of foreclosure proceedings begun by a mortgagee.³

The acceptance of an agency is a general undertaking, among other things, to obey the directions of the principal, and this undertaking becomes specific when instructions are from time to time communicated. They may be general, given for the accomplishment of the object for which the agency is created, or special with a view of some subordinate and subsidiary detail, in furtherance of that object. The pecuniary advantages which these general or special instructions manifestly embrace, in the light of other information which the agent possesses in common with his principal, are thus brought within their contemplation. These instructions are, unless the contrary in-

An agent who must keep money to answer his principal's call is not chargeable with the highest rate of interest because he mingles it with his own and uses it in his business; the legal rate is the limit. *Rochester v. Levering*, 104 Ind. 562, 4 N. E. Rep. 203. See *Tuers v. Tuers*, *infra*, this section.

Howell v. Young, 5 B. & C. 259; *Ship-herd v. Field*, 70 Ill. 438; *Short v. Skipworth*, 1 Brock. 103; *Park v. Hammond*, 4 Camp. 344, 6 Taunt. 495; *Charles v. Altin*, 15 C. B. 46; *Williams v. Littlefield*, 12 Wend. 362; *Caffrey v. Darby*, 6 Ves. 488.

² See § 772.

³ *Tuers v. Tuers*, 100 N. Y. 196, 2 N. E. Rep. 922.

¹ *Miller v. Wilson*, 24 Pa. 114;

tention is expressed, supplemented by the usages of trade and business;¹ they fix boundaries of the authority, as to subjects and methods, which may be exercised in the principal's name, at his risk and on his responsibility, independently of any subsequent election on his part. Hence, if the agent extends his operations to subjects not within his commission, or conducts them in a method excluded by his instructions, he acts at his peril; the principal is not bound; and if his property is thus lost, or his interests are sacrificed or prejudiced, the agent must make good the loss,—and this loss is the amount shown to be necessary to place the principal in as good condition as a faithful performance of the agent's duty would have placed him. The instructions may relate to measures deemed expedient by the principal to secure himself against a contingent or possible loss. If these are disregarded the agent will not be heard to say that he is not liable by reason of the uncertainty of the loss, if it happens; for it is a loss in contemplation of the parties; the instructions were intended to make exemption from such possible loss certain. After the disregard of such instructions, the loss when it occurs is morally and legally the direct consequence of the agent's breach of duty, whatever may be the immediate physical cause.² Thus, an insurance agent who is authorized to issue policies and charged with the duty of daily reporting all risks taken may be liable on his neglect to so report as to property insured by him for the loss paid thereon by the company. In an action against the agent the insurer may show that if he had notified it of the risk it would have canceled the policy before the loss, as it might have done. The establishment of that fact would prove that the agent's negligence was the proximate cause of the principal's loss.³ In

¹ See *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407.

² The text is quoted with approval in *Railroad v. Greer*, 87 Tenn. 698, 704, 11 S. W. Rep. 931.

³ *State Ins. Co. v. Jamison*, 79 Iowa, 245, 44 N. W. Rep. 371. Granger, J., said: "A question in the case is, how can it be established that the company would have canceled the policy if it had been duly reported? Of course, the fact under the testi-

mony must be determined by the jury. But suppose it should appear in testimony that the company had an invariable business rule that it would carry only a certain number of risks in a single block or row of buildings, and that in many or all cases where a risk in excess of the number had been reported it had been canceled, and that this case came clearly within such a rule; and let it be added that this was an ex-

a recent case the conductor of a freight train allowed a person to ride thereon in violation of the company's rules. While so riding the passenger was injured as the result of an accident caused by the negligence of other servants of the company. It was held that the conductor's act was the proximate cause of the injury, and he was liable to the company.¹ But in order that the agent shall be liable for not obeying instructions the principal must make them clear. If they are susceptible of two constructions the meaning given them in good faith by the agent will be regarded as correct, and he will not be liable for any loss resulting, regardless of the principal's belief of the agent's understanding of the instructions.² A principal who has sold goods to irresponsible parties on credit as the result of his agent's failure to obey instructions respecting the responsibility and standing of persons from whom he takes orders may recover the resulting loss.³

§ 772. Neglect of duty or agreement concerning insurance. An agent who is in any case required to insure the property of his principal and fails to do so or does it defectively; or in case of his inability fails to give his principal timely notice that he may thereby be warned to do it himself, will be held liable for the loss, if one occurs, which would be

tra-hazardous risk; that it was such a risk as is generally refused by insurance companies, and such a one as to the ordinary observer would be unsafe and undesirable. Hundreds of facts are established between litigants upon evidence less satisfactory and conclusive. In judicial proceedings it is often necessary and proper to establish what a party would have done under certain facts in fixing the liability of another. Suppose A., as the agent of B., is stationed in Iowa to purchase and forward horses to B. in New York, to be sold on the market, and his instructions are to forward the purchases of each week on the Monday following. After several weeks he neglects to forward as directed for a particular week, and before the horses are received there is a decline in the market and a loss

of \$500. Must B. lose the \$500 because it could not be shown that he would have sold the horses if they had been forwarded? If it should appear in evidence that he had from week to week been selling under the same circumstances, and he should testify that if the horses had been there he would have sold them, would not the testimony justify a finding of the fact?"

¹ *Railroad v. Greer*, 87 Tenn. 698, 11 S. W. Rep. 931.

² *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa, 67, 21 N. W. Rep. 184; *Coquard v. Weinstein*, 16 Mont. 312, 317, 40 Pac. Rep. 696, and cases cited. See *Vienna v. Barclay*, 3 Cow. 231.

³ *Frick v. Larned*, 50 Kan. 776, 32 Pac. Rep. 383. See *Birdsell Manuf. Co. v. Brown*, 96 Mich. 213, 55 N. W. Rep. 801.

covered by the required insurance; and this loss is equal to the indemnity which it was the agent's duty to procure.¹ By issuing a policy for a foreign company which has not complied with the laws of the state in which the contract is made and the property is situated, an insurance agent makes himself personally liable for the loss of such property.² Upon an undertaking to effect an insurance according to special instructions a part of the duty implied is the giving of [10] notice to the employer in case of failure; and an actual promise to that effect, though averred in the declaration, need not be proved.³ A like duty to give notice was held to be imposed on a foreign merchant who had been accustomed to effect insurances for his correspondent abroad. It was held that he was answerable for his neglect because he thereby deprived the principal of any opportunity of applying elsewhere to procure the insurance.⁴ If the custom of a factor

¹ *Criswell v. Riley*, 5 Ind. App. 496, 503, 30 N.E. Rep. 1101; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Marland v. Royal Ins. Co.*, 71 Pa. 393; *Wilber v. Williamsburg City F. Ins. Co.*, 122 N. Y. 439, 25 N. E. Rep. 926, 19 Am. St. 498; *Pottsville, etc. Ins. Co. v. Minnequa Springs, etc. Co.*, 100 Pa. 137; *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99, 29 N. E. Rep. 477; *Thomas v. Funkhouser*, 91 Ga. 478, 18 S. E. Rep. 312; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. Rep. 726; *Washington F. & M. Ins. Co. v. Chesebro*, 35 Fed. Rep. 477; *Everett v. O'Leary*, — Minn. —, 95 N. W. Rep. 901; *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 40 N. W. Rep. 661; *Park v. Hammond*, 4 Camp. 344, 6 Taunt. 495; *Perkins v. Washington Ins. Co.*, 4 Cow. 645, 664; *Morris v. Summerl*, 2 Wash. C. C. 203; *De Tastett v. Crousillat*, id. 132; *Thorne v. Deas*, 4 Johns. 84; *Wilkinson v. Coverdale*, 1 Esp. 75; *Webster v. De Tastett*, 7 T. R. 157; *Miner v. Tagert*, 3 Bin. 204; *Mallough v. Barber*, 4 Camp. 150; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Beardsley v. Davis*, 52 Barb.

159; *Callander v. Oelrichs*, 5 Bing. N. C. 58; *Smith v. Lascelles*, 2 T. R. 187; *Gray v. Murray*, 3 Johns. Ch. 167; *Smith v. Price*, 2 F. & F. 748. See *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 155, 14 S. W. Rep. 317.

Under a contract requiring an agent to insure property delivered to him for sale for the benefit of his principal and which provided that if any of it remained unsold eight months after its consignment it should be subject to the owner's order, the agent is not bound to insure for any length of time exceeding eight months. *Milburn Wagon Co. v. Evans*, 30 Minn. 89, 14 N. W. Rep. 271. See *New York Tartar Co. v. French*, 154 Pa. 273, 26 Atl. Rep. 425; *Deming v. Merchants' Cotton Press, etc. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89, 13 L. R. A. 518.

² *Morton v. Hart*, 88 Tenn. 427, 12 S. W. Rep. 1026.

³ *Callander v. Oelrichs*, 5 Bing. N. C. 58.

⁴ *Smith v. Lascelles*, 2 T. R. 187.

has been to insure consignments of produce and this has been brought to the knowledge of the consignor by uniform charges therefor in his accounts rendered, he will be deemed to have continued that custom until he gives notice of a change, and is responsible for any loss consequent upon his failure to insure before such notice reaches his principal.¹

An insurance broker received instructions to effect a policy for 550*l.* on a ship and freight at and from T. to L. at ten guineas per cent. He effected it in the words of the order to him without having subscribed a liberty, as was customary in such policies, "to touch and stay at all or any of the Canary Islands." It was held that the broker was liable for not having inserted the clause in question, and the principal recovered for the sum directed to be insured less the premium.² If an agent neglects to obey instructions to procure insurance he is not entitled to charge his principal the premium on account of his liability to answer for the loss, if one should occur, if no loss happens.³ Where the agreement to insure is general and there is no difficulty in procuring full insurance, and such is the general practice in the particular matter embraced in the contract, the fair and reasonable construction of it is that the party undertakes to procure a contract for full indemnity. In the absence of any evidence, aside from the general agreement, the court in fixing the amount of damages would not, it seems, stop short of a full insurance. The contract of insurance is one of indemnity; and the party whose property is destroyed will not obtain that unless he recovers its full value. In an action against an agent for not procuring full insurance the measure of damages is, therefore, the value of the property destroyed, to be reduced by any amount received under a partial insurance.⁴

[11] If the insurance directed, however, would be invalid, an action against the agent would not be maintainable for substantial damages; nor would it be any answer to that defense that by usage and courtesy such insurances were usually paid.⁵

¹ *Area v. Milliken*, 35 La. Ann. 1150. *Ex parte Bateman*, 20 Jur. 365; *Beteley v. Stainsby*, 12 C. B. (N. S.)

² *Mallough v. Barber*, 4 Camp. 150. 477; *Douglass v. Murphy*, 16 Up.

³ *Storer v. Eaton*, 50 Me. 219, 79 Am. Dec. 611. *Can. Q. B.* 113; *Ela v. French*, 11 N. H. 356.

⁴ *Beardsley v. Davis*, 52 Barb. 159; ⁵ *Webster v. De Tastett*, 7 T. R. 157.

As to costs incurred by the principal in an unsuccessful suit against the underwriters, where the broker had been in fault in respect of his principal's orders to procure insurance, the costs of that action were disallowed, Lord Eldon saying there was no necessity to bring it to entitle the plaintiff to recover against the broker, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the broker, he was not liable for the costs.¹ An agent who disobeys an order to cancel a policy of insurance is liable to his principal for the damages resulting.² Where a local agent was instructed to procure a reduction of the amount insured by a policy he had issued, which policy was silent as to a compulsory reduction of the amount stipulated for, but provided that it might be canceled, and the agent did not comply with such instruction nor give his principal any notice concerning his action, it was ruled that it might be shown by parol that the instruction meant that the agent should endeavor to agree with the insured on a reduction of the amount of the insurance; that, if he was unsuccessful, he should have reported the fact; in the absence of a report, the principal might conclude that the reduction had been made,³ and that the agent was liable for the difference between the sum for which his principal was liable and the sum for which it would have been liable if the instruction had been obeyed.⁴ An agent who disregards his instructions as to the class of risks he may insure by taking risks of the prohibited class is liable to his principal for a judgment obtained against it after a loss on a risk so taken, he having been given an opportunity to defend, the defense being made with his knowledge, and he having selected the counsel; and also for the costs and interest on the judgment. He was not liable for the counsel fees paid by his principal in the suit against it, nor for the expense of an appeal

¹ *Seller v. Work*, cited in *Marsh.* on Ins. 243.

² *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 8 N. E. Rep. 348; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. Rep. 454; *Germania F. Ins. Co. v. Harraden*, 90 Ill. App. 250; *Royal Ins. Co. v. Clark*, 61 Minn. 476,

63 N. W. Rep. 1029; *Kraber v. Union Ins. Co.*, 129 Pa. 8, 18 Atl. Rep. 491; *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320; *American Central Ins. Co. v. Burkert*, 11 id. 427.

³ *Halsey v. Adams*, 63 N. J. L. 330, 43 Atl. Rep. 708.

⁴ *Id.*, 46 Atl. Rep. 773, 64 N. J. L. 724.

unless it was requested or was actively supported by him.¹ An agent who has issued a policy which he has not reported may be liable for the loss thereon, if the principal shows that it would, if notified, have canceled the contract. The establishment of that fact would show that the agent's negligence was the proximate cause of the loss.² An agent who procures insurance on property of his principal in his possession as agent, whether there was a duty upon him to do so or not, cannot be heard to say that the principal is not entitled to the money paid by the insurer; neither can he avoid paying the money to his principal though there was no loss of the latter's property.³

§ 773. Disregard of orders for the purchase and shipment of goods. If an agent abroad is directed to invest funds furnished him in goods of a certain description, and ship them to another place or country, and disobeys such order, the principal is thus deprived of a gain or profit if the goods would be worth more at the place to which they were required to be sent than at the place of shipment, after paying the cost of transportation, and would have reached their destination had the order been executed. The right of the principal to recover damages for this breach of duty, measured by that gain or profit, is obvious if the difference of market value and the safe arrival of the goods can be established with the requisite certainty. It is a well-established rule that the damages to be recovered for the breach of a contract must be shown with certainty, and not left to speculation or conjecture. The former fact, although sometimes mentioned as an insuperable objection,⁴ has ceased to be a legal obstacle. Market values are susceptible of proof as a legal proposition; though in a

¹ *Sun F. Office v. Ermentrout*, 2 Pa. Dist. Rep. 77.

The recovery of counsel fees was not allowed on the theory that the action was analogous to that for breach of warranty, in which the recovery of such fees has been denied. *Armstrong v. Percy*, 5 Wend. 535; *Reggio v. Braggiotti*, 7 Cush. 166.

Respecting the costs of the appeal the court said: It was not only useless, as the result proved, but unnecessary in order to fix the liability

of defendant to plaintiff. A defendant should not be punished for the erroneous advice of plaintiff's counsel, unless it be at least shown that he actively supported it and himself demanded or requested the removal of the cause to the court of last resort."

² *State Ins. Co. v. Jamison*, 79 Iowa, 245, 44 N. W. Rep. 371.

³ *Fish v. Seeberger*, 154 Ill. 30, 39 N. E. Rep. 982.

⁴ *The Amiable Nancy*, 3 Wheat. 546; *L'Amistad de Rues*, 5 id. 385.

particular instance it may be practically impossible. The time and place being fixed with reasonable certainty, the state of the market is but an ordinary inquiry by evidence—it is a practical, not a legal difficulty.¹ A court or jury may take cognizance of the fact when it is proved, and whether it [12] is a foreign or domestic market can make no difference. That the property would have reached its destination if the agent had obeyed his instructions will, in many cases, be capable of the most satisfactory proof; as where directions are given to send by a particular vessel and that vessel actually makes the voyage in safety.² Where the agent disobeys such an order the burden should rest on him to show that if he had not disobeyed a loss would have occurred; or, in other words, that no injury has resulted from his breach of duty; and it is not enough that if he had obeyed instructions a loss *might* have occurred; he must show that it *must* have happened.³

A merchant in New York directed his correspondent in China to invest money furnished him in silks for the New York market; he disregarded the order, and it appearing that the silks could have been sold at a profit, it was deemed profit which was within the contemplation of the parties, and being such as the proof showed with reasonable certainty would be realized, it was properly taken into consideration in the estimate of damages.⁴ In this case Rapallo, J., said: "It is not necessary now to decide what is the proper rule of damages; but we are not prepared to sanction the idea that the rule adopted in cases of marine trespass, which is the prime cost or value of the property at the time of the loss, with interest,⁵ is necessarily applicable to the case of the violation of a contract, entered into for the express purpose of procuring goods for sale at their place of destination, when their market value at that place can be shown. The fact that damages have

¹ "The law presumes that the market value of a commodity can be obtained; a market price is not speculative nor conjectural." *Tebbs v. Cleveland, etc. R. Co.*, 20 Ind. App. 192, 200, 50 N. E. Rep. 486. See §§ 445, 447.

² *Bell v. Cunningham*, 3 Pet. 69, 5 Mason, 161.

³ *Davis v. Garrett*, 6 Bing, 716; *Ryder v. Thayer*, 3 La. Ann. 149; *Farwell v. Price*, 30 Mo. 587; *Schmertz v. Dwyer*, 53 Pa. 335; *Eby v. Schumacher*, 29 id. 40; *Wilkinson v. Laughton*, 8 Johns. 213.

⁴ *Heinemann v. Heard*, 50 N. Y. 27.

⁵ 3 Wheat. 560.

been sustained must be proved with reasonable certainty; but even a loss of profits, if within the contemplation of the parties at the time of entering into the contract, and a direct consequence of the breach, and not speculative or contingent, [13] may be recoverable.¹ The certainty of the loss must depend upon the evidence; but to apply to such contracts the rules settled in cases of capture and collision would, in the generality of cases, exempt foreign agents from all responsibility for breaches of their contract with, or violation of their duty to, their principals, in respect to the purchase and shipment of goods, whether arising from negligence or fraud."²

The measure of damages indicated does not apply³ where the goods purchased by an agent are not of the description ordered. In such a case he is liable to his principal for all damages he sustains. If some of the goods have been sold and liability incurred by the principal to their purchaser the agent must respond to that extent and also for expenses necessarily made because of the defect in the quality of the goods. He is not liable for the difference between the price he paid for them and the market value of the goods he was directed to buy. In other words, the agent who buys after instructions does not occupy the position of a vendor.³

An agent who buys property for his principal and refuses to deliver it, but holds it as his own for the purpose of making a profit on it, is liable for the profit the principal would have made if the property had been delivered to him.⁴ Where an agent receives and retains stocks without his principal's knowledge and in violation of his trust, they having come to him for his principal, he will be chargeable with their highest market value between the time of their conversion and such reasonable time after the principal's knowledge of it as will allow him to place himself in *statu quo*. In answering the contention that this rule of damages was inapplicable because the stocks which the agent obtained never became the property of the principal, and hence could not have been converted, it was said that this measure of damages is as applicable to ac-

¹Griffin v. Colver, 16 N. Y. 494;
Masterton v. Mayor, 7 Hill, 61; Bell
v. Cunningham, 3 Pet. 85.

³Cassaboglou v. Gibb, 11 Q. B. Div.
797, 9 id. 220.

⁴Nading v. Howe, 23 Ind. App. 690,

²See Safford v. Kinsley, 40 Vt. 506. 55 N. E. Rep. 1032.

tions upon contracts as to those upon torts.¹ Moreover, the reasons for its application to actions for the appropriation, by a trustee, of property impressed with a trust are peculiarly cogent and seem to us conclusive. In such cases this measure of damages rests upon the ordinary rule that the trustee shall not put into his pocket any of the profits arising from the trust. He is bound either to deliver the specific property on the day when the *cestui que trust* is entitled to its delivery, or to pay him, in lieu of it, the highest market value which it attains between that time and the expiration of a reasonable time after the *cestui que trust* is notified of the acts of the trustee.² But it has been held that one who has directed stockbrokers to buy stock for him upon margin, no purpose being indicated that they should carry the stock for a rise in value and sell it when directed, cannot recover the difference between the market value of the stock on the day when it was to have been bought and such value within such reasonable time, in the judgment of the jury, after the plaintiff knew that the stock had not been bought as would have enabled him to have bought it. The recovery cannot exceed such damage as directly and naturally resulted from the broker's default.³

§ 774. **Miscellaneous illustrations of agent's liability.** The primary obligation of an agent whose authority is limited by instructions is to adhere faithfully to them; if he unnecessarily exceeds his commission he renders himself responsible for the consequences.⁴ Where a carrier or other agent has charge of goods consigned C. O. D., and delivers them without collecting moneys charged thereon, he will be liable for the amount which he was required to collect.⁵ In such cases

¹ *Barnes v. Brown*, 130 N. Y. 372, 382, 29 N. E. Rep. 760; *Maynard v. Pease*, 99 Mass. 555.

² *McKinley v. Williams*, 74 Fed. Rep. 94, 20 C. C. A. 312, referring to *Wilson v. Whitaker*, 40 Pa. 114, 117.

³ *Gurley v. MacLennan*, 17 D. C. App. Cas. 170.

⁴ *Adams v. Robinson*, 65 Ala. 586; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Rundle v. Moore*, 3 Johns. Cas. 36; *Hutchings v. Ladd*, 16 Mich. 493; *Goodrich v. Thompson*, 4 Robert.

75; *Schmertz v. Dwyer*, 53 Pa. 335; *Johnson v. New York Central R. Co.*, 31 Barb. 196; *Scott v. Rogers*, 31 N. Y. 676; *Leverick v. Meigs*, 1 Cow. 668; *Peters v. Ballistier*, 3 Pick. 495; *Kingston v. Wilson*, 4 Wash. C. C. 310; *Whitney v. Merchants' Exp. Co.*, 104 Mass. 152, 6 Am. Rep. 207.

⁵ *Walker v. Smith*, 4 Dall. 389; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Wheelock v. Wheelwright*, 5 Mass. 103; *Scott v. Rogers*, 31 N. Y. 676; *McMorris v. Simpson*,

the agent disposes of the principal's property, though it is special, contrary to his instructions, and therefore is chargeable as upon an appropriation to his own use.¹ Any disposition of the principal's property or choses in action contrary to duty by which he is divested of it and suffers injury entitles him to recover of the agent as for a wrongful appropriation or conversion to the extent of his interest and rights in the same.² Where the insured employed a factor or agent to settle with [14] the insurers as for a total loss, and an abandonment was duly made, and the agent afterwards, through mistake or misapprehension of a letter of the insured or from negligence, adjusted the claim as an average loss at twenty per cent., and canceled the policy, he was responsible for the whole amount.³ An auctioneer who failed to accept the highest bid made for land, the sale of which he was intrusted with, was liable for the costs of the abortive sale and for the difference between the amount of such bid and the value of the property at the time of a subsequently attempted sale.⁴ An agent who makes no effort to obtain the market value of land with the sale of which he is charged is liable for the difference between the price obtained for it and that which could have been obtained by reasonable effort, which is presumed to be its market value.⁵

An agent has no right to mix the funds of his principal with his own and hold him liable for their depreciation. If he would keep the money at the risk of his principal for losses on bank failures or other losses on the money itself, he must keep it separate and distinct from his own,⁶ otherwise the principal will be entitled to the whole unless the agent shows the proportion which was his.⁷

Where grain was delivered to wharfingers to be shipped to

21 Wend. 610; *Syeds v. Hay*, 4 T. R. 260; *Stearine, etc. Co. v. Heintzmann*, 17 C. B. (N. S.) 56; *Hutchings v. Ladd*, 16 Mich. 493; *Thompson v. Gwyn*, 46 Miss. 522.

¹ *Id.*; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121.

² *Id.*; *Hancock v. Gomez*, 50 N. Y. 668; *Tuite v. Wakelee*, 19 Cal. 692; *Taussig v. Hart*, 58 N. Y. 425; *Jackson v. Baker*, 1 Wash. C. C. 394; *Parsons v. Martin*, 11 Gray, 111; *Gray v. Murray*, 3 Johns. Ch. 167; *Rundle*

v. Moore, 3 Johns. Cas. 36; *Allen v. Brown*, 51 Barb. 86; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. Rep. 1113.

³ *Rundle v. Moore*, 3 Johns. Cas. 36; *Kempker v. Roblyer*, 29 Iowa, 274.

⁴ *Logie v. Gillies*, 4 N. Z. L. R. (Sup. Ct.) 65.

⁵ *Storms v. Storms*, 21 Ind. App. 191, 51 N. E. Rep. 955.

⁶ *Webster v. Pierce*, 35 Ill. 158.

⁷ *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. Rep. 77; *Bate v. McDowell*, 49 N. Y. Super. Ct. 106.

a certain party in New Orleans, and before shipment they were notified not to ship to such party but to another, which they neglected to do and shipped according to the first direction, the price of the grain being lost in consequence of the insolvency of the consignees, the wharfingers were held liable to the shipper for its value.¹ A commission merchant took a bond for a simple contract debt due to him for goods sold on commission, and included in the instrument a debt due to himself. It was held that by thus extinguishing the simple contract debt of his principal and depriving him of the means of pursuing his claim against his debtor, the agent was at once answerable to him for the value of the goods.² If a principal direct his agent to ship goods by a particular steamer or mode of conveyance, and the agent unnecessarily sends by another and they are lost, the directed method having been departed from, the goods are disposed of contrary to the duty of the agent and he must bear the loss.³ An agent who is directed to remit money by mail in bank notes of a large denomination is responsible for a loss if he remits notes of a smaller denomination and a greater number of them.⁴ And one who accepts property in payment of a note sent him for collection and sells the same at a loss must account for the full sum due on the note.⁵ If an agent who has a claim for collection disregards the principal's instructions as to the person to whom it shall be forwarded, he does so at his peril and cannot be permitted to show that the person he employed used reasonable diligence to secure the claim.⁶

An agent, in matters left to his discretion, must exercise [15]

¹ Howell v. Morlan, 78 Ill. 162; Cutler v. Bell, 4 Camp. 184; Bessent v. Harris, 63 N. C. 542; Marr v. Barrett, 41 Me. 403.

² Jackson v. Baker, 1 Wash. C. C. 394. See Wilkinson v. Clay, 6 Taunt. 110.

³ Johnson v. New York Central R. Co., 31 Barb. 196; Goodrich v. Thompson, 4 Robert. 75; Hand v. Baynes, 4 Whart. 204; Ang. on Car., §§ 162, 176, 178, 213.

In Johnson v. New York Central R. Co., *supra*, it was considered that a deviation from the course marked

out by the principal which is rendered necessary by the circumstances of the case, not foreseen by the principal, is justifiable if the agent exercises the care and skill which his agency calls for, unless the instructions amount in substance to a prohibition of the act in any other than the prescribed method. Greenleaf v. Moody, 13 Allen, 363; Forrestier v. Bordman, 1 Story, 51.

⁴ Wilson v. Wilson, 26 Pa. 393.

⁵ Rush v. Rush, 170 Ill. 623, 48 N. E. Rep. 990.

⁶ Butts v. Phelps, 79 Mo. 302.

a reasonable judgment, and especially must act in good faith. One appointed to settle a claim against a third party received from the debtor promissory notes for the amount, payable at a future day, which were perfectly good and were in fact paid when due. Before maturity the agent sold them for less than their face, without consulting with or informing his principals or making any inquiries of parties with whom money had been deposited for their payment. Upon being called upon to account he denied that he had received anything on the notes for which he was liable. It was held that their sale was a clear violation of duty, and warranted a finding that it was made without authority; that the principals were entitled to recover as for money had and received to the full amount of the notes.¹ An agent is bound to exercise his powers, or proceed in doing the business of his agency according to usage, or in the ordinary course of the business he is employed in; that he will do so is to be assumed as the tacit direction of his principal from the absence of express directions. Hence, in such matters as are regulated by usage, they are at once his commission and a chart for his guidance.² Thus, it was held that an agent of an insurance company, from the nature of the power to receive payment, having authority to receive payment of premiums, necessarily had power to accept whatever was generally used for the purpose of making payments in the locality where the debts were to be collected. The actual currency of that locality soon after the direction to collect premiums, being supplanted by confederate notes, and thenceforth these being the financial means used in buying and selling property and in creating and discharging debts, he was held authorized in his discretion to receive such notes; having received them in good faith, the payments were also valid as between the assured and [16] the insurer.³ But where debts in the hands of an agent are payable in a particular currency he is not authorized to ac-

¹ Allen v. Brown, 51 Barb. 86; Kountz v. Gates, 78 Wis. 415, 47 N. W. Rep. 729; Meade v. Brothers, 28 Wis. 689.

² Story on Agency, § 96; Phillips v. Moir, 69 Ill. 155; 13 Petersdorff's Abr. 751, 752, and notes; Frick v. Larned, 50 Kan. 776, 32 Pac. Rep. 383.

³ Robinson v. International L. Ins. Co., 52 Barb. 450; Baird v. Hall, 67 N. C. 230; Rodgers v. Bass, 46 Tex. 505. See Turner v. Beall, 22 La. Ann. 490; Richardson v. Futrell, 42 Miss. 525; Bernard v. Maury, 20 Gratt. 434.

cept a different one, and cannot do so except at his peril. During the years 1861-2 a party placed in the hands of his agent for collection a number of notes and drafts by their terms payable in United States currency, with no instructions as to the currency in which the collections should be made; the agent was left to exercise his discretion as to the procedure to be taken to enforce payment; he accepted confederate currency in payment and surrendered the notes and drafts; it was held that his action was wrongful as to his principal; without authority, actual or presumptive; he was liable to pay his principal the full amount of the notes and drafts in United States currency, although confederate money was at the time and place of payment the only currency in circulation.¹ If a factor be directed to sell for gold he cannot discharge his liability to his principal in a depreciated currency.² So a bank which receives an uncertified check in payment of a draft held for collection will be liable for the amount of the draft, whether the check is paid or not, the draft having been surrendered; and a local custom to receive such checks is no defense.³ An agent who takes a different security from that he is authorized to receive is liable for the difference between the value of that accepted and that he was directed to receive, with interest.⁴ If an agent for the sale of logs allows the purchaser to scale them, instead of employing the official scaler for that purpose, he must respond for the loss which results from an incorrect measurement.⁵ If he falsely represents that the purchase price of property bought for his principal was more than he paid for it, he is liable for the difference between the amount in fact paid and the sum received from his principal, or if he has received compensation for making the purchase, the amount of it. The principal cannot, by surrendering the property to the agent, recover its value.⁶ An agent whose instructions are not to deliver his principal's consent to the assignment of a lease until the assignor had paid rent in arrear makes himself liable

¹ *Poindexter v. King*, 22 La. Ann. 697; *Symington v. McLin*, 1 Dev. & Bat. 291.

² *Nunnemaker v. Lanier*, 48 Barb. 234. But see *Russell v. Hankey*, 6 T. R. 12.

³ *Mangum v. Ball*, 43 Miss. 288.

⁴ *Lunn v. Guthrie*, 115 Iowa, 501, 88 N. W. Rep. 1060.

⁵ *Crawford v. Cochran*, 2 Wash. Ty. 117, 3 Pac. Rep. 837.

⁶ *McMillan v. Arthur*, 98 N. Y. 167.

for such rent by accepting the assignor's check therefor, that being dishonored.¹ An agent who makes false statements to his principal respecting the value of property for which he trades is liable for the damages actually sustained and forfeits his right to the commission paid him.²

§ 775. **Defaults in regard to commercial paper.** The same general rule as to the measure of damages which has been stated³ applies to agents having in charge for the owners commercial paper or other securities for the payment of money. If through the negligence or unauthorized act of the agent the paper or security becomes worthless, or its value impaired, the principal will have a right of action against him for damages equal to the loss. In respect to checks and bills of exchange diligence is required not only to preserve the liability of the drawer and indorsers, but to have the advantage of such diligence as will be immediately productive. If [17] an agent to procure acceptance of a bill, or for collection of a bill, check, or note, by neglect seasonably to present the paper to the drawee or maker discharges the other parties he is liable for the damages which ensue. Where the debt is thus lost the delinquent agent will be liable for the amount.⁴ Where a debtor transferred a note as collateral security for the payment of a sum of money owing by him, the amount of

¹ *Pape v. Westacott*, [1894] 1 Q. B. 272.

² *Palmer v. Pirson*, 4 N. Y. Misc. 455, 24 N. Y. Supp. 333.

³ § 770.

⁴ *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618 (see this case as to the measure of diligence required), 89 N. Y. 412; *Chapman v. McCrea*, 63 Ind. 360; *Bank v. Triplett*, 1 Pet. 25; *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139; *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555, 17 Wend. 371; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Smedes v. Bank*, 20 Johns. 372; *Bank of Utica v. Smedes*, 3 Cow. 662; *Fabens v. Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59; *Bidwell v. Madison*, 10

Minn. 13; *Hamilton v. Cunningham*, 2 Brook. 367; *Bank v. Smith*, 3 Hill, 560; *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. Rep. 844; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. Rep. 102; *Kelley v. Phenix Nat. Bank*, 17 App. Div. 496, 45 N. Y. Supp. 533; *MERCHANTS' STATE BANK v. STATE BANK OF PHILLIPS*, 94 Wis. 444, 69 N. W. Rep. 170; *First Nat. Bank v. First Nat. Bank*, 4 Dill. 290.

The courts usually allow interest as a matter of course. In Missouri, however, interest is not recoverable in actions of tort based on negligence where no pecuniary benefit has or could have accrued to the defendant. *Gray's Harbor Commercial Co. v. Continental Nat. Bank*, 74 Mo. App. 633, 638.

the note, when paid, to be applied toward the satisfaction of the creditor's demand, and if not paid to be returned to the debtor, the latter was held entitled to maintain an action in his own name for breach of duty against a bank with which the note was left by the creditor for collection, the bank having neglected to give notice of non-payment, whereby the debt was lost, and he was held entitled to recover the whole amount of the note and interest.¹ The duty of the bank to exercise diligence in such a case need not be founded on any express contract with the person depositing the note for collection; it will be implied from the custom of banks in favor of such person as may be beneficially interested in having the duty performed.²

The owner of a bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of it; and if the agent who has been intrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner without unnecessary delay, he will be liable to him for the damage which he sustains by such negligence.³ Nor does it require special instruction from the principal to impose this duty.⁴ If protested for non-acceptance the holder is not obliged to [18] delay suit until the maturity of the bill; he may proceed at once against the drawer or indorser.⁵ An immediate presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest*, is to be added; but, on protest, it leads directly to inquiry and explanation,

¹ McKinster v. Bank, 9 Wend. 46, affirmed, 11 id. 473.

² Id.; Jagger v. National German-American Bank, 53 Minn. 386, 55 N. W. Rep. 545; West v. St. Paul Nat. Bank, 54 Minn. 466, 56 N. W. Rep. 54.

³ Allen v. Suydam, 20 Wend. 321, 32 Am. Dec. 555, 17 Wend. 371; Chit. on Bills, 273; West v. St. Paul Nat. Bank, *supra*; Hitchcock v. Bank, 57 App. Div. 458, 68 N. Y. Supp. 234;

First Nat. Bank v. First Nat. Bank, 4 Dill. 290.

⁴ Allan v. Suydam, Chitty on Bills, *supra*.

⁵ Walker v. Bank, 9 N. Y. 582; Ballingalls v. Gloster, 3 East, 481; Allan v. Mawson, 4 Camp. 115; Mason v. Franklin, 3 Johns. 202; Robinson v. Ames, 20 id. 146, 11 Am. Dec. 259; Watson v. Loring, 3 Mass. 557; Bank of Rochester v. Gray, 2 Hill, 227; Hitchcock v. Bank, 57 App. Div. 458, 68 N. Y. Supp. 234.

and enables the holder to take such prudential measures against all other parties as their character, circumstances or the general state of the times may demand.¹ There may, therefore, be a case where there is not such negligence of the agent as would discharge a drawer or indorser, and yet be such as would entitle the principal to damages. These are not necessarily the amount of the bill, for the recovery will be limited to compensation for the actual injury. *Prima facie*, if the parties to the bill are discharged, the debt is lost; it cannot be presumed to exist in any other available form, and in that case its amount is the measure of damages. If the fact is otherwise, of course it may be shown. Where A., being indebted to B., sent him C.'s bill on D. for the amount, and was not a party to it, and D., having no funds of C., refused acceptance, of which no notice was given by the negligence of B.'s agent, in an action by B. against his agent it was held that inasmuch as A. had not indorsed the bill he was not entitled to notice, and must still remain liable to B. for his debt, and that the drawer was not entitled to notice because he had no funds in the hands of the drawee; therefore B. was entitled to such damages as he had suffered, but was not entitled to recover the whole amount of the bill, but only such damages as he had sustained in consequence of having been delayed in the pursuit of his remedy against the drawer.² So if there is negligent delay by an agent in presenting a bill for acceptance, and the antecedent [19] parties, though not thereby discharged from their legal liability, in the meantime become insolvent, the amount of the bill is *prima facie* the loss.³ It is competent for the defend-

¹ Allan v. Suydam, 17 Wend. 371.

² Van Wart v. Wooley, 3 B. & C. 439. See Van Wart v. Smith, 1 Wend. 219.

³ Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382, 79 N. W. Rep. 859; Merchants' State Bank v. State Bank of Phillips, 94 Wis. 444, 69 N. W. Rep. 170; Gray's Harbor Commercial Co. v. Continental Nat. Bank, 74 Mo. App. 633.

In Allen v. Suydam, *supra*, the action was brought against an agent for collection of a draft drawn July

21, 1833, payable sixty days after date, received by such agent August 16th. The agent retained it until September 2d, when he transmitted it to the cashier of a bank in another state, where the drawee was doing business, and it was received by such cashier on the 6th of September and presented for acceptance on the following day. The drawees said they were not ready to accept — that they did not accept for the drawer without instructions, and they had none, but expected to hear

ant to mitigate the damages by showing either the insolvency of the maker or indorser or that the paper was partially or wholly secured, or any other fact that will lessen the actual

from the drawer soon. The cashier called again on the 10th, and the drawees were then instructed not to accept, and refused; whereupon the draft was protested. On the 9th of October the drawer died insolvent. When the draft was drawn he had funds in the hands of the drawees, but the amount was not shown; they testified, however, that the lateness of the day of presentment for acceptance made no difference in regard to acceptance, as it was an invariable rule with them not to accept without previous advice. It appeared that subsequent to the 16th of August the drawees accepted other drafts to the amount of \$2,000; and it appeared also that the drawer conducted business as a merchant in the city of New York down to the time of his death; whilst on the other hand it was shown that on the 24th of July, 1833, his note to the plaintiffs for \$606.77 was protested at Concord, and remained unprovided for until the draft in question was drawn for the amount. The trial court charged the jury in the action for negligence in not presenting the draft for acceptance, that the jury, having no other knowledge of the amount of the damage than from the proof of the amount of the draft, should find a verdict in favor of the plaintiffs for the amount of the draft and interest. The delay of the agent to present for acceptance was negligence. Cowen, J., said (17 Wend. 371): "I have examined *Van Wart v. Wooley* as reported in the different books referred to by Chitty. In 5 Dowl. & Ryl. and 3 Barn. & Cress., Lord Tenterden, C. J., delivers the opinion of the court that mere delay of the agent to give notice to his principal, though

the drawer were not therefore discharged, would subject him to damages. In *Mood & Malk. N. P. reporters*, the damages were assessed before the same judge at one shilling. The smallness of the sum was because, in the meantime, the plaintiff had recovered the full amount with damages and costs, by an action in this state against *Irving & Co.*, who transmitted the bill to England. Campbell, for the defense, strenuously contended that the mere delay of the remedy against an insolvent drawer who never had funds, and that, too, where the amount of the whole bill had been recovered from another, would not maintain an action. Lord Tenterden, however, was clearly of a contrary opinion.

"We may certainly assume upon such authority that the object of notice is not confined to the saving of the ultimate legal remedy. Such a view, too, is justified by the nature of the business. And immediate [20] presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest*, is to be added; but, on protest, it leads directly to inquiry and explanation, and enables the holder to take such prudential measures against all other parties as their character, circumstances, or general state of the times may demand. In the case at bar there was not only a want of funds in the hands of the drawees, but a positive fraud by the drawer, who countermanded the acceptance; neither of which was known to the plaintiffs below, nor could be, until the demand made at Concord. A demand before maturity, almost certainly leading to discoveries very important to the principal, is not so

loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages.¹

unusual as to leave agents in ignorance that an acceptance should be sought for through the earliest practicable means of communication. A knowledge of the truth, a few days or even a few hours earlier or later, is many times decisive. On the whole, we think the court below were right in holding, as a matter of law, that the delay of the defendants was unreasonable, and that they were therefore liable in this action."

The court of errors reversed the judgment below on the question of damages. At the maturity of the bill the drawer was insolvent, but he had continued to do business as a merchant. There was no actual proof that had the bill been presented without delay, after the defendant received it and notice of non-acceptance given, payment could have been obtained, and the question was not submitted to the jury; the liability of the defendant for the amount of the bill was decided as a matter of law. The negligence complained of, though it did not discharge the drawer, prevented any attempt to obtain payment or security; prevented the very endeavor that diligence in presentment of such paper is intended to afford opportunity for. Should it not devolve on the party whose negligence is the obstacle to exertion in the direction of obtaining payment to show that it would have been unsuccessful? Senator Verplanck, in his dissenting opinion (20 Wend. 334), said: "I can, therefore, find no sounder rule of damages, nor one better for protecting

and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, *prima facie*, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter and to prove fraud, deviation, or any other defense which would have been good, had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect. *Delany v. Stoddart*, 1 T. R. 22; *Wallace v. Tellfair*, 2 T. R. 188; *Webster v. De Tastett*, 7 T. R. 157. In the courts of this state, *Rundle v. Moore*, 3 Johns. Cas. 36; and in the courts of the United States, *Morris v. Summerl*, 2 Wash. C. C. 203. See, also, 1 Phil. on [21] Ins. 521. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established the amount due the plaintiff in the original suit is the *prima facie* evidence of the measure of damages. This presump-

¹ *Borup v. Nininger*, 5 Minn. 523; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618; 1 Dan.

Neg. Inst., § 329; *West v. St. Paul Nat. Bank*, 54 Minn. 466, 56 N. W. Rep. 54.

For negligence in not protesting a note the damages are the difference between the amount realized by the foreclosure sale under the mortgage securing the note — that is, the amount

tion may be controlled or rebutted, and the sheriff may give in evidence any fact showing either that the party has not been actually injured, or to how much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the measure of damages. This has been frequently ruled at our circuits, nor can I find that it has ever been questioned in our supreme court, and is substantially recognized in *Potter v. Lansing*, 1 Johns. 215, 3 Am. Dec. 310; *Russell v. Turner*, 7 Johns. 189, 5 Am. Dec. 254. The Massachusetts decisions are particularly full on this point. See 10 Mass. 470; 11 id. 89; id. 183; 13 id. 187. Similar decisions may be found in the reports of other states. So again in trover. In *Ingalls v. Lord*, 1 Conn. 240, in trover for a note, it was held that the *prima facie* measure of damages was the face of the note; but that evidence might be given to reduce the amount by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value. It is true that Lord Tenterden, in *Van Wart v. Woolley*, . . . held that damages must be shown, and that the face of the bill is not the conclusive measure; but this, I think, is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the *prima facie* measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon

that negligent agent, and not on the party who suffers by his negligence. Circumstances like those of the present case may often render it difficult or impossible for either party to prove or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases is it not just that those chances of loss which must fall upon one or the other should be thrown upon the party in default and not upon the innocent sufferer? It was then for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount."

In the majority opinion by the chancellor it was said: "In relation to the amount of damages, . . . I think the charge of the judge who tried the cause was clearly wrong, and that it has unquestionably produced great injustice in this case. . . . The relation between the drawer and indorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection is not the relation of indorser and indorsee, so as to throw the loss of the whole amount of the bill upon the latter if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the indorser, as required by law. Nor will the payment of damages by the agent have the effect to subrogate him to all the rights and remedies of the person from whom he received the bill, [22] as against other parties who may be liable for the payment thereof; but it is a mere contract of agency which leaves the indorser to all his

for which the plaintiff bid off the property, less the proper expenses to be deducted therefrom — and the amount of the note; the fact that the land may have been worth more than the

rights and remedies for the recovery of his debt as against other parties, and only renders the indorser liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the court of king's bench in England, in the case of *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374, where the plaintiff had not lost his remedy against the drawers of the bill, or the person from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and *Irving & Co.*, who sent the bill to the plaintiffs in payment, not standing in the situation of indorsers of the bill, as their names did not appear upon it. In that case, however, if there had been any evidence to warrant the belief that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of the *Bank of Scotland v. Hamilton* (Glen on Bills, 109), the loss which had arisen from the neglect of the defendants in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon *Woolley & Co.* instead of *Irving & Co.*, who had remitted the same to *Van Wart*; and the plaintiff would then have been permitted to recover whatever damages had been sustained by such negligence for the benefit of *Irving &*

Co. In that respect *Irving & Co.* stood in the same relative situation to *Van Wart* as *Dunlop* did to the *Bank of Scotland* in the case before referred to, and *Woolley & Co.* occupied the situation of *Hamilton & Co.*, who were held liable in that case in exoneration of *Dunlop's* liability. The only difference in principle which I can see between the two cases is that in the Scotch case it was evident that the bill would probably have been accepted and saved if it had been presented for acceptance on *Saturday*, when it was received in Glasgow, instead of being kept back until *Tuesday* evening, when the news of the drawer's failure had reached that place; and, therefore, to exonerate *Dunlop*, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawer's estate under the commission of bankruptcy against him; whereas, in the case of *Van Wart v. Woolley*, there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that anything would have been obtained from the drawers if *Van Wart* or *Irving & Co.* had received notice of the dishonor of the bill immediately after it was received by the agents in London. In the latter case, therefore, the damage which either *Van Wart* or those who had transmitted him the bill in payment had sustained was merely nominal. Besides, the supreme court of this state having decided that neither the [23]

plaintiff bid for it is not material to the defendant's liability.¹ The solvency of the maker of an indorsed note is a material question in an action against a collecting agent for negligence in not protesting it for non-payment. While a general con-

drawer nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them, in fact, having been injured by such neglect, the plaintiff, upon the second trial, was, of course, only held to be entitled to such damages as he had sustained, and which were nominal only. If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of *Van Wart v. Woolley* should have been permitted to retain his verdict upon the first trial, as it did not then appear whether he could actually succeed in collecting the money either from the drawers of the bill or from Irving & Co.; neither did it then appear whether, by the laws of this state, where they resided, they were not actually discharged from liability, so that no judgment could be recovered against them in consequence of the negligence of the agent.

"The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect; and that to recover damages to that extent it was incumbent on the party claiming to give sufficient evidence to satisfy the court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch nor the English

case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of *Van Wart v. Woolley* is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him. Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where by the negligence of the agent the liability of a drawer or indorser who was apparently able to pay the bill has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit the agent by whose negligence the loss has occurred is *prima facie* liable for the whole amount thereof with interest as damages, unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. . . . Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiff might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to

¹ *West v. St. Paul Nat. Bank, supra.*

dition of insolvency is not inconsistent with the ability of the debtor to pay a particular debt, or on the part of the creditor to enforce payment, it is *prima facie* evidence on the last proposition; and the mere possibility that the creditor could have

believe, or even to suppose it probable from this evidence, that the whole amount of this draft was in fact lost to the plaintiff below by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid."

It is manifest that Van Wart v. [24] Wooley was correctly decided; for Irving & Co. were properly assumed to be still liable for the debt which the bill was remitted to pay; and there was no evidence to rebut the presumption of their ability to discharge that debt. Hence the delay of measures against the drawer in consequence of the agent's negligence did not endanger its ultimate collection. The exemption of Van Wart from loss did not depend on the acceptance of the bill, nor on his recourse to the drawer. Allen v. Suydam presents no such features; the holder's only dependence in that case for payment was immediate recourse to the drawer. It is therefore not a parallel case. If he had received the timely notice he was entitled to from the agents, there was a reasonable probability that he could have obtained payment or security from the drawer. As the agents' negligence precluded any effort of this kind at a time that was vitally important for that purpose, were they entitled to have their wrong qualified by what is equivalent to a presumption that had the agents' duty been performed, the same loss would have been sustained? As between the holder of commercial paper and antecedent parties, the law presumes damage from the omission

to present for payment. Heylyn v. Adamson, 2 Burr. 669; Cowley v. Dunlop, 7 T. R. 581. This is so though the party to whom such presentment must be made is bankrupt or insolvent. Russel v. Langstaffe, 2 Doug. 515; Warrington v. Furber, 8 East, 245; Nicholson v. Gouthit, 2 H. Bl. 609; Easdaile v. Sowerby, 11 East, 114; Bowes v. Howe, 5 Taunt. 30; Ex parte Bignold, 1 Deac. 712; Holland v. Turner, 10 Conn. 308; Jackson v. Richards, 2 Cai. 343; Crossen v. Hutchinson, 9 Mass. 205, 6 Am. Dec. 55; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86; Sandford v. Dillaway, 10 Mass. 52, 6 Am. Dec. 99; Farnum v. Foule, 12 Mass. 89, 7 Am. Dec. 35; Groton v. Dallheim, 6 Me. 476; Shaw v. Reed, 12 Pick. 132; Greely v. Hunt, 21 Me. 455; Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 108. Between such parties it is a conclusive presumption, to the extent of the face of the paper, and discharges from liability to pay it; between the agent and the holder, whenever the former is guilty of actionable negligence in respect to the same acts, it would seem just that there should be a rebuttable presumption of a like amount of injury. See Murray v. Judah, 6 Cow. 484; Syracuse, etc. R. Co. v. Collins, 3 Lans. 29; Bradford v. Fox, 38 N. Y. 289; Hoard v. Garner, 3 Sandf. 179; Ingalls v. Lord, 1 Cow. 240; Caffrey v. Darby, 6 Ves. 496; Davis v. Garrett, 6 Bing. 716; Beardslee v. Richardson, 11 Wend. 25, 25 Am. Dec. 596; Brown v. Arrott, 6 W. & S. 403; Beckman v. Shouse, 5 Rawle, 189, 28 Am. Dec. 653.

In an action for the price of goods it appeared that the same were sold

enforced collection of the note from the maker does not forbid a recovery for negligence in allowing the indorser, admitted to have been solvent, to become discharged.¹ The evidence of damages resulting from negligence in presenting a draft for collection need not show with certainty that if due care had been observed the collection could have been made. It is sufficient to show a reasonable probability that such would have been the result.²

§ 776. Same subject. It is not only the duty of an [25] agent employed to procure acceptance to apply promptly for it, and to give his principal notice of refusal, but also to obtain an absolute and valid acceptance, or to treat the bill as dishonored. If he takes an acceptance which does not bind the drawee, reposes upon it, and gives no notice that acceptance has been refused, he will be held to the same responsibility as though he had presented the bill for acceptance, and on refusal had not given notice.³ If a bill is duly accepted

at York on Saturday, the 10th of December, 1825, and on the same day at 3 P. M. the vendee delivered to the vendor, as and for a payment of the price, certain promissory notes of the bank of D. & Co., at Huddersfield, payable on demand to bearer. D. & Co. stopped payment on the same day at 11 A. M., and never afterwards resumed; but neither of the parties knew of the stoppage or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment. But on Saturday, the 17th, he required the vendee to take back the notes, and to pay him the amount, which the latter refused. Held, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt. *Camidge v. Allenby*, 6 B. & C. 373. In this case Bayley, J., said: "The neglect . . . on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers may have been prejudicial to the

defendant. The law requires that the party on whom the loss is to be thrown should have notice of non-payment in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tuesday to the defendant he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have a remedy against the person who paid him the notes."

¹ *West v. St. Paul Nat. Bank*, 54 Minn. 466, 56 N. W. Rep. 54.

² *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. Rep. 844; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. Rep. 102. See *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 79 N. W. Rep. 859.

³ *Walker v. Bank*, 9 N. Y. 582; *Kirkeys v. Crandall*, 90 Tenn. 532, 13 S. W. Rep. 246. See *Wingate v. Mechanics' Bank*, 10 Pa. 104; *McKinster v. Bank*, 9 Wend. 46.

when presented, the duties of an agent for its collection are similar to those of an agent for the collection of a note. The holder in either case is entitled to have the paper presented at maturity to the party primarily liable for payment, and to prompt notice of non-payment to enable him to take immediate measures against that party on his own judgment of the exigencies, and to notify the indorsers and drawer to preserve his right of recourse to them. Of course, where such presentment is not made for any of the reasons which in law constitute an excuse for non-presentment, the agent is not liable for neglect. But in such cases only is non-presentment excused; he is bound to the same diligence in notifying the principal of the facts to enable him to protect his rights as in other cases of dishonor.

The duties of a bank or other collecting agent receiving a check for collection are more exigent and complicated than in respect to other negotiable paper; and for negligence the same rule of damages applies,—that of making good any loss that [26] ensues to the principal in respect to moneys for which the check is drawn. A check is for money presently, and to obtain it at once is the obvious right of the holder, and the clear intention of the drawer if it is made in good faith. This, as the primary purpose, can only be adequately subserved by diligence stimulated by this view; and it will sometimes exceed that required for the preservation of the liability of the drawer and indorsers.¹ The duty of a collecting agent devolves [27] on a party who receives, as collateral security for a debt, commercial paper or any securities for the payment of money from his debtor; he makes the paper his own, or subjects himself to equivalent damages by any act or negligence which deprives the debtor thereof, or involves a loss of the moneys represented by such collaterals.² In *Roberts v. Thompson*³ Scott, J., said: “The general rule is that where a party receives a note as collateral security for an existing debt, with-

¹ 1 Morse on Banks, etc. (4th ed.), § 237.

² *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Little v. Phoenix Bank*, 2 Hill, 425, 7 Hill, 359; *Dayton v. Trull*, 23 Wend. 345; *Copper v. Powell*, Anthon, 49; *Jennison v. Parker*, 7 Mich.

355; *Bradford v. Fox*, 39 Barb. 203, 16 Abb. Pr. 51, 38 N. Y. 289; *Heartt v. Rhodes*, 66 Ill. 351; *Story on Prom. Notes*, § 498; *Palmer v. Holland*, 51 N. Y. 416.

³ 14 Ohio St. 1.

out any special agreement, the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party by reason of a want of such care and diligence, the law will compel him to make good the loss. Such cases are not governed by the strict rules of commercial law applicable to commercial paper, but fall under the general law of agency, which must determine the rights and liabilities of the parties." It was held that where a debtor assigned to his creditor as collateral security a negotiable note of a third person before maturity, and by the terms of the assignment waived demand and notice of non-payment, such creditor, acting in good faith, is not bound to demand or insist upon payment of the security before its maturity, though he may know at the time that payment would be made if insisted upon.

Where the defendant covenanted to take proper means to collect the amount secured by a mortgage of real estate, and was guilty of negligent delay, and still retained the security, Sandford, J., said, in answer to the position that the mortgage was either good or bad, if bad he could collect nothing, [28] and if good the plaintiff had lost nothing: "This we think is not sound. The mortgage, however good it may be, avails the plaintiff nothing so long as the defendant retains and neglects to collect it. He sustained his damage, if it were good, two or three years since, when he was entitled to receive his share of the security, and received nothing. His injury is the same as if he held the defendant's note, payable at that time, and it had remained unpaid. As to the amount, the amount of the bond and mortgage is its presumptive value. It belongs to the defendant to prove it to be a doubtful or worthless security."¹ Where a bank lost transfers of land certificates sent to it for collection by one who held them as collateral the damages were measurable by their value as security, not exceeding the amount of the debt secured, if the certificates could not be replaced; if they could be replaced the expense of replacing them, not exceeding their value as a security, was the measure of the damages. Such expenses consisted of legal advice, and investigation of the records of a

¹ Hoard v. Garner, 3 Sandf. 179; Grant v. Ludlow, 8 Ohio St. 1.

land office, a trip to a distant city to obtain a portion of the transfers from the only person able to give them, and the costs, expenses and attorneys' fees paid in conducting litigation to establish the other portion of the transfers. These results accomplished, the plaintiff was placed as nearly in the position it had occupied before the loss of the certificates as it was practicable for it to be. It could not thereafter hold the defendant for the expense incurred in foreclosing a mortgage on a part of the land covered by the lost certificates. This was clearly not a proper element of the plaintiff's damages necessarily incurred by reason of the loss of the certificates, notwithstanding that other persons had asserted claims against the land foreclosed.¹

Where a debt was really lost by the negligence of the attorney, through the insolvency of the debtor, in an action for the negligence the court loosely told the jury they might find what amount of damages they pleased. As the debtor was not totally insolvent the jury found a verdict for a part of the plaintiff's demand.² An agent who negligently fails to collect notes due his principal is liable for their face value and interest if the makers are solvent;³ and if he receives property in payment of a note sent him for collection and unauthorizedly sells the same to a person whom he knows to be insolvent, is responsible for the value of such property.⁴

An express company having received from the drawer for collection, with instructions to return it at once if not paid, a draft for a sum overdue from the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay \$1.20 included therein. Thereupon the company, without collecting anything on the draft, agreed with him that they would hold it until he could inquire of the drawer as to the disputed part; and the agent wrote the same day making such inquiry and adding: "The parties will hold the draft until I hear from you." Upon receiving a reply in due course of mail from the drawer that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft which

¹ First Nat. Bank v. First Nat. Bank, 116 Ala. 520, 541, 22 So. Rep. 976.

² Russell v. Palmer, 2 Wils. 325.

³ Dickson v. Screven, 23 S. C. 212.

⁴ Griffin v. Gorman, 13 Ky. L. Rep. 879 (Ky. Super. Ct.).

the express company continued to hold but neglected again to present. The third day was Sunday, and on the fourth day he became insolvent. It was held that the express company were liable for the drawer's loss on the draft by the drawee's insolvency.¹ In New York, where the collecting bank is liable for the default of a notary employed by it, the measure of damages which the holder of the paper can recover from the [29] bank on the ground of such default is the amount of the note and interest. If the holder has sued an indorser, and failed to recover by reason of the default of the notary, he cannot increase the damages by adding the expenses of that suit; for the action against the bank is based upon its implied undertaking to give the notice, and not upon any false representation that it has been duly given.²

Reference has already been made to cases illustrating the responsibility of agents in respect to the currency they collect for their principals, and losses afterwards by bank failures or depreciation.³ An agent has no authority to receive anything but money unless authorized to do so.⁴ If he is empowered to receive depreciated currency, and does so, the loss by depreciation is that of the principal.⁵ But if on making collections the bank or other agent receiving the money merely gives the principal credit for the amount, and uses the funds or blends them with others of his own, he assumes the risk of subsequent depreciation.⁶ So if he deposits it with his banker in his own name and a loss occurs from the banker's insolvency.⁷

¹ *Whitney v. Merchants' Union Exp. Co.*, 104 Mass. 152.

² *Downer v. Madison County Bank*, 6 Hill, 648; *Hitchcock v. Bank*, 57 App. Div. 458, 68 N. Y. Supp. 234.

³ See § 774.

⁴ *Drain v. Doggett*, 41 Iowa, 682; *Aultman v. Lee*, 43 id. 404; *Webster v. Whitworth*, 49 Ala. 201; *Turner v. Turner*, 36 Tex. 41; *Mudgett v. Day*, 12 Cal. 139; *Catterall v. Hindle*, L. R. 1 C. P. 186; *Underwood v. Nichols*, 17 C. B. 239; *McCulloch v. McKee*, 16 Pa. 289; *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. Rep. 596; *Paul v. Grimm*, 165 Pa. 139, 30 Atl. Rep. 721.

The last case applied the rule to an attorney in fact with power to sell land, the authority given being to sell for such sum or price and on such terms as to him seemed meet, and to ask, receive, etc., all sums of money which shall become due. The agent received corporate bonds which he held until they became worthless. He was liable for the price for which the land was sold.

⁵ *Marine Bank v. Fulton Bank*, 2 Wall. 252.

⁶ *Id.*; *Webster v. Pierce*, 35 Ill. 158. See *Bartlett v. Hamilton*, 46 Me. 425; *Pinckney v. Dunn*, 2 S. C. 314.

⁷ *Story on Agency*, § 208; *Cartmell*

By violating his instructions to remit money by express and sending a check on parties of good standing and credit, who became insolvent before his principal could have the check cashed, the agent made himself liable for the loss.¹ An agent to collect money is bound to make immediate payment to his principal.² He is not obliged to incur the risk, in the absence of instructions, of selecting the mode of remittance to a distant principal; but it is his duty in such case, when he has collected money on account of his principal, to give him prompt notice of the fact.³ He will be chargeable with interest if he [30] unreasonably neglect or delay giving such notice,⁴ or if he converts the money to his own use.⁵

§ 777. **Same principles applied to factors.** In the absence of special directions as to price a factor must sell for the fair value or market price; if he disregards this duty and sells at a less price he will be compelled to account for the goods at the prices which his duty required him to realize for them.⁶ He has a reasonable time to make sale, and in case of neglect is liable for the market value during that period; and this price the plaintiff has the burden of proving.⁷ He thus makes himself responsible for the goods at the price for which it was his duty to sell them, when a reasonable time for making a sale has elapsed.⁸ He is, however, only bound to ordinary diligence. When his instructions leave the management of the property to his discretion he is bound only to good faith and reasonable conduct.⁹ He is required to act with reason-

v. Allard, 7 Bush, 482; Hammon v. 289; Lyle v. Murray, 4 Sandf. 590; Cottle, 6 S. & R. 290; MacDonnell v. Yon v. Blanchard, 75 Ga. 519.
Harding, 7 Sim. 178; Webster v. 3 Id.
Pierce, 35 Ill. 158; Wren v. Kirton, 4 Dodge v. Perkins, 9 Pick. 368; 11 Ves. 377; Caffrey v. Darby, 6 Ves. Clark v. Moody, 17 Mass. 145.
496; Massachusetts L. Ins. Co. v. 5 Hill v. Hunt, 9 Gray, 66.
Carpenter, 2 Sweeny, 734; Norris v. 6 Bigelow v. Walker, 24 Vt. 149;
Hero, 22 La. Ann. 605; Sargeant v. Linsly v. Carpenter, 4 Robert. 200.
Downey, 49 Wis. 524, 5 N. W. Rep. 7 Graham v. Maitland, 37 How. Pr.
903. See Wood v. Cooper, 2 Heisk. 307.
441; Hale v. Wall, 22 Gratt. 424; Bel- 8 Atkinson v. Burton, 4 Bush, 299;
linger v. Gervais, 1 Desaus. 174, 2 Whelan v. Lynch, 60 N. Y. 469, 19
Am. Dec. 686. Am. Rep. 202.

¹ Walker v. Walker, 5 Heisk. 425.

² Merchants' Bank v. Rawls, 21 Ga.

⁹ Evans v. Potter, 2 Gall. 13. See Guy v. Oakley, 13 Johns. 332.

able care and prudence; to exercise his judgment after proper inquiry and precaution.¹

§ 778. **Sales at unauthorized price.** Like other agents, a factor must obey the orders of his principal, and is liable for losses which result from any deviation. If he is directed to hold for sale till a particular day and then sell, and disobeys by selling before, he is liable for the difference between the price on that day and the price obtained;² and if directed not to sell below a certain price, and he does sell for a less price, for the actual damage sustained.³ In an action to recover for the negligence of a factor in failing to obtain the best market price for goods consigned to him for sale in a particular market, the price there is the basis of his liability, the existence of a market price being shown. The same rule governs when a sale is made without orders from the principal.⁴

It was once held in New York that where an agent sells [31] below the limit fixed in his instructions the measure of damages is the difference between the price obtained on the sale and the minimum price fixed by the instructions.⁵ This decision was reversed, the appellate court holding that the principal was only entitled to compensation for the injury actually sustained; that it was competent for the factor to show in reduction of damages that the goods at the time of sale and down to the time of trial were worth no more than the price

¹ *Leverick v. Meigs*, 1 Cow. 645; *Gheen v. Johnson*, 90 Pa. 38.

² *Brown v. McGran*, 14 Pet. 479; *Evans v. Root*, 7 N. Y. 186, 57 Am. Dec. 512; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Johnson v. Wade*, 2 Baxter, 280; *Hornsby v. Fielding*, 10 Heisk. 367. See *Kelly v. Smith*, 1 Blatch. 290.

³ *Hinde v. Smith*, 6 Lans. 464; *Taylor v. Ketchum*, 5 Robert. 507; *White v. Smith*, 6 Lans. 5; *Thompson v. Gwyn*, 46 Miss. 522; *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Gray v. Bass*, 42 Ga. 270; *Porter v. Wormser*, 94 N. Y. 431; *Blot v. Boiceau*, 3 N. Y. 78; *Frothingham v. Evertson*, 12 N. H. 239; *Dalby v. Stearns*, 132 Mass. 230; *Ainsworth v. Portillo*, 13 Ala.

461. See *Knowlton v. Fitch*, 48 Barb. 593, 52 N. Y. 288.

The breach of an agreement to order goods only when they could be sold at a designated price makes the factor liable for the difference between the best market price for which they could have been sold and what the principal in fact received. *Rollins v. Duffy*, 18 Ill. App. 398.

⁴ *Pugh v. Porter Brothers Co.*, 118 Cal. 628, 50 Pac. Rep. 772; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Phy v. Clark*, 35 Ill. 377; *Kauffman v. Beasley*, 54 Tex. 563.

⁵ *Blot v. Boiceau*, 1 Sandf. 111; *Switzer v. Connett*, 11 Mo. 88.

at which they were sold; that he takes the risk by such a sale of a rise in their value at any time before the action is brought, and perhaps down to the time of trial. The invoice price, or that fixed by the principal in the instructions, is *prima facie* their value; and as to articles having no market value the principal may insist on the price annexed to the instructions.¹ In a Massachusetts case, where a factor agreed he would not sell a consignment of tobacco for less than forty cents a pound, but did sell for less, the trial court refused to charge that the defendant would not be liable above its fair market value at the time it was sold, but was liable on the basis of its value when a return of it was demanded. This ruling was affirmed. The court said: "The sale of the tobacco below the limit of their authority was a breach of their agreement, and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price, but in choosing a time for sale when the market was depressed and a favorable price could not be realized. The consignor had a right to insist that his goods should be held until his price could be obtained. We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after the sale in violation of instructions."² This measure of damages has recently been applied by the supreme court of the United States,³ and, after much discussion, by the court of appeals of

¹ *Blot v. Boiceau*, 3 N. Y. 78; *Hinde v. Smith*, 6 Lans. 464.

This measure of damages is approved in Massachusetts (*Dalby v. Stearns*, 132 Mass. 230), and was established in New Hampshire at an early day. Chief Justice Parsons said: "Had these goods been destroyed by the negligence of the plaintiffs, they would have been answerable for their value, and the damages could not have been ex-

tended beyond that merely because the defendant had ordered them to sell for a certain price, and not for less. If, instead of a loss by negligence, the loss be by a disobedience of orders, without fraud, the result must be the same." *Frothingham v. Everton*, 12 N. H. 239.

² *Maynard v. Pease*, 99 Mass. 555; *Anstell v. Crawford*, 7 Ala. 335.

³ *Galigher v. Jones*, 129 U. S. 192, 9 Sup. Ct. Rep. 335.

New York.¹ The subject is more particularly considered in the chapter on conversion.² Where a factor guarantees that goods consigned to him for sale shall yield not less than a fixed price, on the breach of his guaranty he is liable for the amount which he has engaged they shall bring, regardless of the value of the goods or of the price at which they were sold. His liability becomes absolute upon making a sale for cash, or, if it is made upon credit, upon expiration of the term of credit.³

§ 779. **Same subject.** The limit by agreement or in- [32]structions may be fixed with reference to the selling price of other similar goods; when, in case of a sale for less, damages will be given on the basis of that limit; such selling price may be determined either by offers to sell the goods referred to in the ordinary course of business or by actual sales.⁴ In *Brown v. McGran*⁵ it is laid down as a general doctrine that "when-ever a consignment is made to a factor for sale the consignor has a right generally to control the sale thereof according to his own pleasure from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and consignor which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse the advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price;

¹ *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 id. 368; *Wright v. Bank*, 110 id. 237, 18 N. E. Rep. 79, 1 L. R. A. 289.

² Ch. 28.

³ *Pugh v. Porter Brothers Co.*, 118 Cal. 628, 50 Pac. Rep. 772.

⁴ *Harrison v. Glover*, 72 N. Y. 451.

⁵ 14 Pet. 479.

unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a [33] sound discretion at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made, or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities."¹ This doctrine was approved in *Field v. Farrington*.² The rule in New York is that a factor is bound to obey the subsequent instructions of his principal as to the sale, although he has made advances, unless the principal, after reasonable notice, fails to reimburse him.³ The fact that advances have been made will not protect a factor from the consequences of neglecting to sell according to orders, unless compliance therewith would have prejudiced him.⁴

¹ After demand and refusal of repayment of advances the factor may sell the property for less than the stipulated price, and such right is not waived by an agreement to wait longer for reimbursement, the principal promising that the factor shall lose nothing thereby. *S. Blaisdale Co. v. Lee*, 127 N. C. 365, 37 S. E. Rep. 509.

² 10 Wall. 141. See *Weed v. Adams*, 37 Conn. 378; *Whitney v. Wyman*, 24 Md. 134; *Marfield v. Douglass*, 1 Sandf. 360 (reversed, 3 N. Y. 70);

Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 369; *Blair v. Childs*, 10 Heisk. 199; *Beadles v. Hartmus*, 7 Baxter, 476; *Butterfield v. Stephens*, 59 Iowa, 596, 13 N. E. Rep. 751; *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. Rep. 167.

³ *Marfield v. Goodhue*, 3 N. Y. 62; *Hilton v. Vanderbilt*, 82 id. 591; *Casson v. Field*, 52 N. Y. Super. Ct. 196.

⁴ *Howland v. Davis*, 40 Mich. 545; *Butterfield v. Stephens*, 59 Iowa, 596, 13 N. W. Rep. 751.

§ 780. **Duty to sell at certain time.** Where a factor is directed to sell at a particular time, it is his duty to sell then or within a reasonable time thereafter for the best price he can then obtain. If he omits to do so the principal may treat the property as appropriated by the factor, and is entitled to recover the amount the goods could have been sold for if the order had been complied with.¹ In such a case the principal is obviously entitled to the price which would have been received if the agent had followed the instructions. So where the instructions are to hold until a certain price can be realized and the market advances to that price, but the agent has sold before, it is manifestly just to hold the agent for the difference between what he received and the limit fixed. But where the instructions fix a limit which is at the time and continues to be in advance of the market value; where the agent sells after his power to sell has ceased, and when it was his duty to forward the goods to another market, or merely to hold them, and therefore by selling in violation of instructions he may be charged with a conversion, the question at what time the value shall be estimated in the assessment of damages is one of considerable difficulty, on which there is a conflict of decision. Such cases will often differ from ordinary cases of trover in the circumstance that the defendant knew the owner's intentions and was under obligation to obey instructions to effectuate them; hence the profits or ultimate advantage which the principal had in view, and which subsequent events showed would have been realized, were in a legal sense contemplated by the parties. But it is a question whether this should place an agent in a situation to answer by a severer standard than any wrong-doer who tortiously converts another's property, ignorant and reckless of the owner's intentions. The violation of an agent's conventional duty is no more culpable than is the violation of the

¹ *Whelan v. Lynch*, 65 Barb. 326, 60 N. Y. 469, 19 Am. Rep. 202; *Allen v. McConihe*, 124 N. Y. 343, 26 N. E. Rep. 812.

The principal is not bound, on learning that his direction to sell has not been executed, to notify the factor that he abandons all claim to

the property and will hold him responsible for its value, nor to take the property and pay the purchase price of it in order to protect the factor. *Allen v. McConihe*, *supra*, distinguishing *Whelan v. Lynch*, *supra*.

owner's right of property by the other; it was the duty of the agent to obey instructions of his principal; and it is no less the solemn duty of others to abstain from the violation of the rights of ownership. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and if not sold on that day to ship the same to New York, he was held bound to obey the instructions or be liable as for a conversion. On the day mentioned for the sale in the instructions the factor, by giving a refusal until the morning of the following day, and then perfecting the sale for the required price, was held to have violated his instructions and to have incurred that liability.¹ Upon these facts Hogeboom, J., said: "The question is one of complete indemnity to the party injured. It is not stated in terms, and perhaps not in effect, that the sale by the defendant was fraudulent or in bad faith; and therefore no damages founded specially on that ground ought to be recovered. But it is stated that the sale was without authority and in violation of instructions, and therefore every damage consequent upon such a sale should be allowed. It is not stated that the instructions to ship to New York were with a view to the *immediate* sale of the wheat on its arrival at New York, and therefore the plaintiff should not be limited to the price of the wheat immediately after it would have arrived in New York, if forwarded according to the plaintiff's instructions. But it is stated, inferentially at least, that the order to ship to New York was with a view to an ultimate sale there. . . . Perhaps, if this would involve a more restricted rule of damages than would otherwise obtain, the plaintiff is not limited to it, inasmuch as there is in the complaint an allegation [35] of an illegal conversion of the property entitling the plaintiff to such damages as belong to such a cause of action. . . . There is nothing in the case or in the evidence by which we can precisely ascertain what the plaintiff would have done with the property if he had retained it; and this presents one of the chief difficulties in ascertaining, in point of fact, the damages which the plaintiff has sustained. If he designed an immediate sale thereof on its arrival in New York, the price at which he could have sold it at that

¹Scott v. Rogers, 31 N. Y. 676.

time as compared with the price which the defendant got for it, and which from a stipulation in the case we are authorized to infer has been paid over to the plaintiff, would show the loss sustained by him. But, as before stated, neither the allegations in the complaint nor the evidence in the case discloses any clear proof of an intent to make an immediate sale; and I think, as well under well settled rules of law as the reason and spirit of the case, the plaintiff ought not to be limited to such damages. He may be supposed to be reasonably conversant with the market and with the prospects of a rise in the price, which subsequent events verified. . . . If at some subsequent time, within a reasonable period after the conversion, he had notified the defendants of his election to adopt the price at that period, I think that would have fixed a reasonable and lawful standard for the estimate of damages. . It would have been saying, in substance, I elect to consider the property as mine up to this period; I now elect to make a sale of it, and I hold you responsible for the present value of the property. But no such course was taken. . . . No suit was commenced until years afterwards; and it is now claimed to be the legal rule, that the aggrieved party may make price at any time after the conversion and before the trial of the cause, or, at least, that he may do so, provided the suit is commenced within a reasonable time after the conversion. . . . It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach for the commencement of his action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be to allow the plaintiff some reasonable period within [36] the statute of limitations for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of the commencement of the action."

§ 781. **Same subject.** The rule adopted in the case last stated was based on the assumed fact that the plaintiff did not intend to sell his wheat in New York at once after its arrival, and the legal right to the benefit he had impliedly reserved to himself, by his instructions, of any rise in that market which might take place in the near future; and this was construed to embrace the remainder of the season, from July 13th to November 29th, when navigation closed. The fact that he did not intend to sell immediately after the arrival of the wheat in New York was inferred apparently from the absence of proof that he intended an immediate sale. As the fact was important on the question of damages, it may admit of question whether the party asserting it, and claiming an increase of damages in consequence of it, should not have been required to prove it. The injury to the plaintiff by the sale made by the defendant was, *prima facie*, the difference between the amount obtained by that sale and the value of the wheat in New York when it should have arrived there, after deducting the cost of transportation.¹ Since the opinion was given from which the above extract was taken there has been an important change declared in New York in the rule of damages for conversion, as well as for non-delivery of goods on a contract of sale where the price has been paid. In the absence of special circumstances, it is now the value of the property at the time and place of conversion, or breach of the contract, or a reasonable time after the owner has knowledge of the wrongful act, [37] with interest.² And this is believed to be the general rule in this country, though it does not prevail uniformly in all states. The same rule ought to govern between principal and agent; there are the same considerations to support it.³ The measure of damages stated is not to be increased, as a matter

¹ Bell v. Cunningham, 3 Pet. 69; & M. Nat. Bank, 60 id. 40; Wehle v. Schmertz v. Dwyer, 53 Pa. 335; Eby Haviland, 69 id. 448; Matthews v. v. Schumacher, 29 id. 40; Sturgess v. Coe, 49 id. 57; Tyng v. Commercial Bissell, 46 N. Y. 462; Magnin v. Dinsmore, 62 id. 35, 20 Am. Rep. 442; Sisson v. Cleveland, etc. R. Co., 14 Mich. Warehouse, 58 id. 308; Whelan v. Lynch, 60 id. 469, 19 Am. Rep. 202; Wintermute v. Cooke, 73 N. Y. 107; §§ 773, 777; Smith v. Savin, 141 N. Y. 315, 36 N. E. Rep. 338.

² Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Merchants' & T. Bank v. Farmers' ³ See Wagner v. Peterson, 83 Pa. 238; Pinkerton v. Manchester R., 42 N. H. 424; § 105.

of law, by the loss of advances made by the broker.¹ It is the duty of the owner of stocks which have been converted by a broker, acting in good faith and under an honest mistake, by an unauthorized sale thereof, followed by a refusal to replace the stocks, to replace them himself within a reasonable time after notice of the sale. This rule applies whether the stock was carried on a margin for the owner, or whether he had paid for it in full and was holding it as an investment.²

The special circumstances which warrant an increase of damages beyond the value at the time and place of conversion are those which on general principles justify the allowance of consequential damages; and sometimes the courts proceed on principles analogous to those which a court of equity applies to unfaithful trustees. Where property is disposed of by an agent contrary to instructions, or without authority, it is often property purchased and directed to be held for a particular purpose. When that happens, and the object is thwarted by the act or omission complained of, the injury is properly estimated with reference to the special value of the property for the particular use intended.

§ 782. Terms of sale. The acceptance of a consignment is an implied acceptance of the accompanying terms stated by the consignor. Thus, where the consignor informed his factor that he had made a consignment to him, and should anticipate the avails by drawing certain bills of exchange on him, by accepting the consignment it was considered that he became bound to pay the bills; that, having failed to pay them, he was liable to the drawer for the damages and costs which he had necessarily paid by reason of the bills having been protested.³ A factor is authorized to sell on credit where it is justified by the usages of trade, and the credit is not beyond the usual period.⁴ If his instructions are to sell for

¹ *Minor v. Beveridge*, 141 N. Y. 399, 36 N. E. Rep. 404, 38 Am. St. 804.

² *Wright v. Bank*, 110 N. Y. 237, 18 N. E. Rep. 79, 1 L. R. A. 289.

³ *Urquhart v. McIver*, 4 Johns. 103.

⁴ *Byrne v. Schwing*, 6 B. Mon. 199; *De Lazard v. Hewitt*, 7 B. Mon. 697; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Clark v. Van Northwick*, 1 Pick. 343; *Forrestier v. Bordman*, 1

Story, 43; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Story on Agency*, §§ 60, 110; *Mechem on Agency*, § 990; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. Rep. 827.

In the last case the rule applied is that it will be presumed, nothing appearing to the contrary, that a credit sale is according to usage.

cash,¹ or the sale is made on credit contrary to the usage of the place, the factor makes himself liable for the purchase price.² Where the principal consigns for sale without instructions and the factor sells for cash on delivery without giving credit, it is his duty to obtain payment before he allows the property to go out of his control. If, through any negligence or carelessness on his part or as a matter of favor to the vendee, he is allowed to get possession without making payment, the factor is liable to the consignor for the price.³ So if, on the expiration of a credit, he extends it without the assent of his principal, he is responsible for any loss which results from such extension.⁴ In selling on credit the factor must exercise skill and prudence; and if without consulting his principal he gives credit to a customer known to be, or whom due inquiry would have shown to be, of doubtful responsibility, he will be chargeable with any consequent loss.⁵ Where goods sold were not paid for or delivered, but remained in a warehouse, and the factor failed for a month after the sale to give the purchaser's name to his principal, the latter being thereby rendered unable to protect himself, the factor was liable for the value of the goods at the price for which they were sold by him. For three days following that on which the factor should have given his principal definite information respecting the sale, the goods could have been resold for the contract price; hence it was presumed that the principal would have ordered a resale had he known all the facts he ought to have been in possession of, and the factor was liable to account from the last date at which such price could have been obtained.⁶ Factors may conduct business either wholly or in part without

¹ *Hall v. Storrs*, 7 Wis. 253; *Catlin v. Smith*, 24 Vt. 85; *Sheffield v. Linn*, 62 Mich. 151, 28 N. W. Rep. 761.

² *Harlan v. Ely*, 68 Cal. 522, 9 Pac. Rep. 947.

³ *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274. See *Stollenwerck v. Thacher*, 115 Mass. 224; *Phillips v. Moir*, 69 Ill. 155; *Morrison v. Cole*, 30 Mich. 102; *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412; *Lubert v. Chauviteau*, 3 Cal. 458, 58 Am. Dec. 415; *Fick v. Runnels*, 48 Mich. 302, 12 N. W. Rep. 204.

⁴ *Hairston v. Medley*, 1 Gratt. 98; *Amory v. Hamilton*, 17 Mass. 103.

⁵ *Ernest v. Stoller*, 5 Dill. 438; *Howe v. Sutherland*, 39 Iowa, 484; *Foster v. Waller*, 75 Ill. 464; *Burrill v. Phillips*, 1 Gall. 360; *Housel v. Thrall*, 18 Neb. 484, 25 N. W. Rep. 612. See *Gorman v. Wheeler*, 10 Gray, 362.

⁶ *Western Union Cold Storage Co. v. Winona Produce Co.*, 197 Ill. 457, 64 N. E. Rep. 496.

disclosing their principals, take notes, judgments and insurance policies in their own names, without being chargeable with conversion, on those forms having the effect to exclude their principals.¹ They are entitled to a general lien on the goods or their proceeds in their hands for their demands against the principal, not only for commissions, advances and disbursements, but for their liabilities in behalf of their principals not yet matured.²

§ 783. **Guaranty commission.** Where a factor receives a *del credere* or guaranty commission there is a diversity of views as to his undertaking: whether it is absolute, as that of the primary debtor, to pay the principal the amount to which he is entitled for the goods sold on the expiration of the buyer's credit, irrespective of his solvency or insolvency;³ or whether it is a guaranty which binds the factor like a surety to pay on the purchaser's default.⁴ On either view when the event transpires which entitles the principal to apply to the factor for payment recovery may be had against him for the goods [39] sold of the amount which would be recoverable in an action for money had and received if the purchaser had in fact paid.⁵ If the money be paid to the factor that generally fulfills the guaranty, which does not extend to assure its safe arrival to the hands of the principal, though such factor is bound to the care and prudence due from an agent in sending it.⁶ But if the guaranty evinces an intention to cover a safe remittance the responsibility may be thus enlarged.⁷

¹ Story on Agency, § 111.

² Stevens v. Robins, 12 Mass. 180; Story on Agency, §§ 351, 377, 378.

³ Sherwood v. Stone, 14 N. Y. 267; Wolfe v. Koppel, 2 Denio, 368, 43 Am. Dec. 751, 5 Hill, 458; Cartwright v. Greene, 47 Barb. 9; Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, id. 285.

⁴ Gall v. Comber, 7 Taunt. 558; Hornby v. Lacy, 6 M. & S. 566; Peele v. Northcote, 7 Taunt. 478; Morris v. Cleasby, 4 M. & S. 566; Story on Agency, § 215; Thompson v. Perkins, 3 Mason, 232; Mechem on Agency, § 1014. See Bradley v. Richardson, 23 Vt. 721, 2 Blatch. 343;

Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190; Muller v. Bohlens, 2 Wash. C. C. 378; 1 Pars. on Cont. 92.

⁵ Swan v. Nesmith, 7 Pick. 220, 19 Am. Dec. 282; Wolfe v. Koppel, 5 Hill, 458, 2 Denio, 368, 43 Am. Dec. 751. See Dunnell v. Mason, 1 Story, 543.

⁶ 1 Pars. on Cont. 92; Lucas v. Groning, 7 Taunt. 164; Muller v. Bohlens, 2 Wash. C. C. 378; Heubach v. Rother, 2 Duer, 227; Leverick v. Meigs, 1 Cow. 654. But see Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190.

⁷ McKenzie v. Scott, 6 Bro. P. C. 280.

§ 784. **Rendering accounts.** Keeping and rendering accounts, and giving the principal seasonable information concerning his interests, are especially duties of this class of [40] agents,¹ and they are very strictly responsible for the truth of their accounts and reports.² In Pennsylvania it has been held that where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own. The representation has the effect of an estoppel.³ In that case the agent credited the principal in his annual account current with a debt outstanding that afterwards proved bad, and because the agent neglected to give notice of that fact within a reasonable time he was held responsible as an insurer of it. There would seem to be none of the qualities of an estoppel in the facts of such a case, and no ground for making the agent so liable. He incurred no liability for selling on credit, because he sold to a purchaser then in good credit, or apparently so; he credited the debt as one against such a purchaser, but not acting on a guaranty commission he did not insure its collection. His omission to give notice of a subsequent failure was mere negligence, as the insolvency is not considered as impeaching the good faith or prudence of the sale. Such negligence, on general principles, rendered him [41] liable for the actual injury resulting therefrom,⁴ by the principal not having early information to warn him against any operations proceeding upon that credit as a fund. The

¹ *Arrott v. Brown*, 6 Whart. 9; *Brown v. Arrott*, 6 W. & S. 402; *Elliott v. Walker*, 1 Rawle, 126; *Forrestier v. Bordman*, 1 Story, 43; *Clark v. Moody*, 17 Mass. 145.

An agent employed to take orders for goods is not responsible for the cancellation of an order given him because he delayed for fourteen days to send the order to his principal; the damage to the latter was not such as might have been reasonably expected to occur, delivery of the goods not being required until two and a half months after the order

was given. *Hurley v. Packard*, 182 Mass. 216, 65 N. E. Rep. 64.

² If a factor informs his principal of the sale of his property and does not comply with a request for details, he thereby raises a presumption which authorizes the strictest construction of the evidence against him as to amount, value and price. *Bate v. McDowell*, 49 N. Y. Super. Ct. 106. See § 782.

³ *Harvey v. Turner*, 4 Rawle, 223; *Arrott v. Brown*, 6 Whart. 9. See § 769.

⁴ *Elliott v. Walker*, 1 Rawle, 126.

existence of the credit is a circumstance in the situation requiring greater diligence in communicating any fact affecting it; it is also a fact material on the question of damages, if in the absence of notice the principal was subjected to any sacrifice by acting upon such credit as real. The assumption that such negligence caused a loss equal to the amount of the debt, and that the agent should therefore be responsible for it as an insurer, independent of the consequences in the particular case, is treated as an exception in that state to the general rule and has been criticised as such.¹ Whether a factor assumes an uncollected debt on report of which he gives the principal credit, assumes liabilities, or makes payments, is a question of intention. When the factor pays or gives his note or a credit to his principal for such a debt in a final account, it has been considered that he intended to make the debt his own.² But giving credit to the principal for unmatured debts in an account current, or giving notes made payable when funds from such debts are expected, is not a conclusive assumption of them by the factor; such credit is but a liquidation of the account, and does not alter his responsibility.³ He is entitled to charge back to the principal such of the credited debts as prove bad,⁴ or to defend against the principal's action on a note given for such credits in the same event on the ground of a failure of consideration.⁵

§ 785. **Remitting funds.** A factor or consignee, after apprising his principal of the sale of goods consigned to him, may wait to receive directions as to the mode of remitting the net proceeds; he is not liable to an action until he is in some default in remitting or paying according to the orders of his principal.⁶ He is not liable for interest until he is in [42] default.⁷ He must make remittance in the manner directed

¹ 1 Am. L. Cases, 661, note to Goodenow v. Tyler.

² Oakley v. Crenshaw, 4 Cow. 250. See Hapgood v. Batcheller, 4 Met. 573; Robertson v. Livingston, 5 Cow. 473; Harvey v. Turner, 4 Rawle, 223.

³ Robertson v. Livingston, 5 Cow. 473; Reily v. Lamar, 2 Cranch, 343; Hapgood v. Batcheller, 4 Met. 573.

⁴ Reily v. Lamar, *supra*.

⁵ Hapgood v. Batcheller, *supra*.

⁶ Ferris v. Paris, 10 Johns. 285; Halden v. Crafts, 4 E. D. Smith, 490; Cooley v. Betts, 24 Wend. 203; Brink v. Dolsen, 8 Barb. 337; Greentree v. Rosenstock, 61 N. Y. 583.

⁷ Ellery v. Cunningham, 1 Met. 112; Pope v. Barrett, 1 Mason, 117. See Fulkerson v. White, 22 Tex. 674.

by the principal. If instructed to remit by draft, and he remits in a different manner and the money is lost, he must bear the loss.¹ In February, 1837, S., a resident of New York, received a sum of money of H., who resided in Liverpool, and was directed to remit by purchasing and forwarding a bill of exchange. S. thereupon purchased a bill on his own credit at a premium of eleven and one-half per cent., which he forwarded to H. at ten per cent., that being the rate at which similar bills were then selling for cash. H. kept the bill until November, 1839, having in the meantime made various unsuccessful efforts to collect it, and was then first informed that it had not been purchased with his money. He immediately wrote to S. that the bill would not be regarded as payment, and shortly afterwards brought an action for money had and received, and it was held that the action was maintainable.² If a factor refuses to deliver goods in his possession on the termination of his agency he is chargeable with their market value at the time of his refusal.³ A sub-agent intrusted with the collection of a debt from a third party may not apply the proceeds thereof to the payment of a claim due himself from the principal agent from whom it came, or in any way divert the funds from a quick transmission to his principal. If the latter directs the sub-agent to make any other use of the funds and such direction is complied with, the sub-agent knowing that, so far as his principal is concerned, the funds are trust funds, is liable therefor to the principal.⁴

§ 786. **Liability of brokers.** Brokers constitute a distinct class of agents, and are employed in a great variety of commercial transactions. Breaches of their duty are compensated on the same fundamental rules as apply between principal and agent generally. Though, strictly, a broker is a mere negotiator of bargains between other parties, without any trust or bailment of the subject of his agency, still the name is sometimes applied to agents who have actual or symbolical possession of the thing which is the subject of their negotiations.⁵ A

¹ Foster v. Preston, 8 Cow. 198;
Kerr v. Cotton, 23 Tex. 411.

⁴ Milton v. Johnson, 79 Minn. 170,
81 N. W. Rep. 842, 47 L. R. A. 529.

² Hays v. Stone, 7 Hill, 128.

⁵ See Story on Agency, § 32;

³ Monnet v. Merz, 127 N. Y. 151, 27
N. E. Rep. 827. Mechem on Agency, § 13.

broker must make full satisfaction to his principal for any loss sustained by his fault; the principal has recourse upon him for damages which will be equivalent in amount to the advantages which would have resulted from a due discharge of duty. Thus, a loan broker who undertook to obtain ample security for his principal's money by mortgage of real estate, and took a mortgage which proved insufficient in consequence of [43] prior incumbrances, was held liable for the loss,¹ which was measured by the difference between the amount loaned and the value of the security.² If a broker directed to loan money on a particular property, if it was unincumbered, makes the loan with a pre-existing mortgage still on the property, his liability cannot exceed the amount of such mortgage.³ Where the action was based upon a complaint in three counts, for breach of contract to invest the plaintiff's money safely, for negligence in making the investment, and for fraudulent representations as to the securities, the measure of damages was held to be the difference between the securities delivered and safe securities, the assessment to be made under the first two counts as of the time when the plaintiff acquired the security; the same rule as to the time of making the assessment applied to the count for fraud unless the facts justified the application of a different rule. The facts which would justify the assessment as of the time when the plaintiff should have been led to inquire into the condition of the security, as by default in the payment of interest, are thus indicated: If the plaintiff was aged and inexperienced and confided in the defendant because of his friendship and his position, and because she had before trusted him with the making of investments, and took the mortgages because of his false representations that the loans were not in excess of one-third of the value of the mortgaged property, that the appraisers were fair men, and that he

¹ *Shipherd v. Field*, 70 Ill. 438; *McFarland v. McClees*, 5 Atl. Rep. 50 (Pa.); *Bank v. Western Bank*, 13 Bush, 526, 26 Am. Rep. 211; *Bannon v. Warfield*, 42 Md. 22; *Whitney v. Martine*, 88 N. Y. 535; *Rochester v. Levering*, 104 Ind. 562, 576, 4 N. E. Rep. 203.

² *Lowenburg v. Walley*, 25 Can.

Sup. Ct. 51. One judge thought the plaintiff, having repudiated the mortgage, was entitled to recover the full sum loaned with interest thereon on condition of a transfer of the mortgage.

³ *Welsh v. Brown*, 8 Ind. App. 421, 35 N. E. Rep. 921.

was himself holding similar mortgages as investments of his own property, and she held the mortgages as investments without anything to put her upon guard until interest was defaulted, the damages should be assessed as of the time subsequent to that date, when reasonable inquiry as to the circumstances of the default would have disclosed the true condition and value of the mortgages. "The only particular in which damages so assessed could exceed the damages as of the time when she had first suffered an actionable wrong, in consequence of the defendant's fraud, would be the depreciation in value in the meantime due to the depreciation in value of the mortgaged property during the same period. While we do not say that the ordinary investor who buys mortgages is not expected to exercise from time to time when he acquires them reasonable diligence to see whether the value of the mortgaged property is depreciating, we do think that if the plaintiff was induced, by the fraudulent representations which the evidence tended to prove, to take these investments and to hold them without further inquiry until interest was defaulted, she was doing only what under the circumstances was the natural consequence of the defendant's wrongful conduct, and that it is just that he, and not she, should bear such loss as was the natural consequence of keeping the investments, as the defendant must have been aware from the circumstances she probably would do, and as he must have expected her to do."¹

As we have seen, an insurance broker who neglects his duty to effect insurance, or performs that duty defectively, is made liable in respect to the loss in place of the insurance as the insurer would have been had the policy been duly effected.² A house agent who charges a commission to a landlord for letting his house is bound to due and reasonable care in ascertaining the solvency of the tenant; and if in default in this respect, to make compensation for the rent lost by the tenant's insolvency.³

Stock brokers are employed in respect to stocks, bonds and things of that nature to make sales and purchases very nearly as factors are in respect to merchandise, and their liabilities are governed by the same principles. They are as agents

¹ *Coffing v. Dodge*, 167 Mass. 231, 45 N. E. Rep. 928.

² § 772.

³ *Heys v. Tindall*, 1 B. & S. 296.

bound to obey the instructions of their customers, and must not only answer for any loss or damage which results from any deviation, but may be made liable as for conversion whenever they make any disposition of the subjects of their agency contrary to their duty. Where a certificate of shares in a corporation was intrusted to a broker with directions to sell under circumstances specified, it was held that he had no right to transfer the shares for any other purpose to the name of another person or to his own name; and that evidence of a custom or usage among brokers so to do was not admissible; that the owner might treat such a transfer as a sale, and recover the market price of the shares on the day of the transfer, although the broker afterwards tendered to him another certificate of an equal number of such shares.¹ And he is subject to the same rule of damages if he convert stock or bonds deposited with him as a pledge or security.² Where a broker undertakes to sell stock short for a customer and to carry it on the payment of margin and commission, he is bound to make both a sale and a purchase. Every short sale is made by the seller with the contemplation of covering it by a purchase when the market shall have declined, and for the purpose of making a profit by the decline. When [44] the broker has made the short sale, delivered the stock to the purchaser and received the price, he is said to carry it for his principal until he is bound by his contract to purchase stock to cover it, and the margin is the broker's security against any loss by advance in the market during that time. If this time is not fixed by the contract, the law implies from his agreement to make a short sale for his customer on a commission, that it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectuated. A short sale to be covered immediately would be a very idle proceeding. The broker can, however, close the transaction at any time if the margin, upon his demand and notice, is not kept good. After he has carried the stock for a reasonable time, thus affording

¹ *Parsons v. Martin*, 11 Gray, 111; ² *Wagner v. Peterson*, 83 Pa. 238;
Taylor v. Ketchum, 35 How. Pr. 289, *Neiler v. Kelly*, 69 id. 403.
5 Robert, 507; *Taussig v. Hart*, 49 N. Y. 301.

his customer an opportunity to realize his expectations, he may, upon proper notice, terminate his relations with him. He is his agent, and must obey his orders both in making the sale and covering it. If he acts without orders, or against orders, he commits a breach of duty, and becomes liable, like any other agent, for the loss he may occasion his principal. Where a broker, after a short sale of stock made for his principal, without notice to him, or any default on his part, or any authority from him, bought in the stock and covered the short sale, and afterwards, on receiving the principal's direction to cover the short sale, did not, as he could not, comply, having previously disabled himself from doing so by his own purchase, he was held liable to his principal for this breach of duty for the difference between the price at which the stock was sold short and the market price on the day when the order was received to purchase with interest, deducting commissions and revenue stamps.¹ If a broker violates his contract to carry grain for his principal by selling without notice or demand for margins and at a sacrifice, he cannot recover his commissions or advances in an action upon the contract, even subject to the principal's right to recoup damages,² and the latter may, under the common counts in *assumpsit*, recover all moneys advanced as margins.³ There may be such recovery if purchases are not made, fictitious reports of transactions being made to the principal. It is immaterial in such a case whether loss was sustained or not.⁴ In a late English case a broker on the London stock exchange wrongfully closed a customer's account which he had agreed to keep open until the next account. The case was tried before Wills, J., who regarded the question of the measure of damages as a difficult one. He

¹ White v. Smith, 54 N. Y. 522; Knowlton v. Fitch, 48 Barb. 593, 52 N. Y. 288; Cothran v. Ellis, 107 Ill. 413; Denton v. Jackson, 106 id. 433.

In Campbell v. Wright, 118 N. Y. 594, 23 N. E. Rep. 914, brokers sold wheat short for a customer on a margin and bought in without authority on his account. He repudiated the purchase and directed them to buy for him at a price specified, which they did not do. The pur-

chase might have been made at the price named. It was ruled that plaintiff's damages were the amount the brokers would have owed him had they made the purchase.

² Ball v. Clark, 28 Fed. Rep. 179.

³ Larminie v. Carley, 114 Ill. 196, 29 N. E. Rep. 382; Jones v. Marks, 40 Ill. 313.

⁴ Prout v. Chisolm, 21 App. Div. 54, 47 N. Y. Supp. 376.

thought that the plaintiff was entitled to all the advantages that might have been his had the contract been carried out, including the right to sell the shares whenever he chose. At different times different prices might have been realized. Although it was perfectly certain that the best prices ruling during the time would not have been realized, exactly the same thing took place in other cases in which persons withholding property from the owner had been held liable for the best prices during the time the property was withheld. It was a case in which the wrong-doer suffered because he was a wrong-doer, and the plaintiff was entitled to the best prices of the shares during the time it was in his option to sell or not to sell.¹

A broker purchased stock for a customer, not as an investment, but upon speculation; the latter furnishing a small amount as a margin, and the former supplying the residue. It was held that if, upon being advised of an unauthorized sale of the stock, the principal desires further to prosecute the adventure, he has a right to disaffirm the sale and to require the [45] broker to replace the stock, and upon failure or refusal to do this the remedy of the principal is to replace it himself; and the advance in the market price from the time of the sale up to a reasonable time to replace it, after notice of the unauthorized sale, affords a complete indemnity and is the proper measure of damages.² This rule applies whether the broker neglects to execute orders for the sale or the purchase of stocks.³ In California it is held that if a broker binds himself to make a sale of property at a specified price and sells for less, he is liable for the difference between the value of the property at the expiration of the time in which the sale was to be made and the price he was to sell for.⁴ But in Illinois the damages are measured by the difference between the highest attainable selling price and the amount guarantied, with interest from the time the sale was to have been made.⁵

¹ Michael v. Hart, 17 T. L. Rep. 761 (1901), affirmed, on further consideration by the same judge, [1901] 2 K. B. 867.

² Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Markham v. Jaudon, 41 N. Y. 235; Gruman v. Smith, 81 id. 25; Colt v. Owens, 90 id. 368; Wright v. Bank, 110 id. 237, 18 N. E. Rep. 79,

1 L. R. A. 289; Galigher v. Jones, *infra*.

³ Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. Rep. 3'5.

⁴ Dunn v. Mackey, 80 Cal. 104, 22 Pac. Rep. 64.

⁵ Plumb v. Campbell, 129 Ill. 101, 110, 18 N. E. Rep. 790.

A custom-house broker who undertakes to secure the entry of dutiable goods before a new tariff law takes effect must exercise reasonable diligence to that end; failing to do so, he will be liable for the difference in the duties imposed by the old law under which they might have been entered, but for his default, and the higher duties imposed by the new law. It will not be presumed in his favor, the goods having been imported for sale, that the owner would take them out of bond and re-export them without paying the duties.¹

§ 787. **Damages for acting as agent without or in excess of authority.** A party may suffer injury from the assumption by another to act as his agent without authority, as well as by acts of an agent contrary to private instructions, but in the exercise of such apparent authority that the principal cannot repudiate the acts done. In such cases the pretended or disobedient agent is liable to the principal for the loss he suffers from such misconduct. Where a person falsely pretending to be the agent of the owner of land to sell the same executed a contract for its sale, which was recorded, and upon which the purchaser brought suit for specific performance, thereby putting the owner to trouble and expense, he was held liable to the latter in an action on the case for the damages sustained by him in defending the suit.² So where an agent so misconducted that his principal was obliged to go into chancery to be relieved from his act, the agent was required to pay the costs.³ But where the principal is not bound and has the op-

¹ *Vernier v. Knauth*, 7 App. Div. 57, 39 N. Y. Supp. 784.

² *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

If an agent delivers a deed in violation of his instructions, and the land is conveyed to an innocent purchaser, the former is liable for the value of the land at the date of such delivery, and interest thereon to the time of trial. *Triggs v. Jones*, 46 Minn. 277, 48 N. W. Rep. 1113.

³ *Respass v. Morton*, Hard. 226.

In a recent English case the plaintiff was seized in fee-simple of hereditaments; he employed the defendant as his solicitor to procure money

on a mortgage thereof. A first mortgage was given a third person, and the defendant took a second mortgage which he himself prepared, and which contained a power of sale without the usual condition that the sale should not be made except in default of payment. A sale was made without notice to the mortgagor, although at a price which was not inadequate. The court found that there was no proof that the plaintiff had had the peculiarity of the form of the power of sale properly explained to him; and awarded him damages which included, first, such costs as he had been put to by

tion to repudiate the act done in his behalf, he will ratify it as to the agent by ratifying the act as to the other party, and will thus exonerate the agent from liability for acting without or in excess of his authority.¹ An agent who has employed a sub-agent under such circumstances that the latter is responsible directly to him, instead of the principal, is as to such sub-agent a principal; he may sue in his own name for any breach of duty by such sub-agent; he will be entitled to recover [46] for the benefit of his principal such damages as he has suffered or will suffer therefrom; or to an amount which will indemnify himself if the principal has recovered from him the damages resulting from such sub-agent's fault,² including costs where it was reasonable to defend and the defense was conducted in a judicious manner.³

SECTION 2.

AGENT AGAINST PRINCIPAL.

§ 788. **Agent's rights.** An agent is not only entitled to compensation for his services in the business of the agency, but also to be reimbursed moneys paid by him therein, and to be indemnified in respect to any liabilities he has incurred within his authority to third persons in behalf of his principal, or by obeying his lawful orders. The subject of compensation for services has been sufficiently discussed in the chapter on that subject.⁴

reason of the sale being made without his knowledge; second, a sum estimated to cover the costs which he would be put to in making new investments of money realized from the sale in property of a similar description to that which was sold; third, a sum to represent the probable prospective increase of value of the hereditaments since the time of sale to the trial; fourth, the difference between the solicitor and client costs which he incurred and the party and party costs which he was entitled to recover from the defendant. *Cockburn v. Edwards*, 16 Ch. Div. 393 (1880).

¹ *Winpenny v. French*, 18 Ohio St. 469; *Woodward v. Suydam*, 11 Ohio, -

360; *Ætna Ins. Co. v. Sabine*, 6 McLean, 393; *Bray v. Gunn*, 53 Ga. 144; *Towle v. Stevenson*, 1 Johns. Cas. 110; *Beall v. January*, 62 Mo. 434; *Nesbitt v. Helser*, 49 Mo. 383; *Bean v. Drew*, 15 La. Ann. 461; *Watson v. Bigelow*, 47 Mo. 413.

² *Van Wart v. Woolley*, 5 Dowl. & R. 374; *Story on Agency*, § 201; *Mainwaring v. Brandon*, 8 Taunt. 202. See *Allen v. Suydam*, 20 Wend. 321, 328, 32 Am. Dec. 555.

³ *Mors le Blanch v. Wilson*, L. R. 8 C. P. 227. See § 82; *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35; *Richardson v. Dunn*, 8 C. B. (N. S.) 655.

⁴ § 667 *et seq.*

§ 789. **Reimbursement of expenditures.** The agent's right to be repaid moneys he has expended for his principal pursuant to his authority rests upon a clear legal ground; they are paid at the principal's request and the law implies a duty and [47] promise to refund.¹ Thus, where a principal orders his agent to purchase a commodity and to draw on him for the amount, when the agent has complied with such direction the principal is bound to accept and pay his bills; if he fails to do so, the agent is entitled to recover from him not only the amount of the bills, but damages and costs of protest. If the agent has paid these he may recover upon a count for money paid and the bills may be given in evidence on that count.² This right of action will not be affected if the agent sells the commodity without orders after the protest of the bills, although he has rendered no account of the sales.³ An agent who insures his principal's property may recover the premiums paid, although the policies were voidable because issued by himself as the agent of the insurer.⁴ On an accounting between principal and agent to recover the excess over the actual price of land purchased, which the latter had appropriated, the sum paid by him to a third party, who had no knowledge of the deception practiced by the agent, for information that the land was for sale, is a proper credit in favor of the agent.⁵

¹ *Ramsay v. Gardner*, 11 Johns. 439; *Packard v. Lienow*, 12 Mass. 11; *Ruffner v. Hewitt*, 7 W. Va. 585; *Powell v. Newburgh*, 19 Johns. 284; *Elliott v. Walker*, 1 Rawle, 125, 18 Am. Dec. 602; *D'Arcy v. Lyle*, 5 Bin. 441; *Brown v. Clayton*, 12 Ga. 564; *Warren v. Hewett*, 45 id. 501; *Wade v. Roberts*, 6 Humph. 124; *Shearman v. Akins*, 4 Pick. 283; *Yeatman v. Corder*, 38 Mo. 339; *Bastable v. Denegre*, 22 La. Ann. 124; *Greely v. Bartlett*, 1 Me. 172, 10 Am. Dec. 54; *Vandyke v. Brown*, 8 N. J. Eq. 657; *Sentance v. Hawley*, 13 C. B. (N. S.) 458; *Capp v. Topham*, 6 East, 392; *Blackmar v. Thomas*, 28 N. Y. 67; *Hidden v. Waldo*, 55 N. Y. 294; *Gihon v. Stanton*, 9 N. Y. 476; *Monnet v. Merz*, 127 N. Y. 151, 27 N. E. Rep. 827; *Glover v. Henderson*, 120 Mo. 367, 25 S. W. Rep. 175, 41 Am. St. 695;

Robinson v. Crawford, 31 App. Div. 228, 52 N. Y. Supp. 560; *McEwen v. Loucheim*, 115 N. C. 348, 20 S. E. Rep. 519; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. Rep. 950.

In *Moore v. Remington*, 34 Barb. 427, it was held that where an agent is entitled to charge for expenses he may recover for the fair worth of his board, even though he actually paid nothing for it. But the better authority is to the effect that an agent has no claim for reimbursement until he has actually made payment. *Brand v. Henderson*, 107 Ill. 141. See § 683.

² *Riggs v. Lindsay*, 7 Cranch, 500.

³ *Id.*

⁴ *Rochester v. Levering*, 104 Ind. 562, 572, 4 N. E. Rep. 203.

⁵ *Salsbury v. Ware*, 183 Ill. 505, 56 N. E. Rep. 149.

Sums paid for storage and insurance may be recovered though incurred after the expiration of the time the broker was directed to sell, if the delay has been ratified by the consignor and the broker acted in good faith and with reasonable care. Agreed interest on advances should be computed to the time fixed for the sale of the property, or until it was actually sold if the consignor waived the delay.¹ The sale by a broker, without proper notice, of stock purchased by him for a customer on a margin, and held in pledge to secure the advance made, does not, as matter of law, extinguish the claim against the customer for the advance.² The principal cannot avoid liability to his agent for commission and for reimbursement for his outlays, after the services have been performed, because the contract under which the agent acted was voidable, not being in writing.³ To entitle himself to recover for disbursements the agent must keep within the instructions given him. Where the principal specially directed his agent to employ certain persons to make repairs on his property and the agent employed other persons to make them, he was not entitled to an allowance for the expense so incurred.⁴

§ 790. Factor's right to reimburse himself by sales.

Where the goods or assets of the principal in the hands of the factor or agent are a primary fund for the payment of moneys due him, it is necessary for him to show that such fund is exhausted, and the remedy against the principal personally is limited to the deficiency.⁵ But in Massachusetts it has been held⁶ that advances made by a factor on receipt of goods consigned to him for sale are presently due, and suit may be brought therefor without waiting for the avails of the consignment. The principal consigned to a factor parcels of cotton for sale, and immediately drew drafts on him which were accepted and paid. The cotton was sold by him to persons in good credit for their notes payable to him on time.

¹ Willis v. Thacker, 20 Tex. Civ. App. 233, 49 S. W. Rep. 128.

² Minor v. Beveridge, 141 N. Y. 399, 36 N. E. Rep. 404, 38 Am. St. 804.

³ Bibb v. Allen, 149 U. S. 481, 498, 13 Sup. Ct. Rep. 950.

⁴ Burby v. Roome, 7 N. Y. Misc. 167, 27 N. Y. Supp. 250.

⁵ Corlis v. Cumming, 6 Cow. 181; Montgomerie v. Ivers, 17 Johns. 38; Gihon v. Stanton, 9 N. Y. 476; Hidden v. Waldo, 55 id. 294. See Peisch v. Dickson, 1 Mason, 9; Barrill v. Phillips, 1 Gall. 360.

⁶ Beckwith v. Sibley, 11 Pick. 482.

Before their maturity some of the makers became insolvent, and the factor brought suit for the moneys advanced on the drafts. The court said, by Shaw, C. J., that "the payment of the drafts by the plaintiffs, and the time of their payment, were not at all dependent upon the sale of the cotton. The [48] consignment of the cotton for sale, upon which the plaintiffs would have a *lien*, not only for the repayment of the amount of the particular drafts, but for their general balance, no doubt emboldened the consignors to draw more freely upon their correspondents than they otherwise would, and operated as an inducement to the latter to accept and pay their drafts. But that circumstance has very little tendency to prove that the plaintiffs relied exclusively upon that fund, or had agreed to await reimbursement until such particular fund was realized or had failed. . . . The legal relation of the parties then was this: The defendants were indebted to the plaintiffs for money due presently; they had a lien on the cotton before the sale and on the notes taken for it after the sale as security for the debt due them. And although they took the notes in their own name, it was in trust for the consignors; the property in the notes remained beneficially in the defendants and the plaintiffs had only a lien.¹ But where a creditor has a collateral security for his debt he is not confined to rest exclusively upon such security for repayment; but notwithstanding the pledge or collateral security may look to the general credit of the debtor, and have his action unless there is some agreement or contract, express or implied, to give time or to look to a particular fund. In the present case the burden is upon the defendants, and no such agreement is proved and no usage, course of dealing or other circumstances from which such a contract can be implied." In a later case² the defendant applied to the plaintiffs to make and they made sundry advances in cash and in their acceptances to enable him to purchase sheepskins upon an agreement that he would pull the wool and consign the same as security for such advances, and for sale upon a guaranty commission. Hubbard, J., said: "The facts, as they are stated, do not furnish evidence

¹Denston v. Perkins, 2 Pick. 86; ²Upham v. Lefavour, 11 Met. Chesterfield Manuf. Co. v. Dehon, 5 174.
Pick. 7, 16 Am. Dec. 367.

that the plaintiffs agreed to give the defendant credit until the property consigned to them was sold. The plaintiffs stand like other commission merchants. They have no right, in the absence of directions, immediately to sell the goods consigned to them, if the interest of the consignors will be sacrificed by such a sale. The receiving of the goods under an agreement like the present carries with it, also, the obligation to give a reasonable credit; and to force the goods into market as soon as received, without regard to the interests of the owner, and merely to turn them into money as early as practicable, would be such a breach of duty as to expose them to a claim of damages if the goods were sacrificed by the sale. On the other hand, they are only required to give a reasonable time, and then, if the goods are not sold, they may call for payment or further security, and may sue for the amount due them."

The factor's right to sell a sufficient quantity of the property of his principal to reimburse himself for advances made or expenses incurred in caring for such property is not revoked by the principal's death. Such sale must be made according to the usages of trade and in the exercise of a sound discretion. If so made, the factor will not be liable as an executor *de son tort*, though the sale was made without a strict legal right.¹ The principal's right to the proceeds of the sale of property in the hands of his factor is secondary only to the latter's lien for commissions, advances and charges. A factor cannot defeat or diminish his principal's claim therefor by purchasing the claims of third persons and interposing them as a counter-claim.²

§ 791. Agent may charge for exchange. Under an agreement to collect debts and apply the proceeds to the payment of a principal's indebtedness to the agent he is entitled to deduct the rate of exchange between the place of collection and the place where the debt from the principal is payable, and also his reasonable commissions.³

§ 792. How right to reimbursement affected by mode of doing business. Where an agent employed to subscribe stock in a railroad company for his principal and in his name, sub-

¹ Willingham v. Rushing, 105 Ga. 72, 31 S. E. Rep. 130.

² Britton v. Ferrin, 171 N. Y. 235, 63 N. E. Rep. 954.

³ Howe v. Wade, 4 McLean, 319.

scribed and paid calls in his own name, it was held that the principal was not bound; and on tender of a transfer of the certificate the agent was not entitled to recover the money paid; he should have pursued the instructions and subscribed in his principal's name.¹ But where the order was general to buy stock for the principal and the brokers bought, paid for it, and took the certificate in their own names, after an offer to transfer the certificate, a demand of payment and neglect by the principal to pay, they were held entitled to recover the price paid, and not merely the difference between that and the market value of the stock on the day of their demand.² Where the principal is liable for moneys paid by the agent, he is liable also for interest, if a stipulation therefor exists or may be presumed from the nature of the business or the usage [50] of trade; or if he is in default in the performance of his obligation to reimburse the agent.³ To give rise to this obligation to reimburse on the part of the principal the disbursement must be within the agent's authority, and the money must have been reasonably and in good faith paid.⁴ He should pursue his principal's instructions, and cannot recover for extra expenses caused by departing therefrom.⁵

§ 793. Agent's right to indemnity. An agent is entitled to indemnity for losses or damages sustained in transacting

¹ *Shrack v. McKnight*, 84 Pa. 26.

² *Giddings v. Sears*, 103 Mass. 311.
See *Dodge v. Tilston*, 12 Pick. 328.

³ Story on Agency, § 338; §§ 326, 329, *ante*.

⁴ *Ruffner v. Hewitt*, 7 W. Va. 585.

In *Fuller v. Ellis*, 39 Vt., 345, 94 Am. Dec. 327, the plaintiff had hired the defendant, who was skilled in the management of horses, to take two horses to Richmond, Va., for exhibition at the state fair, and to sell them, if possible, for the most he could get for them. While at Richmond he sold one, and after ineffectual efforts to dispose of the other, without consulting his principal, he took it to Charleston, S. C., and finally succeeded in selling it; but his expenses amounted to \$445.23. On account of the unsettled state of

the country, it was impossible for the defendant to bring back the horse after he reached Wilmington, N. C. It was held that the defendant exceeded his instructions, and he was not entitled to pay for his expenses after he left the place to which his instructions directed him to go. And regarding him as a general agent he did not exercise a sound discretion and act with common prudence, and on that ground was not entitled to recover. *Brown v. Clayton*, 12 Ga. 564; Story on Agency, § 336.

⁵ *Ranger v. Harwood*, 39 Tex. 139; *Keys v. Westford*, 17 Pick. 273; *Carr v. Hills Archimedian Lawn Mower Co.*, 12 Daly, 332; *Godman v. Meixsel*, 65 Ind. 32; *Maitland v. Martin*, 86 Pa. 120.

the business of his agency, and against liabilities incurred therein. Where an agent acting *bona fide* and without fault in the proper service of the principal is subjected to expense, or sued on any contract made by him, or for any act done pursuant to his authority, the law implies that the principal will indemnify and reimburse him.¹ This is the general principle arising from the relation of the parties, and applies not only to entitle him to recover full compensation where the loss has already happened, but also, *quia timet*, in giving him the right to retain funds or securities as indemnity for outstanding liabilities which have not matured or been enforced.² To afford ground for compensation the loss must occur [51] without the agent's fault,³ naturally and directly from the execution of the agency; this must be the cause and not merely the occasion of the damage.⁴ Thus, if he is compelled to pay damages to a third person for a false representation of the quality of the principal's goods, made innocently in pursuance of directions from the principal, and in consequence of a deception practiced by him,⁵ or for converting the property of a third person by direction of the principal, claiming to be the owner, the agent having no notice of any adverse title,⁶

¹ Powell v. Newburgh, 19 Johns. 284; D'Arcy v. Lyle, 5 Bin. 441; Stocking v. Sage, 1 Conn. 519; Save-land v. Green, 36 Wis. 612; Whitehead v. Darling, 5 S. W. Rep. 356 (Ky.); Guirney v. St. Paul, etc. R. Co., 43 Minn. 496, 46 N. W. Rep. 78, 19 Am. St. 256; Ellis v. Pond, [1898] 1 Q. B. 426. See Evansville, etc. R. Co. v. McKee, 99 Ind. 519.

² Id.; Story on Agency, § 339; Bastable v. Denegre, 22 La. Ann. 124; Drummond v. Humphreys, 39 Me. 347; Poole v. Adkisson, 1 Dana, 115; Yeatman v. Corder, 38 Mo. 337; Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Mechem on Agency, § 653.

³ Elliott v. Walker, 1 Rawle, 126.

⁴ Duncan v. Hill, L. R. 8 Ex. 242.

A broker who on behalf of a principal buys stock upon the exchange for the next settling day, and, without authority from his principal and

contrary to his contract obligation with him, sells the stock before that day at a loss, cannot claim indemnity from his principal. Ellis v. Pond, [1898] 1 Q. B. 427.

A broker authorized to sell the goods of his principal for him on commission cannot recover from the latter disbursements made in buying goods at an advanced price over that at which the principal was to supply them where the contracts of sale are made by the broker in his own name, and the principal has refused to supply the goods. Delafield v. Smith, 101 Wis. 664, 78 N. W. Rep. 170, 70 Am. St. 938.

⁵ Paley on Agency, 153, 301.

⁶ Adamson v. Jarvis, 4 Bing. 66; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Avery v. Halsey, 14 Pick. 174; Allaire v. Ouland, 2 Johns. Cas. 54.

or to pay the price of property purchased for his principal and the expenses of a suit consequent upon the purchase,¹ the injury proceeds from the execution of the agency, and the agent is entitled to indemnity from the principal. An agent may pay damages for which he is clearly liable without being sued therefor, and recover to the extent that they were actually sustained, but no further, although he may have paid more.² He may also discharge a liability for which his principal is liable without compulsion and recover therefor.³ Where a broker sells stocks in obedience to the directions of his customer, on the refusal of the latter to deliver he will be liable for the losses which the broker may sustain in fulfilling the contract.⁴ An agent who is sued for an act done in pursuance of his principal's employment is not bound to let judgment be entered against him, but may defend and recover the expenses of a defense *bona fide* made,⁵ and may prosecute an appeal from an adverse judgment.⁶ In order to recover for a sum paid by way of compromise of a claim against his principal the agent must show that the principal authorized or took part in the compromise.⁷

§ 794. **No indemnity for unlawful act.** If one request or direct another to do an act which he knows at the time will be a trespass, and promise to indemnify him, the promise is void; but if the person who does the act at the instance or by the command of another does not know at the time that he is committing a trespass, the promise of indemnity is valid.⁸

¹ Clark v. Jones, 16 Lea, 351.

² Saveland v. Green, 36 Wis. 612.

³ Curry v. Curry, 87 Ky. 667, 9 S. W. Rep. 831.

⁴ Baily v. Carnduff, 14 Colo. App. 169, 59 Pac. Rep. 407. See Sistare v. Best, 88 N. Y. 527.

⁵ First Nat. Bank v. Tenney, 43 Ill. App. 544, referring to Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Stocking v. Sage, 11 Conn. 519; Maitland v. Martin, 86 Pa. 120; Frixione v. Tayliaferro, 34 Eng. L. & Eq. 27; Powell v. Newburgh, 19 Johns. 283; Saveland v. Green, 36 Wis. 612.

⁶ First. Nat. Bank v. Tenney, *supra*.

⁷ Monnet v. Merz, 61 N. Y. Super.

Ct. 120, 18 N. Y. Supp. 780, 127 N. Y. 151, 27 N. E. Rep. 827.

⁸ Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Betts v. Gibbins, 2 A. & E. 57; Adamson v. Jarvis, 4 Bing. 66, 72; Ives v. Jones, 3 Ired. 538; Hays v. Stone, 7 Hill, 128; Howe v. Buffalo, etc. R. Co., 37 N. Y. 297.

An agent employed to buy "futures" cannot recover his advances if the dealings are void as gambling transactions. Kirkpatrick v. Adams, 20 Fed. Rep. 287; National Bank v. Cunningham, 75 Ga. 366; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160.

§ 795. **Measure of recovery.** If a third person has recovered a judgment against the agent which he has satisfied, the amount which he has been so compelled to pay is the measure of damages in his action for recovery over against the principal.¹ In such case, if the third person so recovering judgment against the agent accepts his note in discharge of it, it is equivalent to payment for the purpose of recovery against the principal.²

SECTION 3.

THIRD PERSONS AGAINST AGENT.

§ 796. **When agent liable to third persons.** In mat- [52] ters of contract a third person may in many cases recover against one who is in fact an agent acting within the scope of his authority, as well as against one exceeding his authority, or acting as agent without being such at all. Where one who is in truth an agent does not disclose his principal, but makes a contract in his own name; or discloses his principal, and yet contracts in his own name because credit is given to him personally, or his personal responsibility is relied upon, he becomes the principal, and his agency in no way affects his liability. There is another class of cases where written contracts are made by persons assuming to be agents, but who have not the requisite authority, and the contract is so framed that when the name of the principal and the words indicating agency are rejected because not used or inserted by authority, a complete contract remains in the name of the agent. In such cases the pretended agent has been held liable as the principal. The cases, however, are in conflict on the question whether the agent can be made liable as principal on such an instrument.³ But where he is treated as such, and liable accordingly, the element of agency is wanting as in the preceding class.

A person who assumes to act as an agent without authority, or in excess thereof, is liable in some form of action⁴ to the

¹Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Kip v. Brigham, 6 Johns. 158; Blasdale v. Babcock, 1 id. 17. See § 83.

²Howe v. Buffalo, etc. R. Co., *supra*.

³Story on Agency, § 204a and notes.

⁴In Massachusetts the remedy is by action of tort. Jefts v. York, 10 Cush. 392. And so in Illinois, Nebraska and Wisconsin. Hancock v.

person with whom he deals in that assumed character.¹ And [53] he is responsible not only where he so assumes to act, and fraudulently asserts that he has authority, but also where he misleads by knowingly acting without authority, although intending no fraud.² So, also, where he undertakes to act as an agent in good faith believing that he has due authority when he has not, and acts under an innocent mistake.³ Mr. Baron Alderson, in *Smout v. Ilbery*, said: "There is no doubt that in the case of a fraudulent misrepresentation of his authority with an intention to deceive, the agent would be personally responsible. But, independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable even where no proof of such fraudulent intention can be given. First, where he has no authority and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his knowledge; and it is but just that he who does so should be considered as holding himself out as having competent authority to contract, and as guarantying the consequences arising from the want of such authority. But there is a third class in

Yunker, 83 Ill. 208; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. Rep. 316, 33 Am. St. 616; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468. In New York the remedy is by action for breach of contract. *Baltzen v. Nicolay*, 53 N. Y. 467; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. Rep. 246. And so in Oregon. *Cochran v. Baker*, 34 Ore. 555, 52 Pac. Rep. 520, 56 id. 641.

¹ *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Baltzen v. Nicolay*, 53 N. Y. 467; *Mechem on Agency*, § 543; *Paley on Agency*, by Dunlop, p. 387; *Story on Agency*, § 264; *Learn v. Upstill*, 52 Neb. 271, 72 N. W. Rep. 213; *Lewis v. Tilton*, 64 Iowa. 220, 19 N. W. Rep. 911, 52 Am. Rep. 436; *Blakeley v. Bennecker*, 59 Mo. 183;

Winona Lumber Co. v. Church, 8 S. D. 498, 62 N. W. Rep. 107; *Codding v. Munson*, 52 Neb. 580, 72 N. W. Rep. 846; *Edwards v. Armour Packing Co.*, 190 Ill. 467, 60 N. E. Rep. 807.

² *Id.*; *Downman v. Jones*, 9 Jur., 454-458; *Mahoney v. Kent*, 7 N. Y. Misc. 726, 28 N. Y. Supp. 19; *Mills v. Hunt*, 20 Wend. 431.

³ *Story on Agency*, § 264; *Smout v. Ilbery*, 10 M. & W. 1, 9, 10; 2 *Smith's Lead. Cas.* 222-227, in note to *Thompson v. Davenport*, 9 B. & C. 78; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468; *Mechem on Agency*, § 545; *Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. Rep. 110, 21 Am. St. 846; *Scaling v. Knollin*, 94 Ill. App. 443.

which the courts have held that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but he has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And, if that wrong [54] produces injury to a third person who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which an agent has been held personally responsible will be found to arrange themselves under one or the other of these classes. In all of them it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated to be true what he did not know to be true; omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act.”¹

A public officer who does not interpose his own credit is not liable on a contract executed by him on behalf of the state, even in cases where he might have been liable had he represented an individual. Where it is sought to charge him personally the facts and circumstances ought to show clearly that both parties acted upon the assumption that a personal liability was intended.² Such liability does not attach when he contracts ostensibly for his principal without authority, the want of power being known to the other party.³ If an agent's

¹ Collen v. Wright, 8 El. & B. 647; Dec. 189; Parks v. Ross, 11 How. 362; Weeks v. Profert, L. R. 8 C. P. 427. Sanborn v. Neal, 4 Minn. 126, 77 Am.

² Gill v. Brown, 12 Johns. 385; Dec. 502.

King v. Butler, 15 id. 281; Murray v. ³Newman v. Sylvester, 42 Ind. 106; Kennedy, 15 La. Ann. 385, 77 Am. Murray v. Carothers, 1 Met. (Ky.) 71;

authority is given by statute all who contract with him are conclusively presumed to know its extent and limitations.¹ But if such an officer executes a contract ostensibly in behalf of the public, and it is known to him and the other party, as a matter of fact and law, that he was not authorized to execute it, and that he was at the time acting as the representative of another, he will be considered the real principal and cannot avoid liability because he assumed to contract in his public capacity.² In some courts the doctrine is more broadly stated and applied: If an agent, either public or private, exceeds his authority in making a contract, he is personally liable for its performance, for the law will esteem him as acting in his individual capacity rather than suffer the contract to fall.³

The general rule is, as we have seen, that an agent does not incur liability to third persons so long as he acts within the scope of his authority, and where he does incur it he has recourse to his principal. Hence an agent who, pursuant to instructions, pays away his principal's money with knowledge, when he pays it, but without when he received it, that the payment will amount to an act of bankruptcy on his principal's part, is not liable to the trustee, on the subsequent bankruptcy of the principal, for the money so paid.⁴

§ 797. Agent liable on implied warranty of authority. He is liable as upon a warranty of his authority,⁵ and for the reason that, where he exceeds his authority or acts without any, and so has not bound his principal, he has misled the party with whom he has dealt. Therefore, the rule does not

Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; State v. Hastings, 10 Wis. 518; Hull v. Marshall County, 12 Iowa, 142.

¹ Perry v. Hyde, 10 Conn. 329; Murray v. Carothers, 1 Met. (Ky.) 71; McCurdy v. Rogers, 21 Wis. 199, 91 Am. Dec. 468; Ogden v. Raymond, 22 Conn. 384, 58 Am. Dec. 429.

² New York & C. Steamship Co. v. Harrison, 16 Fed. Rep. 688.

³ Bay v. Cook, 22 N. J. L. 343; Timken v. Tallmadge, 54 N. J. L. 117, 22 Atl. Rep. 996.

⁴ Ex parte Helder, 24 Ch. Div. 339.

⁵ In re National Coffee Palace Co., 24 Ch. Div. 367; White v. Madison, 26 N. Y. 117, 26 How. Pr. 481; Colten v. Wright, 8 El. & B. 647; Balzen v. Nicolay, 53 N. Y. 467; Scaling v. Knollin, 94 Ill. App. 443; Cochran v. Baker, 34 Ore. 555, 52 Pac. Rep. 520, 56 Pac. Rep. 641; Lewis v. Nicholson, 18 Q. B. 502; Taylor v. Nosstrand, 134 N. Y. 108, 31 N. E. Rep. 246; Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. Rep. 506, 54 Am. Rep. 178; Starkey v. Bank of England, [1903] App. Cas. 114, [1902] 1 Ch. 610 (reported as Oliver v. Bank of England).

apply where it appears that he fully communicated his authority before the dealings in question were concluded. In that case the other party acts upon his own judgment of the agent's power.¹ And so where an agency had existed, but had been determined by the death of the principal abroad unknown to either party.² The liability rests upon fraud or warranty, and extends to the whole loss or injury which the party dealt with sustains in consequence of the contract as made not being binding upon the supposed principal. Thus, where an agent employed to purchase property at auction at a limited price exceeded his authority, he was considered as purchasing on his own account.³ So where an agent of a bank, by means of false representations as to his authority to employ at- [55] torneys for his principal, secured professional services for the bank in sundry attachment proceedings, and on suit against the bank by the attorney for the value of his services it turned out that the agent had no such authority, and so the bank could not be made responsible, it was held that the attorney had his action against the agent personally for the value of his services as attorney, together with the actual amount of his costs incurred in the suit against the bank.⁴ The same doctrine has been applied in other cases. Where a broker applied to a bank for a power of attorney for the sale of consols, believing himself to be instructed by the stockholder, and *bona fide* induced the bank to transfer the consols to a purchaser upon a power of attorney to which the stockholder's signature was forged, the broker was liable to indemnify the bank against the claim of the stockholder for restitution.⁵ The damages proper include the value of the property sold, or of the services rendered by the procurement of the agent unqualified to bind the supposed principal; and if an abortive suit has been prose-

¹Barry v. Pike, 21 La. Ann. 221; Aspinwall v. Torrance, 1 Lans. 381; Clark v. Foster, 8 Vt. 98; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Sinclair v. Jackson, 8 Cow. 585; Hall v. Lauderdale, 46 N. Y. 70; Jefts v. York, 10 Cush. 392; Story on Agency, § 265; Michael v. Jones, 84 Mo. 578; Mechem on Agency, § 546. See Lander v. Castro, 43 Cal. 497.

²Smout v. Ilbery, 10 M. & W. 1.

³Hampton v. Specknagle, 9 S. & R. 212.

⁴Wright v. Baldwin, 51 Mo. 269.

⁵Starkey v. Bank of England, *supra*. See Fairbank's Ex'rs v. Humphreys, 18 Q. B. Div. 54, 56 L. J. (Q. B.) 57, and an article in 18 Law Quart. Rev. 364.

cuted on the contract on the faith of its being binding against such principal, the costs of it are recoverable as part of the damages.¹

¹Eckstein v. Whitehead, 10 Up. Can. C. P. 65; Randell v. Trimén, 18 C. B. 786, 37 Eng. L. & Eq. 275; Spedding v. Nevell, L. R. 4 C. P. 212; Goodwin v. Francis, L. R. 5 C. P. 295; Collen v. Wright, 7 El. & B. 301.

In the last case W. signed a written agreement describing himself in the signature as agent of G., whereby he agreed with C. that a lease should be granted to C. of a farm belonging to G. C. and W. both believed that W. had authority from G. to make the agreement; but in fact W. had no such authority. G. refusing to grant the lease, C. filed a bill against him for specific performance, and, after G. had put in his answer denying W.'s authority, C. gave W. notice of the suit and ground of defense, and that C. would proceed with the suit at W.'s expense unless W. gave him notice not further to proceed; and that C. would bring an action against W. for damages in the event either of the bill being dismissed on the ground of the defense set up or of W. requiring C. not to further proceed. W. answered repudiating his liability to C. The bill was dismissed on the ground of the defense set up. It was held that C. was entitled to maintain an action against W. as for breach of a promise that W. had the authority; and that C. might recover in such action damages for the expense of the chancery proceedings, it not appearing that he had instituted them incautiously, and they being therefore damages naturally resulting from the misrepresentation made by W. Lord Campbell, C. J., said: "We are to consider whether the plaintiff is entitled to recover in respect of the expenses of the chan-

cery suit. I think he is. He acted as a reasonable man would who gave faith to the representation that a contract had been made by the alleged principal; he required that that contract should be specifically performed. The case cannot differ from that of a sale of goods by a party alleging himself to be a broker. The purchaser says that the alleged broker's contract is broken, because he had no authority to sell. If, before the action was brought, the alleged broker had explained the mistake, the purchaser could not have recovered damages incurred by subsequently prosecuting the action. But if the assertion was made and never retracted, I could not blame him for bringing the action. If the purchaser could not know that the alleged broker had no authority to make the contract, the loss arising from the contract seems to me naturally to result from the allegation. I cannot distinguish the case of such an action from the case of a bill for specific performance filed in the belief that the contract was authorized on the part of the alleged principal."

A broker who buys bank shares for an undisclosed principal and does not accept them himself, but, pursuant to a general power to transfer given by the vendor, transfers them to his principal, is not liable to indemnify the vendor against the statutory "double liability" which the principal has failed to pay. Boulton v. Gzowski, 24 Ont. App. 502, reversing 28 Ont. 285.

Where the plaintiff employed a broker to sell stock which was sold on the exchange and in accordance with its rules to the defendant, also a broker, acting for an undisclosed

§ 798. **The measure of damages.** The same sum [56] which the agent without authority had agreed for in behalf of his solvent principal will be the sum recoverable against him,¹ or, as it has been otherwise expressed, "the person who contracts with the agent is entitled to be put in the same position as if the representations" made by the agent concerning his authority were true.² In other words, where upon an executed consideration a certain sum would be due from the supposed principal if he had been bound by the contract and solvent, that sum is recoverable from the unqualified agent.³

Where the agent has exceeded his authority the party with whom the contract is made is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the amount of the contract.⁴ It seems, however, that the holder of such a contract may resort to the principal for so much as the agent had authority to promise in his behalf, where it is severable.⁵ If one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, may repudiate the contract and hold the person who assumed to be agent immediately responsible for damages on his warranty of authority without waiting for the time when an action might be maintained on the contract itself. Damages in such a case, it is said, are measured not by the contract but by the injury resulting from the agent's want of power.⁶ But these damages must ordinarily be such [57]

principal, and the plaintiff after the sale paid calls due on the stock, the defendant was personally liable therefor. *Wilcox v. Clarke*, 21 Vict. L. R. 694.

¹ *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Meech v. Smith*, 7 Wend. 315; *Duesenbury v. Ellis*, 3 Johns. Cas. 70, 2 Am. Dec. 144; *Palmer v. Stephens*, 1 Denio, 471; *Pitman v. Kintner*, 5 Blackf. 250, 33 Am. Dec. 469; *Bowen v. Morris*, 2 Taunt. 385; *Polhill v. Walter*, 3 B. & Ad. 114; *Woods v. Dennett*, 9 N. H. 55; *Grafton Bank v. Flanders*, 4 N. H. 239; *Feeter v. Heath*, 11 Wend. 477.

² *In re National Coffee Palace Co.*, 24 Ch. Div. 367.

³ Cases cited in first note to this section.

⁴ *Feeter v. Heath*, 11 Wend. 477.

⁵ *Johnson v. Blasdale*, 1 Sm. & M. 17, 40 Am. Dec. 85. See *Gordon v. Buchanan*, 5 Yerg. 71; 1 Par. on Cont. 69.

⁶ *White v. Madison*, 26 How. Pr. 481, 26 N. Y. 117. See *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64; *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. Rep. 788, 11 Am. St. 231; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. Rep. 580, particularly referred to *infra*.

as could be recovered against the party for a total breach or a breach co-extensive with the principal's repudiation of the supposed agent's act. The auctioneer who sells real property without sufficient authority so that the purchaser can get no title will be liable to pay his expenses of investigating the title, with interest on the deposit and also on the purchase-money, if kept in readiness and unproductive.¹

If a special agent employed to sell, with orders not to warrant, nevertheless warrants, the principal will not be bound and the agent will be answerable; for otherwise the buyer would be without remedy.² By the contract, so far as the agent is concerned, the other contracting party is entitled to the same compensation as upon a total breach of a valid contract. If the principal is not bound by and does not adopt the contract, the consequential loss to the other party is the same that he would suffer if the principal had bound himself according to the tenor of the contract and then refused to fulfill. In the latter case the injured party may obtain his damages by action directly upon the contract; this may not always or generally be done in an action against the agent; but in an action on his express or implied warranty of authority or for the deceit, the same rule of compensation which would be applicable to the defaulting party would be the only adequate measure of redress against the agent who had caused the same injury through a want of assumed power to bind the party who refused to ratify and perform. This is well illustrated by a series of English cases. In *Spedding v. Nevell*³ the defendant falsely assumed to be the agent of his brother, and made a contract with the plaintiff for the renewal of her lease for a term of twenty-one years. Subsequently the plaintiff made an agreement to dispose of her interest in the property at a profit. The owner refused to recognize the brother's authority and declined to renew the lease. The plaintiff's vendee, who had been put in possession at the expiration of the original term, was turned out and a lease made out to another person. Plaintiff and her vendee brought a suit against the owner to enforce specific performance of the agreement to lease. Until the trial of that suit plaintiff had no knowledge of the agent's

¹ 2 Sedgw. Dam. (8th ed.), § 838.

³ L. R. 4 C. P. 212. See note 1.

² Paley on Agency, by Dunlop, 386; page 2418.

Fenn v. Harrison, 3 T. R. 757.

lack of authority. After it was dismissed plaintiff's vendee brought an action against her upon the agreement made between them and recovered damages and costs. In the case against the assumed agent it was ruled that plaintiff was entitled to recover the costs which she was compelled to pay in the suit brought for the specific performance, and damages commensurate with the value of the lease which she would have had if the defendant had authority to enter into the agreement he made. A recovery of the costs incurred and damages assessed in the action brought against the plaintiff by her vendee was denied on the ground that it could not be taken to be in the contemplation of the parties to this action at the time the agreement for the renewal of the lease was made that the lease should be sold; and besides that resale was made without entering into any communication with the defendant, and without his knowledge or the knowledge of the owner of the reversion. In another case¹ one of four joint owners of an estate which they advertised for sale represented that he was authorized to sell it, and made a contract of sale, and sent the plaintiff an abstract of the title. The co-owners repudiated the contract and sold at a greater price to another person. Plaintiff brought suit against them all for breach of the contract and continued it until the three swore that the agreement was made without authority. In an action against him who made the contract it was held that the proper measure of damages was the cost of investigating the title; the costs incurred and paid by the plaintiff down to the time when it became apparent that the defendant was not authorized to act in the way he did; the difference between the contract price and the market price of the land, and that the sum for which it was afterwards sold was *prima facie* evidence of the latter. Damages incurred by the resale of animals bought for the purpose of use on the land, without notice to the defendant and before the title had been investigated or possession given, were too remote.

A further illustration of the application of the rule of damages stated is furnished by a later English case, the facts² of

¹ Godwin v. Francis, L. R. 5 C. P. 24 Ch. Div. 367 (1883); followed in Meek v. Wendt, 21 Q. B. Div. 126 295.

² In re National Coffee Palace Co., (1888).

which were that a broker was instructed to obtain fifty shares of stock at \$1 each in a designated company. By his mistake the shares were allotted to the principal in another company; the allotment was repudiated, but the proper entry was previously made on the company's register. The shares were in fact unsalable in the market, and soon after the order was placed the company was wound up and the principal was released from liability as a contributor. The official liquidator

In *Simons v. Patchett*, 7 El. & B. 568, the action was against the agent for breach of implied warranty that in purchasing a ship from the plaintiff he had authority to make the contract for the supposed principal. It appeared at the trial that the principal having refused to adopt the defendant's contract, the plaintiff resold the ship at less than the contract price. The resale was taken to be reasonably made for the best price that could be obtained, and it was taken that the principal was perfectly solvent, and it was held that a verdict was properly taken for damages measured by the difference between the contract price and that obtained on the resale. Lord Campbell, C. J., said: "What was the contract in this case? That the defendant had authority from . . . (his principals), . . . so that the bargain he had made in their name was binding on them. What then has the plaintiff suffered from this bargain not being binding on (them)? It is not disputed that, if the bargain had been binding, and had not been fulfilled, the plaintiff would have recovered against . . . (the principals) . . . damages for not fulfilling the contract; and if they had fulfilled the contract, the plaintiff would have had from them the full price. The loss of the damages, therefore, which he would have recovered from . . . (the principals) . . . is the direct consequence of the breach of the defend-

ant's contract. Viewing the matter in another light, the result is much the same. It is not to be disputed that, if direct evidence had been given of a fall in the market price of ships between the time of the making of the supposed bargain and the time at which the plaintiff might reasonably resell the ship, that fall in the price would be recoverable. Might not the jury reasonably infer such a fall in price from the difference in price actually obtained in this case? If so, the case would be brought within the general rule as to the measure of damages for not accepting goods." This case proceeded upon the assumption of the solvency of the principal. On that assumption the same rule was applied which would have applied to the principal if he had been bound by the contract and refused to accept and pay for the property. The damages to be recovered against the false agent, however, are what was lost by the plaintiff by not having the valid contract which the agent warranted he had. Though if there had been such a binding contract, the purchaser would have been liable to the plaintiff in damages, yet if the purchaser was not solvent, the jury would say that the loss in consequence of not having a binding contract was not the sum for which he would in that case have had judgment against the purchaser. *Simons v. Patchett*, *supra*, per Crompton, J.

claimed the value of the shares from the broker by way of damages for his misrepresentation of authority. Referring to the cases already considered, Brett, M. R., said: "In all these cases the court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made. If that be the measure of damages it does not depend upon the amount which would have been awarded to him in an action against the alleged principal if the contract had been broken by him; that may not be the same amount as what the plaintiff has entirely lost. We may test it in this way. If the action were brought against the principal because he had broken the contract, the amount actually recovered would be quite different if he were solvent and if he were insolvent; if he were solvent the plaintiff would recover the whole loss; if he were insolvent he might not recover a shilling. Therefore it is what the plaintiff actually lost, not what the verdict of the jury would have given him, for the execution might have produced nothing. Again, the defendant might be in such a position that you would not have to consider the question of breach of contract at all. In the present case [the brokers] are probably people who would never break their contracts, and therefore you must come back to consider what the plaintiff has actually lost by losing this particular contract. What then did the company lose? . . . In this particular case what would they have got by the contract [with the alleged principal] if he had given authority to make it? If he had been insolvent they would not have got a farthing; but he was not insolvent, and therefore in this particular case they would have got £50 from him on the allotment of his shares and they would not have given him anything; it would not have been like an ordinary vendor handing over goods. They would only have handed over a piece of paper. In return for his £50 in money they would only have given him a phantasy. The company had a nominal capital of two hundred and fifty thousand shares, of which they had only allotted a very small number; therefore the phantasy which they gave him cost them noth-

ing. The sum of £50 was *prima facie* the measure of damages and there is nothing to displace it."

A rule of liability prevails in California which varies very materially from that laid down in the cases stated. It is there held that one who undertakes to sell land for the owner without authority from him, if the contract does not contain apt words to charge the agent personally, is not liable for the loss of the bargain. His liability does not extend beyond the recovery of money paid him, or for labor performed under the contract, or special damages resulting to the plaintiff by reason of the defendant's wrong. The failure of the intended purchaser of land to negotiate with the owner is not a necessary consequence of the assumed agent's representation of his authority to make the sale of it.¹

§ 799. Recovery of money from agent. An agent will be liable on his contracts, though made as agent, where there is no responsible principal to resort to; that is, where he represents a principal not suable, other than the government.² So where money has been paid to an agent for the use of his principal under such circumstances that the party paying it might recover it from the latter, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal fresh credit upon the faith of it, it may be recovered from the agent.³

An action may be brought against an agent who has received money to which his principal has no right if the agent has had notice not to pay it over; and in some cases without such notice, if it has not been actually paid over.⁴ Where an agent has settled with his principal by retaining his own fees and costs, and paying over the balance, he has so closed his account as not to be liable to repay the money paid to him by mistake.⁵ But it is not sufficient that he has passed the

¹ Wallace v. Bentley, 77 Cal. 19, 18 Pac. Rep. 788, 11 Am. St. 231; Senter v. Monroe, 77 Cal. 347, 19 Pac. Rep. 580; Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

² Paley on Agency, 374; Story on Agency, § 280; Hills v. Bannister, 8 Cow. 31.

³ Mechem on Agency, §§ 561, 562; Paley on Agency, 388; Buller v. Har-

rison, 2 Cowp. 565; Cox v. Prentice, 3 M. & S. 344; Hearsey v. Pruyn, 7 Johns. 179; Langley v. Warner, 1 Sandf. 209; Mowatt v. McClelan, 1 Wend. 173; Story on Agency, § 300. See Bank of United States v. Bank, 6 Pet. 8, 18.

⁴ Hearsey v. Pruyn, *supra*.

⁵ Mowatt v. McClelan, 1 Wend. 173.

sum received to the principal's account, giving him credit for it in discharge of a debt to himself.¹ Where the payment to the agent has been compulsory, and not expressly for the use of the principal, or has been obtained by the agent fraudulently or illegally, no notice not to pay it over to the principal is necessary; and the action may be maintained against the agent notwithstanding he may have paid the money over to his principal.²

§ 800. Agent liable for his torts. An agent is also liable for torts committed by himself, although done in the business of another;³ that is, for acts of misfeasance, whether done intentionally or ignorantly, in pursuance of the agency, he [60] is directly liable to the person injured; and the latter is not limited to an action against the principal.⁴ But for negligence of duty imposed by his employment an agent or servant is not liable to a third person, but only to the employer. There is no privity of consideration between the servant and the person who employs his master; and non-feasance alone will not support an action without consideration.⁵ A word of caution may be necessary here as to the signification of the word "misfeasance," which has not always been given the scope it is entitled to. The late Justice Gray, when chief justice of the Massachusetts court, expressed what is believed to be the better doctrine: "It is often said in the books that an agent is responsible to third persons for 'misfeasance' only, and not for 'non-feasance.' And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the non-

¹ Buller v. Harrison, 2 Cowp. 565; Paley on Agency, by Dunlop, 389. See Frye v. Lockwood, 4 Cow. 454; La Farge v. Kneeland, 7 id. 456; Carew v. Otis, 1 Johns. 418.

² Snowden v. Davis, 1 Taunt. 359; Ripley v. Gelston, 9 Johns. 201, 6 Am. Dec. 271; Edwards v. Hodding, 1 Marsh. 377, 5 Taunt. 815; Hardacre v. Stewart, 5 Esp. 103; Miller v. Aris, 1 Selw. N. P. 103. See Elliott v. Swartwout, 10 Pet. 137.

³ Horner v. Lawrence, 37 N. J. L. 46.

⁴ Crane v. Onderdonk, 67 Barb. 47; Erwin v. Davenport, 9 Heisk. 44; Elmore v. Brooks, 5 id. 45; McPheters v. Page, 83 Me. 234, 22 Atl. Rep. 101, 23 Am. St. 772; Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. Rep. 93, 28 L. R. A. 439.

⁵ Paley on Agency, by Dunlop, 396,

feasance. But if the agent actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not 'non-feasance,' or doing nothing; but it is 'misfeasance,' doing a thing improperly."¹ The neglect of an agent to have a machine upon which he set an inexperienced person to work made safe or to instruct him as to its use is "non-feasance," setting such person to work on such a machine, knowing it to be dangerous, is "misfeasance," and that, being the efficient cause of the resulting injury, made the agent responsible.² An agent in complete control of a building with authority to keep it in repair, and who has undertaken to do so, is liable to a third person for his negligence in that respect.³ One who superintends the construction of a building as agent of the contractor is jointly liable with the latter in an action on the case for an injury to a third person which resulted from culpable negligence in the erection thereof.⁴ But the liability of the agent does not extend to the neglect of a sub-agent. "The general rule of law is that an agent is not

399; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Carey v. Rochereau*, 16 Fed. Rep. 87. See *Baird v. Shipman*, 33 Ill. App. 503, 132 Ill. 16, 23 N. E. Rep. 384, 7 L. R. A. 128; *Mechem on Agency*, § 569 *et seq.*

A solicitor who neglects to make an investment of money paid into court pursuant to an order acts as an officer of the court, and is liable to the party for whose benefit the order was made for the loss of interest. If there had been a decline in the price of the securities in which the investment was to be made between the time the order was made and that at which the solicitor was called to account, the amount of the decline will

be deducted from the interest which would have been received. *Batten v. Wedgwood Coal & Iron Co.*, 31 Ch. Div. 346.

¹ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, followed in *Kenney v. Lane*, 9 Tex. Civ. App. 150. See *Mechem on Agency*, § 572.

² *Greenberg v. Whitcomb Lumber Co.*, *supra*.

³ *Lough v. Davis*, 30 Wash. 204, 70 Pac. Rep. 491; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. Rep. 384, 22 Am. St. 504, 7 L. R. A. 128; *Campbell v. Portland Sugar Co.*, 63 Me. 552.

⁴ *Mayer v. Thompson-Hutchison Building Co.*, 104 Ala. 611, 16 So. Rep. 620, 53 Am. St. 88, 28 L. R. A. 433.

responsible for the negligence or want of skill of a sub-agent employed by him, where such employment was necessary to the transaction of the business intrusted to him, and he has used reasonable diligence in his choice as to the skill and ability of the sub-agent.”¹

¹ Kuhnert v. Angell, 10 N. D. 59, 84 N. W. Rep. 579, 88 Am. St. 675, citing Tiernan v. Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 206; Baldwin v. Bank, 1 La. Ann. 13, 45 Am. Dec. 72; Barnard v. Coffin, 141 Mass. 37, 6 N. E. Rep. 364, 55 Am. Rep. 443. See, on the general subject, 3 Col. L. Rev. 116.

CHAPTER XIX.

INSURANCE.

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§ 801. Growth and importance of insurance contracts.

The law of insurance has now arrived at such a condition [61] of importance that it occupies a very large share of the attention of the courts and the legal profession. A hundred years ago it had scarcely an existence, and its growth has been entirely out of proportion to that of other branches of the commercial law, great as these have been. A glance at the modern reports reveals the fact that the adjudged cases involving the consideration of the law of insurance are very numerous. And when we reflect that not a ship hoists her anchor for a voyage on the ocean, nor a river steamer casts her lines loose from her wharf, without this protection from the results of disaster; that not a village on the continents of Europe and America has failed to take its "bonds of fate" against the ravages of flood and fire equally with the great commercial cities of the world; and that solicitious affection has in many thousands of instances demanded provision against the edicts of death itself by a ransom in favor of the living, we need not be surprised at the almost overshadowing proportions to which this topic of the law has grown in so short a period. Against the perils of storm and wreck, treachery and public enemies on sea and river; against accidents by fire, whether kindled by God in the lightning's flash or by the imprudence or viciousness of men on land or ocean; against the inevitable decree of death itself, to whose hand all must yield, the law of insurance has provided indemnity, if not consolation. The business itself demands and absorbs an amount of capital and capacity commensurate with the vastness of the field it occupies, and the discussions to which it has given rise are second in magnitude to none that claim the attention of the forum. The comparatively restricted portion of this vast field appropriate for consideration in this treatise would [62] seem to lighten the writer's labors; but a very little reflection will satisfy the reader that the extent and application of

the remedies for wrongs can never be thoroughly explained or understood until the elements of the broken contract have been carefully studied and analyzed; and while the remedy is but an insignificant part of the whole subject its useful presentation presupposes a careful examination of all that precedes it. While, therefore, the present chapter will be devoted to the question of the damages arising upon contracts of insurance, the preparation for that discussion is necessarily drawn from a somewhat careful survey of the wider field embracing the entire subject.

§ 802. **Kinds of insurance.** There are three main classes of insurance, viz.: marine, fire and life. The first is defined to be a contract by which one party, called the underwriter or insurer, for a stipulated sum, called a premium, undertakes to indemnify the other, called the insured, against all or certain enumerated perils of the sea to which the ship, cargo or freight, called the subject of insurance, may be exposed during a certain voyage or for a period of time. The second is defined to be contracts of insurance against accidents or loss by fire, and is applicable to all species of property subject to injury or destruction thereby. The third class is contracts upon the life of some particular person, which are to the effect that upon the death of the person whose life is insured during the time for which it is so insured, or if generally upon his life, that upon the occurrence of his death the insurer will pay the amount of the policy to the person holding the same. The instrument when executed, as it usually is, in writing by the parties, contains the terms of the contract and is denominated a policy of insurance.¹

¹ Unless required by statute the contract of insurance need not be in writing. *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Trustees of Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419; *Baxter v. Massasoit Ins. Co.*, 13 Allen, 320; *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93; *Relief Ins. Co. v. Shaw*, 94 U. S. 574; *Hen-*

ing v. United States Ins. Co., 2 Dill. 26; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa, 508, 8 N. W. Rep. 338, 9 id. 386; *Emery v. Boston Ins. Co.*, 138 Mass. 398; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 5 N. W. Rep. 303.

If the insurer's charter requires that its policies shall be written, equity will direct that a policy be made and delivered after a loss has

SECTION 1.

MARINE INSURANCE.

§ 803. Cause of damage must be proximate. Prelim-[63]mary to entering upon the general question of the measure of damages in marine insurance, there is one branch of the subject affecting the right of recovery that deserves specific notice. It is a maxim in marine insurance "that the direct, not the remote, cause of the damage" is to be considered.¹ The exist-

occurred and a valid parol agreement for insurance has been made. *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441.

¹*Davis v. Garrett*, 6 Bing. 716; *Ionides v. Universal Ins. Co.*, 14 C. B. (N. S.) 260; *Insurance Co. v. Transportation Co.*, 12 Wall. 194, 201. The following cases illustrate the doctrine of proximate cause as understood in the law of insurance: *Bondrett v. Hentigg*, Holt's N. P. 147; *Mercantile Steamship Co. v. Tyser*, 7 Q. B. Div. 73; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 1 Q. B. Div. 96, L. R. 2 App. Cas. 384; *Redman v. Wilson*, 14 M. & W. 476; *Sarquy v. Hobson*, 2 B. & C. 7; *Cory v. Burr*, L. R. 8 App. Cas. 393, 9 Q. B. Div. 463, 8 Q. B. Div. 313; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. Rep. 68; *Dyer v. Piscataqua Ins. Co.*, 53 Me. 118; *Potter v. Ocean Ins. Co.*, 3 Sumn. 27; *Magoun v. New England Ins. Co.*, 1 Story, 157; *Merchants' Mut. Ins. Co. v. Butler*, 20 Md. 41; *Peters v. Warren Ins. Co.*, 14 Pet. 99; *Greenwich Ins. Co. v. Raab*, 11 Ill. App. 636; *New York, etc. Exp. Co. v. Traders' Ins. Co.*, 132 Mass. 377, 42 Am. Rep. 440; *Georgia Ins. etc. Co. v. Dawson*, 2 Gill, 365; *Rice v. Homer*, 12 Mass. 230; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477; *Cincinnati & F. Ins. Co. v. May*, 20 Ohio, 223; *Knight v. Eureka, etc. Ins. Co.*, 26 Ohio St. 664, 20 Am. Rep. 778; *Norwich, etc. Trans-*

portation Co. v. Western Massachusetts Ins. Co., 34 Conn. 561; *General Mut. Ins. Co. v. Sherwood*, 14 How. 351; *American Ins. Co. v. Durham*, 12 Wend. 463; *Street v. Augusta, etc. Ins. Co.*, 12 Rich. 13; *Neilson v. Commercial Ins. Co.*, 3 Duer, 455; *Phoenix Ins. Co. v. Cochran*, 51 Pa. 143; *The Ontario*, 37 Fed. Rep. 220; *Northwestern Transportation Co. v. Boston M. Ins. Co.*, 41 id. 793; *Ruger v. Firemen's Fund Ins. Co.*, 90 id. 310; *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 36 Pac. Rep. 774, 812, 26 Am. St. 267; *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. Rep. 635, 30 L. R. A. 346, 66 Am. St. 485; *Prader v. National Masonic Accident Ass'n*, 95 Iowa, 149, 63 N. W. Rep. 601; *Freeman v. Mercantile Mut. Accident Ass'n*, 156 Mass. 351, 17 L. R. A. 753, 30 N. E. Rep. 1013; *Lynn Gas & E. Co. v. Meriden F. Ins. Co.*, 158 Mass. 570, 33 N. E. Rep. 690, 20 L. R. A. 297, 35 Am. St. 540; *Martin v. Manufacturers' Accident Ind. Co.*, 151 N. Y. 94, 45 N. E. Rep. 377; *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178, 12 C. C. A. 544, 27 L. R. A. 629; *Reischer v. Borwick*, [1894] 2 Q. B. 548; *Kerr v. Minnesota Mut. Benefit Ass'n*, 39 Minn. 174, 39 N. W. Rep. 312, 12 Am. St. 631; *Cuesta v. Royal Ins. Co.*, 98 Ga. 720, 27 S. E. Rep. 172; *Huer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 33 N. E. Rep. 411; *Pink v. Fleming*, 25 Q. B. Div. 396; *Shelbourne v.*

ence of this rule is not controverted, but there have been difficulties in its application. The United States supreme court thus applied it:

1. When two causes of loss occur, one at the risk of the assured and the other insured against, or one cause insured against by A. and the other by B., if the damage caused by each peril can be discriminated from the other it must be borne proportionately. 2. But if the damage caused by the two perils cannot be distinguished from each other, then the party responsible for the predominating efficient cause, or which set in operation the other, is liable for the loss.¹ It was therefore held in the particular case that when an insurance upon a steamboat against fire excepted "any fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power," it is an insurance against fire [64] caused by a collision, and that the underwriters against fire were responsible for a loss occasioned by the sinking of a vessel caused by fire, though the fire was occasioned by a collision not insured against, if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and that was such a condition as that she could have been saved.²

In *Ionides v. Universal Ins. Co.*³ Erle, C. J. said: "The conclusion I have come to, after an attentive consideration, is that the plaintiff is entitled to recover in respect of a loss of a part of the insurance. The policy was for £3,000 upon six thousand five hundred bags of coffee, valued at £25,000, and it contained an exception in the following words: 'Warranted free from capture, seizure and detention, and all consequences thereof or any attempt thereat, and free from all consequences of hostilities, riots or commotions.' The insured ship, with the coffee on board, on her voyage from Belize to New York, had to pass Cape Hatteras. The captain intending to shape his course north northeast until he had rounded the cape, and then to steer due north, being out of his reckoning, and conceiving that he had passed the cape, when he was in fact about thirty

Law Investment & Ins. Corp., [1898]
2 Q. B. 626.

² *Ionides v. Universal Ins. Co.*, 14
C. B. (N. S.) 260.

¹ *Insurance Co. v. Transportation*
Co., 12 Wall. 194.

³ 14 C. B. (N. S.) 260.

miles south and ten miles west of it, ran the ship on shore at Hatteras Inlet, where she was eventually lost. If these had been the only facts it would have been a clear case of loss by perils of the sea. But it appears that at Cape Hatteras, until the secession of the southern states of America, there had always been a light maintained, and that the light had been extinguished for hostile purposes by the confederate or southern party, who were at the time in possession of North Carolina. It may be taken as a fact, for the purpose of the present judgment, that if the light had still been there, the captain would have seen it, and might have put about in time and saved the ship. The great contention on the first part of the case was whether the loss so brought about was a loss 'by the consequence of hostilities,' within the meaning of the policy. The extinguishment of the light was undoubtedly an act of hostility upon the part of the confederates toward the federals; but was the loss the consequence of hostilities? I agree with the learned counsel that the question is entirely one of construction, and that the intention of the parties is to be [65] gathered from the contract itself, taking it with the surrounding circumstances. . . . I agree with the learned counsel who suggested that the words of the exception in this policy are to be construed as they would be if the assured had reassured his cargo against the perils which are excepted by the warranty now in question, so that to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim '*causa proxima non remota spectatur*' is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained; but if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out of the light at Cape Hatteras so immediately connected with the loss of the ship as to make the one the consequence of the other? Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too dis-

tantly connected with each other to stand in the relation of cause and effect. I will put an instance of what I conceive to be a 'consequence of hostilities' within the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbor nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost: that loss would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a third case,—the ship chased into a bay where she is unable to anchor or to make any harbor, and getting out again on a change of wind, but in pursuing her voyage encounters a storm which, but for the delay, she would [66] have escaped, and being overwhelmed was lost: there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the *proximate* cause of loss would be the perils of the sea, and not the attempt at seizure. Take another instance. The warranty extends to loss from all the consequences of hostilities. Assume that a vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel, in ignorance of the fact, enters this channel and his ship is blown up; in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. But, suppose the master, being aware of the danger presented in the one channel, and, in order to avoid it, attempts to make the port by the other, and by unskilful navigation runs aground and is lost,—in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy. Applying these principles to the facts of the present case, I am of the opinion that, the captain having missed his reckoning, and either not keeping a sufficient lookout, or not lying to when his position was doubtful,

and so running on shore, it cannot be said that the absence of the light was proximately the cause of the loss; but that the loss was not within the exception contained in the warranty, but was within the general terms of the policy; and that as the wreck of the ship brought about the loss of the cargo, the insurers are liable." Perhaps the most useful and satisfactory decisions of recent date on the question are found in the cases of *Insurance Co. v. Boon*,¹ and *Insurance Co. v. Express Co.*,² to which the practitioner is referred.

§ 804. Extent of injury; manner of ascertainment. Assuming that a contract has been made between the underwriter and the insured, and that a breach of the former's undertaking has occurred, the first questions of interest to the parties are as to the extent of the injury, and how it shall be made good. And the first observation is that when- [67] ever the policy by its terms provides a particular manner of ascertaining the damages that must be followed. Insurance policies are to be interpreted in the same way and by the same general rules which apply to other contracts. The state of the existing law, the effect of usage and custom, the usual course of business, the intention of the parties, the technical and popular meaning of words, the effect of warranties, special representations, of conditions, exceptions and limitations in the contract,—none of these call for special observation save that they are to be expounded as in all other contracts, to effectuate the purposes had in view when made.

§ 805. Interpretation of contract. It is perhaps fair to say that in marine insurance particularly the policy or written contract is a less perfect guide to the real engagement of the parties to it than almost any other species of contract; for the subject-matter is such that in the nature of it the stipulations must often be general in order to cover a variety of details, and thus leave much to interpretation by the judicial tribunals. In alluding to this class of instruments Chief Justice Marshall observed³ that "policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally con-

¹ 95 U. S. 117.

Mass. 377, 42 Am. Rep. 440, and cases therein stated.

² Id. 227. See *New York & B. Exp. Co. v. Traders' & M. Ins. Co.*, 132

³ *Yeaton v. Fry*, 5 Cranch, 342.

strued in order to effect the real intention of the parties, if that intention can be clearly ascertained." While doubtless the growing importance of insurance has led to greater precision than when this criticism was made there is no doubt still justice and truth in it.¹ As to fire and life policies of the present day, their provisions are usually very comprehensive and often much involved in uncertainty and confusion. If the intention of the parties to them is not clear the authorities are agreed that doubtful expressions are to be construed most favorably for the insured.²

§ 806. **Valued policies.** One very common means of fixing the amount of the underwriter's liability in cases of loss is by [68] what is known as a "valued policy." This is where the amount to which the underwriter is bound is for a sum fixed in the agreement by the parties to it at the time it is made, and is usually not open to evidence to vary it; when such a contract is made it can only be impeached for fraud.³ But if upon a valued policy there is only a partial loss of the subject of insurance, the insured can only recover the proportion which the loss bears to the whole amount fixed therein. The

¹ *Parkhurst v. Gloucester Mut. F. Ins. Co.*, 100 Mass. 301, 97 Am. Dec. 100; *Oliver v. Mutual Com. Ins. Co.*, 2 Curt. C. C. 290-1; *Rankin v. Potter*, 5 Moak's Eng. Rep. 40, L. R. 6 H. of L. 83. See 1 May on Ins., §§ 172-177.

An insurance for the voyage round at and from B. to C., with the privilege of one other port in the same island with C., and at and from either of them back to B. on freight laden or to be laden, valued at the sum insured, is upon separate and distinct voyages, during the prosecution of which distinct freights were at risk, and to each of which, as they successively came into existence, the whole valuation in the policy ought to be applied, and a total loss on the homeward voyage part paid for accordingly. *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. 293, 28 Am. Dec. 219; *Insurance Co. v. Mordecai*, 22 How. 111.

² *Devitt v. Providence Washington Ins. Co.*, 173 N. Y. 17, 65 N. E. Rep. 777; May on Ins., sec. 175; 3 Berryman's Ins. Digest, p. 345.

³ *Harris v. Eagle Ins. Co.*, 5 Johns. 368; *Lewis v. Rucker*, 2 Burr. 1167; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367; *Forbes v. Aspinwall*, 13 East, 323; *Sturm v. Atlantic Mut. Ins. Co.*, 68 N. Y. 77; *The Main*, [1894] Prob. 320; *Lidgett v. Secretan*, L. R. 6 C. P. 616; *Barker v. Jan-son*, L. R. 3 C. P. 303; *The St. Johns*, 101 Fed. Rep. 469; *Steamship Balmoral Co. v. Marten*, [1903] App. Cas. 511, [1901] 2 K. B. 896.

The valuation is not conclusive for purposes collateral to the contract, as where the insured attempts to hold the insurer to it for the purpose of any indemnity or right he may have by way of subrogation. *Burnan v. Rodocanachi*, L. R. 7 App. Cas. 333.

valuation in the policy is conclusive in case of partial loss by the general current of authority, though it has been held otherwise in Massachusetts and Mississippi.¹ The court is not, however, precluded from inquiring whether the assured had any interest in the property valued, or whether it or any part of it has been at risk.² If the contract furnishes the rule of determination, other evidence will not be admissible, as, for instance: the parties by the policy agreed upon an estimate of \$9,600 as the value of three hundred and eighty kegs of a particular kind of tobacco. The loss was of one hundred and fifty-seven kegs, and the court held that the insurer was bound by his contract to pay for the partial loss at the same rate he would have paid for the whole, if the whole had perished, and evidence of the value was excluded.³ In *Forbes v. Aspinall*⁴ the principle of the above case was in part denied; but as the facts were not parallel the case can scarcely be construed as denying the rule or as materially qualifying it. *Shawe v. Felton*⁵ applies the rule in a very extreme case. The syllabus is to this effect: "That on an insurance on ship and goods, valued at so much, on a voyage to Africa and the West Indies, the assured is entitled to recover the wholesum on a total loss which happened in the latest period of the voyage, although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the final place of the ship's destination, where she arrived in port a mere wreck and soon after foundered. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterward she sunk, held, that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market." It was said [69] in that case that to open the policy and order an inquiry would take away all the certainty which valued policies were intended

¹ *Clark v. United Ins. Co.*, 7 Mass. 365, 5 Am. Dec. 50; *Brewer v. American Ins. Co.*, 123 Mass. 78; *Natchez Ins. Co. v. Buckner*, 4 How. (Miss.) 63.

² 14 Am. & Eng. Ency. of Law, 339.

³ *Harris v. Eagle Ins. Co.*, 5 Johns.

374; *Voisin v. Providence Washington Ins. Co.*, 51 App. Div. 553, 65 N. Y. Supp. 333.

⁴ 13 East, 323.

⁵ 2 East, 109.

to have, and to nullify the deliberate agreement of the parties, which had been made to avoid the necessity of an investigation into the damages actually occurring.

The rule that the value fixed in the policy shall be conclusive when real estate has been insured and is wholly destroyed has been adopted by statute in some states, and it has been held that under such a statute a stipulation inserted in the policy providing that if differences arise there should be an arbitration before any suit could be maintained was void;¹ and so of an agreement that real property shall be considered personalty.² The right to recover the full sum named in the policy is not affected by any contract between the parties,³ nor by an excessive valuation of the property insured in the proofs of loss.⁴ Statutes of this character affect all policies on real property in the state where they are in effect, regardless of where the policies are issued.⁵ In some states the statutes express that the sum insured shall be the measure of damages when the property is destroyed. The effect of this language is to make an insurer who has consented to other insurance liable for the amount of its policy, and disables it from having its liability reduced to a *pro rata* share of the whole insurance.⁶

¹ Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552, quoting White v. Connecticut Mut. L. Ins. Co., 5 Cent. L. Jour. 486, 4 Dill. 177, and disapproving Farmers' Ins. Co. v. Curry, 10 Ch. L. N. 43, 13 Bush, 312, 26 Am. Rep. 194. To same effect as the Wisconsin case is Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. Rep. 962; German Ins. Co. v. Eddy, 36 Neb. 461, 55 N. W. Rep. 1073.

² Havens v. Germania F. Ins. Co., 123 Mo. 403, 27 S. W. Rep. 178.

A one-story brick, metal roof warehouse erected by a tenant upon leased land, the title and the right to remove it being in him, is real property. Orient Ins. Co. v. Parlin-Orendorff Co., 14 Tex. Civ. App. 512, 38 S. W. Rep. 60.

³ Sun Mut. Ins. Co. v. Holland, 2 Tex. Civ. Cas. 391; Insurance Co. v.

Leslie, 47 Ohio St. 409; Dugger v. Insurance Co., 95 Tenn. 245, 32 S. W. Rep. 5; Caledonian Ins. Co. v. Cooke, 101 Ky. 412, 41 S. W. Rep. 279; Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. Rep. 911.

⁴ German Ins. Co. v. Jansen, 18 Tex. Civ. App. 190, 45 S. W. Rep. 220; Sullivan v. Hartford F. Ins. Co., 89 Tex. 665, 36 S. W. Rep. 73.

⁵ Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. Rep. 443, 3 L. R. A. 523.

⁶ Barnard v. National F. Ins. Co., 38 Mo. App. 106; Oshkosh Gas Light Co. v. Germania F. Ins. Co., 71 Wis. 454, 5 Am. St. 233, 37 N. W. Rep. 819; Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578; Havens v. Germania F. Ins. Co., 123 Mo. 403, 45 Am. St. 570, 26 L. R. A. 107, 27 S. W. Rep. 178; Phoenix Ins. Co. v. Port Clinton Fish

On the loss of property covered by a policy issued pursuant to such a statute the measure of recovery after a second loss is the sum insured, less the amount paid in settlement of prior losses. If the loss is partial the actual damage is all that insurer is liable for.¹

Where the same risk, interest and subject-matter are covered by more than one policy, each underwriter is nevertheless liable for the loss, and has a right to contribution from his co-insurers.² But under the operation of policies which contain the "American clause" the rule is different; the later underwriter is only liable for such loss as is not covered by prior policies.³ Where there are several policies each for a part only of the amount at which the subject of insurance is valued and together the parts so insured do not aggregate more than the stated value, the risk, interest and subject-matter are not the same. Each is a valued policy for the same proportion of the loss that it covers of the whole valuation.⁴ On a marine policy the liability of the underwriter for the loss, whether total or partial, is to pay that proportion which the amount underwritten bears to the whole amount at risk, unless there is some stipulation therein to the contrary. Thus, in a policy on a ship she was valued at \$22,000; the amount insured was \$7,400; the loss suffered was \$2,187. By the above rule the underwriter was liable for $\frac{7400}{22000}$ of the loss.⁵ Under a valued policy if only part of the property is put at risk and there is a total loss, there can be a recovery of only a proportionate part.⁶ A part owner insuring in his own name

Co., 14 Ohio Ct. Ct. 160; Western Assur. Co. v. Phelps, 77 Miss. 625, 27 So. Rep. 745.

¹ Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. Rep. 312.

² 1 Arnould, Mar. Ins. (6th ed.) 331; Thurston v. Koch, 4 Dall. 348; Min-turn v. Columbian Ins. Co., 10 Johns. 75; American Ins. Co. v. Griswold, 14 Wend. 461; Hogan v. Delaware Ins. Co., 1 Wash. C. C. 419; Cromie v. Kentucky & L. Mut. Ins. Co., 15 B. Mon. 432; Murray v. Insurance Co., 2 Wash. C. C. 186; Wiggin v. Suffolk Ins. Co., 18 Pick. 145, 29 Am. Dec. 576; Kane v. Commercial Ins.

Co., 8 Johns. 229; Godin v. London Assur. Co., 1 Burr. 492. See Bruce v. Jones, 1 H. & C. 769; Morgan v. Price, 4 Ex. 615; Irving v. Richardson, 1 M. & R. 153.

³ Lewis v. Manufacturers' F. & M. Ins. Co., 131 Mass. 364; Ryder v. Phoenix Ins. Co., 98 id. 185. See Bank of British North America v. Western Assur. Co., 7 Ont. 166.

⁴ Whiting v. Independent Mut. Ins. Co., 15 Md. 397.

⁵ Id.

⁶ Wolcott v. Eagle Ins. Co., 4 Pick. 429.

only and without mentioning any other owner or person interested can recover only the amount of his own interest.¹

§ 807. **What constitutes a total loss; wholly destroyed in the law of fire insurance.** Such a loss necessarily occurs when there is an actual destruction of the subject of the insurance by one of the causes or perils insured against, or when it is wholly lost to the owner by capture, seizure or an authorized sale by the master by reason of a peril covered by the policy.² It occurs when the subject is so damaged that it cannot be repaired, or is not repairable except at an expense greater than the value of the subject being repaired.³ A perusal of the opinion of Justice Miller in *Insurance Co. v. Fogarty*⁴ will disclose the fact that a more liberal interpretation has been given the phrase "total loss" in recent cases than in the earlier ones. The previous decisions of the supreme court of the United States are there reviewed, and a departure from the earlier ones made. The extreme rule of an absolute extinction or destruction of the thing insured is pronounced not to be the true doctrine. The principle of *Judah v. Randel*,⁵ where a carriage was insured and all was lost but the wheels, which held that the thing insured was lost totally, was approved. In the case before it the insurance was upon machinery. It was said: "The circuit court was right in holding that what was insured was machinery — pieces or parts of a machine — pieces made and shaped to

¹ *Finney v. Warren Ins. Co.*, 1 Met. 16, 35 Am. Dec. 343.

² *Marine Ins. Co. v. Tucker*, 3 Cranch, 357; *Gordon v. Bowne*, 2 Johns. 150; *Delano v. Bedford Ins. Co.*, 10 Mass. 347, 6 Am. Dec. 132; *Dorr v. New England Ins. Co.*, 11 Mass. 1; *Cambridge v. Anderton*, 2 B. & C. 691; *Fleming v. Smith*, 1 H. of L. Cas. 513; *Prince v. Ocean Ins. Co.*, 40 Me. 481, 63 Am. Dec. 676; *Dunning v. Merchants' Mut. M. Ins. Co.*, 57 Me. 108; *Graves v. Washington M. Ins. Co.*, 12 Allen, 391; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505; *Hall v. Ocean Ins. Co.*, 37 Fed. Rep. 371; *Brown v. Phoenix Ins. Co.*, 4 Bin. 445; *Francis v. Ocean Ins. Co.*, 6 Cow. 404.

³ *Graves v. Washington M. Ins. Co.*, 12 Allen, 291; *Irving v. Manning*, 1 H. of L. Cas. 287, 6 C. B. 391; *California Navigation & Exp. Co. v. State Investment & Ins. Co.*, 70 Cal. 586; *Carr v. Providence, etc. Ins. Co.*, 38 Hun, 86; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 32 Am. Dec. 271; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 459, 43 Am. Dec. 341.

⁴ 19 Wall. 640.

⁵ 2 Caines' Cas. 324; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664. See *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces had they also arrived in good condition."

If property is rendered useless for the purposes for which it had been used it is totally lost.¹ The question being whether a building was "totally destroyed," the trial court instructed thus: "Although you may find the fact that after the fire a large portion of the four walls were left standing and some of the iron-work still attached thereto, still if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy." Upon the principle that a policy on a building insures it as such and not the materials of which it is composed,² the quoted instruction was approved.³ This case has been followed in Texas;⁴ and the same rule has been applied in Missouri,⁵ Wisconsin, Nebraska and Ohio.⁶ The cases in the states named hold that "wholly

¹ Manchester F. Ins. Co. v. Feibelman, 118 Ala. 308, 329, 23 So. Rep. 759.

² Nave v. Home Mut. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394.

³ Williams v. Hartford Ins. Co., 54 Cal. 442, 450, 35 Am. Rep. 77.

⁴ Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103, 59 Am. Rep. 613; Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93.

⁵ Barnard v. National F. Ins. Co., 38 Mo. App. 107, 117; Havens v. Germania F. Ins. Co., 123 Mo. 403, 27 S. W. Rep. 718, 45 Am. St. 570, 26 L. R. A. 107; O'Keefe v. Liverpool, etc. Ins. Co., 140 Mo. 558, 41 S. W. Rep. 922, 39 L. R. A. 819. See Ampleman v. Citizens' Ins. Co., 35 Mo. 308.

⁶ Oshkosh Packing & P. Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200; Seyk v. Millers' Nat. Ins. Co., 74 Wis.

destroyed," as these words are used in valued policy statutes, are equivalent to "total loss."¹ There can be no total loss of a building so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the injury. Whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before injury, would, in proceeding to restore the building, utilize such remnant as such basis. The character of the evidence admissible on this question is not affected by a valued-policy statute.² It has been ruled in Missouri that a mill may be wholly destroyed though a part of its machinery was in another building pending the making of improvements, such part not being burned. The value of it will be deducted from the sum insured;³ and that there was no error in refusing to instruct that if the cellar walls remained and the lower floors were in such condition that they could be safely used in rebuilding there was not a total loss or entire destruction of the building.⁴ A building so injured by fire as to be made insecure and a menace to life, after being condemned by public authority, which has prohibited an attempt to repair it, is a total loss.⁵ If the insured makes use of material in a

67, 3 L. R. A. 523, 41 N. W. Rep. 443; *Harriman v. Queen Ins. Co.*, 49 Wis. 71, 5 N. W. Rep. 12; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. Rep. 1125; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. Rep. 767, 67 Am. St. 805; *German Ins. Co. v. Eddy*, 36 Neb. 461, 55 N. W. Rep. 1073, 19 L. R. A. 707; *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. Rep. 911; *Pennsylvania F. Ins. Co. v. Drackett*, 63 Ohio St. 41, 57 N. E. Rep. 963.

An accident policy provided for the payment of a principal sum if the insured, from a violent and accidental injury which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand

and one entire foot." The loss of the use of the members named as part of the body, so that they will not perform their functions, entitled the insured to a full recovery. *Sheanon v. Pacific Mut. L. Ins. Co.*, 77 Wis. 618, 9 L. R. A. 685, 46 N. W. Rep. 799, 20 Am. St. 151.

¹ See *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664.

² *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 37 S. W. Rep. 1068, 35 L. R. A. 672. See *Corbett v. Spring Garden Ins. Co.*, 155 N. Y. 389, 50 N. E. Rep. 282, 41 L. R. A. 318.

³ *Havens v. Germania F. Ins. Co.*, *supra*.

⁴ *O'Keefe v. Liverpool, etc. Ins. Co.*, *supra*.

⁵ *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 So. Rep. 472.

building which has been wholly destroyed insurer is entitled to be credited with its value.¹ The effect of the valued-policy statute of Texas is, where the loss is total, to make the sum insured a liquidated demand and to nullify a condition in the contract giving insurer the right to repair or replace the building.² This is not the rule in Wisconsin.³

A constructive total loss is such a loss as entitles the assured to claim the whole amount of the insurance on giving due notice of abandonment.⁴ It is covered by a policy limited to "total loss only."⁵ In England the loss must be too great to justify repairs;⁶ but in this country the loss must only equal one-half the value of the subject to be abandoned to the insurer.⁷ The right to abandon proceeds on the ground that the insured has actually lost more than one-half the capital employed in the adventure.⁸ The loss of a vessel insured should be deemed effectual and certain from the time she was so injured that her destruction became inevitable, and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after the injury; and a subsequent sale will not affect the right of the insured to recover for such injury.⁹ The rule of the supreme court of the United States is that an insurer is not liable upon memorandum articles except in case of actual total loss, and that there can be no such loss when a cargo of such articles has arrived in whole or in part,

¹ *German Ins. Co. v. Eddy*, *supra*. 92; *Forwood v. North Wales Mut. M.*

² *Commercial Union Assur. Co. v. Ins. Co.*, 9 Q. B. Div. 732.

Meyer, supra; *Fire Ass'n v. Brown*, 33 S. W. Rep. 997 (Tex. Ct. of Civ. App.).

³ See § 830.

⁴ *Arnould on Marine Ins.*, sec. 903; *Adams v. McKenzie*, 32 L. J. (C. P.) 92. It was formerly otherwise in England. *Cocking v. Frazer*, 4 Doug. 295.

⁵ *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 69 Am. Dec. 308; *O'Leary v. Stymest*, 6 Allen (N. B.), 289; *Greene v. Pacific Ins. Co.*, 9 Allen (Mass.), 217; *Snow v. Union & Mut. M. Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349; *Adams v. McKenzie*, 32 L. J. (C. P.)

⁶ *Benson v. Chapman*, 6 M. & G. 810; *Grainger v. Martin*, 4 B. & S. 9; *Devitt v. Providence Washington Ins. Co.*, 173 N. Y. 17, 65 N. E. Rep. 777.

⁷ *Gordon v. Ins. Co.*, 2 Pick. 249; *Smith v. Ins. Co.*, 7 Met. 448; *Marmaud v. Melledge*, 123 Mass. 173; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378; *Hubbell v. Great Western Ins. Co.*, 74 N. Y. 246; *Taber v. China Mut. Ins. Co.*, 131 Mass. 239; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

⁸ *Pezant v. National Ins. Co.*, 15 Wend. 453, 457.

⁹ *Duncan v. Great Western Ins. Co.*, 5 Abb. Pr. (N. S.) 173.

in specie, at the port of destination. In the case before the court¹ the entire cargo was warranted by the memorandum clause free from average unless general, and, by a rider, free from particular average, but liable for absolute total loss of a part. The insurer was not liable for a constructive total loss, but only for an actual total loss of the whole or of a distinct part. The rule in Massachusetts is otherwise.² In the case first cited the policy in suit contained this clause: partial loss on tin plates is excepted; the policy on which the action in the other case rested expressed: free of partial loss. The insurer was liable for a constructive total loss, the property having been damaged more than fifty per cent. in value. The subject is examined in a recent New York case, which, though it turned somewhat upon the language of the policy, favors the view held in Massachusetts.³

§ 808. Contract methods for ascertainment of damages.

It is a common provision in fire insurance policies to stipulate for a settlement of losses insured against by arbitrators or umpires to be selected in a manner pointed out therein. It is also very generally required that the insured shall furnish certain proofs of the loss within an arbitrary fixed period after the occurrence, or "immediately," as "soon as possible," or "within a reasonable time."

It may be remarked that no stipulation, the effect of which would be to deny the jurisdiction of the courts to determine upon the liability or non-liability of the insurer, is regarded as valid. And as we have already seen,⁴ a stipulation for ascertaining the cash value of the loss by proofs and umpire, before any suit can be instituted against the insurer, when the statute provides that the sum fixed in the policy should be the measure of damages, is invalid.⁵ Any contract that deprives the courts of the power to determine the right to recover is void, no matter what substitute may be provided to pass upon

¹ Washburn & M. Manuf. Co. v. Ins. Co., 173 N. Y. 17, 65 N. E. Rep. Reliance M. Ins. Co., 179 U. S. 1, 21 777.
Sup. Ct. Rep. 1.

⁴ § 806.

² Kettell v. Alliance Ins. Co., 10 Gray, 144; Mayo v. India Mut. Ins. Co., 152 Mass. 172, 25 N. E. Rep. 80, 23 Am. St. 814, 9 L. R. A. 831.
³ Devitt v. Providence Washington

⁵ Thompson v. St. Louis Ins. Co., 43 Wis. 459; Hughes v. Vinland F. Ins. Co., 43 Wis. 323; Kill v. Hollister, 1 Wils. 129; Insurance Co. v. Morse, 20 Wall. 445.

that question.¹ There is practical unanimity in holding that any agreement as to the mode of adjustment or of settling the amount of the loss or the time for paying it, or any particulars of that nature which do not go to the root of the action, but are preliminary to or in aid thereof — as, for instance, an agreement that at the trial of the action it shall not be lawful for either party to enter into the question of the amount of the loss, but that it shall be settled by reference, and that the only question to be tried at law shall be the right to recover — is valid.² A distinction is made between an agreement to refer every matter in dispute to arbitration and one to pay such a sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its [70] amount.³ Subject to these limitations on the power of parties to make a binding contract not to resort to the judicial tribunals, which are imposed as a matter of public policy, any lawful means of ascertaining the loss and arriving at an adjustment of the amount is valid and binding. A condition providing for an appraisal of the damage does not become operative until the existence of a real difference between the parties has arisen.⁴

When certain proofs of loss are required by the contract to be made by the insured before the loss is payable, these proofs are a condition precedent to a right of action against the insurer.⁵ And no action can be maintained on the policy, unless

¹ *Scott v. Avery*, 5 H. of L. Cas. 811; *Thompson v. Charnock*, 8 T. R. 139; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 70; *Reed v. Washington Ins. Co.*, 138 Mass. 575; *German-American Ins. Co. v. Etherton*, 25 Neb. 505; *Hickerson v. Insurance Cos.*, 96 Tenn. 193, 33 S. W. Rep. 1041, 32 L. R. A. 172.

² 2 May on Ins., § 493; *Old Sauce-lito Land & Dry Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. Rep. 232; *Carroll v. Girard F. Ins. Co.*, 72 Cal. 297, 13 Pac. Rep. 863; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N.

W. Rep. 1055; *Wolff v. Liverpool, L. & G. Ins. Co.*, 50 N. J. L. 453, 14 Atl. Rep. 561; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. Rep. 422.

³ 2 May on Ins., § 493; *Snowden v. Kittaning Ins. Co.*, 122 Pa. 502, 16 Atl. Rep. 22.

⁴ *Hickerson v. Insurance Cos.*, *supra*.

⁵ *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507; *Wright v. Hartford Ins. Co.*, 36 Wis. 522; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa, 587; *Gauche v. London, L. & G. Ins. Co.*, 4 Woods, 102, 10 Fed. Rep. 347.

it is averred that these conditions have been complied with, and the proof shall sustain the allegations.¹

§ 809. **When proofs of loss a condition precedent.** When these proofs of loss are to be furnished within a given time after the occurrence of the casualty the insured must comply with the requirement.² It occurs to the writer that such a provision, based simply on an arbitrary fixed time, ought to be construed only as directory, and that when a reasonable and substantial compliance with the requirement is shown, it should be sufficient. When by the contract the proofs are to be made in a reasonable time, what is such is a question of fact to be determined upon evidence, if disputed, and is therefore a question for the jury,³ or a mixed question of law and fact.⁴

§ 810. **Manner and time of making proofs.** These proofs must be furnished in the *form* specified in the contract, but if none is specified then it is sufficient that they furnish satisfactory evidence of the loss.⁵ In the New York case cited the court observed that the provision in policies requiring notice [71] and proof of loss is to be expounded liberally in favor of the assured, and its requirements are satisfied by furnishing such reasonable evidence as the party can command at the time to give assurance to the underwriters of his right to receive the money and of their liability for the loss. This opinion was pronounced in a case where the insurance had been effected by one for the benefit of himself and other owners, and all the parties had not united in the preliminary notice and proofs, and the changes in some of the interests were not noted therein. The manner of making proofs is discussed in a large number of cases, of which those cited below may be found instructive.⁶ The requirements of the policy concerning

¹ Id.

² Smith v. Haverhill Mut. F. Ins. Co., 1 Allen, 297, 19 Am. Dec. 733; Scammon v. Germania Ins. Co., 101 Ill. 621; McDermott v. Lycoming F. Ins. Co., 44 N. Y. Super. Ct. 221; Home Ins. Co. v. Lindsey, 26 Ohio St. 348.

³ Wightman v. Western Ins. Co., 8 Robert. 482; Edwards v. Baltimore Ins. Co., 3 Gill, 176.

⁴ Swan v. Liverpool, L. & G. Ins. Co., 52 Miss. 704; Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58.

⁵ Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Germania F. Ins. Co. v. Curran, 8 Kan. 9; Walsh v. Washington M. Ins. Co., 32 N. Y. 427; Taylor v. Ætna Ins. Co., 13 Gray, 434.

⁶ Keeler v. Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714; Kernochan v. New York Bowery F. Ins. Co., 17

preliminary proofs may be waived either expressly, or by conduct from which a waiver may be implied.¹ There is probably no difference in the construction to be placed upon marine contracts of insurance and those against fire on land in the matter of making the proofs and estimates of loss, and the cases of both classes are referred to as equally in point.

While mere silence on the part of the insurer is not a waiver of proofs of loss in accordance with the contract, still any act which has the effect to mislead the insured into the belief that the proofs will not be required or that those furnished are sufficient is proper evidence to the jury of a waiver; and the question as to whether there has been a waiver is one of fact.² It has been held in Texas that the effect of a statute declaring that a policy on real property shall be a liquidated demand against the insurer for the sum named therein in case of total loss makes proof of loss as required by the policy unnecessary.³

§ 811. Preliminary proofs for information only. All [72] these proceedings relating to notice, proof of loss and so forth are for the protection and information of the insurer, and do not fix the amount of the damages or limit the right of the

N. Y. 428; *Works v. Farmers' Ins. Co.*, 57 Me. 281; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154, 49 Am. Dec. 234; *Pratt v. New York Central Ins. Co.*, 55 N. Y. 505, 14 Am. Rep. 304; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553. See 4 Berryman's Ins. Digest, p. 1329 *et seq.*

¹In addition to the cases cited in the preceding note, the following will be found in point on the subject of waiver of the sufficiency of preliminary proofs of loss: *Charleston Ins. Co. v. Neve*, 2 McMull. 237; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Aetna Ins. Co. v. Tyler*, 16 Wend. 385; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Heath v. Franklin Ins. Co.*, 1 Cush. 257; *Taylor v. Merchants' Ins. Co.*, 9 How. 390. See 27 Am. L. Reg. 197-203. And it is said that when strict compliance with the terms of the contract has become impossible, it will be excused if the party furnishes the best attainable proof and

shows good faith. *Hynds v. Schenectady Ins. Co.*, 11 N. Y. 554; *Norton v. Rensselaer Ins. Co.*, 7 Cow. 645; *Lycoming Ins. Co. v. Schollenberger*, 44 Pa. 259; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Clark v. New England Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44; *Cornell v. Le Roy*, 9 Wend. 163. See 4 Berryman's Ins. Digest, p. 1318 *et seq.*

²*Atlanta Ins. Co. v. Manning*, 3 Colo. 224; *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 453; *Planters' Mut. Ins. Co. v. Engle*, 54 Md. 468; *Butterworth v. Western Assur. Co.*, 132 Mass. 489; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 432; *Swan v. Liverpool, L. & G. Ins. Co.*, 52 Miss. 704; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Great Western Ins. Co. v. Staaden*, 26 Ill. 365; *O'Brien v. Commercial F. Ins. Co.*, 63 N. Y. 111.

³*Continental Ins. Co. v. Chase*, 33 S. W. Rep. 603 (Ct. of Civ. App.).

insured to recover. They clearly cannot bind the insurer, however formally they may be made, and upon the same principle the other party is not bound. Although these proofs seem to be treated in some sort as admissions by the insured, and may be properly regarded as evidence, it is hardly consistent to give a greater effect to them as against one party than the other. They are really intended for the protection and benefit of both; they in fact ought to bind neither. Like a coroner's inquest in a case of homicide, they are purely for information, and any attempt to give them a *quasi-judicial* consequence is as unfair to one party as to the other.¹ When the books and accounts of the insured have been lost or destroyed, the preliminary proofs which they might furnish are not required.² The following cases on the question of proofs of loss, what are in time and what are not, what is a waiver by the insurer and what is not, may be profitably consulted by the practitioner.³ Where the pleadings contained an allega-

¹ *Standard F. Ins. Co. v. Wren*, 7 Ill. App. 242; *German F. Ins. Co. v. Gauten*, 13 id. 593; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. Rep. 473; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. 28; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31; *McMartin v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239.

² *Mechanics' F. Ins. Co. v. Nichols*, 16 N. J. L. 410; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442.

³ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Edwards v. Baltimore Ins. Co.*, 3 Gill, 176; *Kimball v. Howard Ins. Co.*, 8 Gray, 33; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Duncan v. Topham*, 8 Man., Gr. & S. 229; *Watterman v. Dutton*, 6 Wis. 265; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, 9 Am. Rep. 506; *O'Conner v. Hartford F. Ins. Co.*, 31 Wis. 161; *Blossom v. Lycoming F. Ins. Co.*, 64 N. Y. 166; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201; *O'Brien v. Phoenix F. Ins. Co.*, 76 N. Y. 459; *Rokes v. Amazon Ins. Co.*, 51 Md. 512,

34 Am. Rep. 323; *Hicks v. Empire F. Ins. Co.*, 6 Mo. App. 254; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 500; *Bunstead v. Dividend Mut. Ins. Co.*, 12 id. 81; *Worsley v. Wood*, 6 T. R. 710; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Inman v. Western Ins. Co.*, 12 Wend. 452; *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. 452; *Trask v. Insurance Co.*, 29 Pa. 198, 72 Am. Dec. 622; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Brink v. Hanover F. Ins. Co.*, 70 N. Y. 593; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. Rep. 804; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. 223; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Aurora F. & M. Ins. Co. v. Krannick*, 36 Mich. 289; *Harriman v. Queen Ins. Co.*, 49 Wis. 71, 5 N. W. Rep. 12; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560; *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Home*

tion that the condition in the policy that preliminary [73] proofs should be made had been complied with, it was held supported by evidence that the insurer waived the proofs.¹

§ 812. **Pleadings.** When the preliminary proofs of loss have been made according to contract, or waived by the insurer, expressly, or by such conduct as will relieve the insured from the duty of making them, and there is a refusal to pay the indemnity provided, resort must be had to the judicial tribunals. In stating his case for recovery the party must present all the facts upon which his right depends. The contract should be either set out at length or in legal effect, with full allegations of the breach or breaches, the loss, the compliance of plaintiff with its requirements, if any, subsequent to the loss, or a waiver of them by defendant, or the impossibility of compliance when that would operate to excuse, an allegation of the injury and its extent, demand, when the same is necessary, and refusal to pay. Upon the joinder of issue and the settlement of incidental questions affecting the right of recovery comes the more important consideration of the amount of damages.

§ 813. **Rule of damages on open policies.** We have already seen that in the case of a valued policy the amount of recovery is fixed, and evidence of the loss is not admissible beyond or *aliunde* the contract.² But assuming that the [74] policy is an open one, i. e., the value in case of loss has not been fixed by provision in it, then the rule as to the measure of damages is *the actual loss sustained by the insured at the time of the accident or loss, to be determined by evidence*, as in other cases of damage, controlled or varied only by the terms of the contract.³ For adjusting partial as well as total losses

Ins. Co. v. Lindsey, 26 Ohio St. 348; State Ins. Co. v. Todd, 83 Pa. 272; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466; Jones v. Michigan Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405; Basch v. Humboldt Ins. Co., 35 N. J. L. 429; Taylor v. Roger Williams Ins. Co., 51 N. H. 50; Hibernia Mut. F. Ins. Co. v. Meyer, 39 N. J. L. 482; Heath v. Franklin Ins. Co., 1 Cush. 257; Clark v. New England Mut. F. Ins. Co., 6 id. 342, 53 Am. Dec. 441; Francis v. Somerville Ins. Co., 25 N. J. L. 78; Mason v. Citizens' F. & M. Ins. Co., 10 W. Va. 572; Post v. Ætna Ins. Co., 43 Barb. 357; Peoria Ins. Co. v. Whitehill, 25 Ill. 466.

¹ Pine v. Reid, 6 Man. & Gr. 1; Atlantic Ins. Co. v. Manning, 3 Colo. 224.

² § 807.

³ Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 82; Insurance Co. v. Transpor-

the contract may modify the rules of law; as in case of a stipulation that no partial loss or memorandum articles shall be compensated,¹ or no partial loss less than a specified per centum of the amount insured, or the value of the property insured.² The same effect was given to a stipulation that in determining whether a constructive total loss has occurred the cost of repairs shall be estimated as in adjusting the amount of a partial loss by deducting one-third new for old.³ The original cost, or the cost of reproduction, is not a necessary element of the value.⁴ And when the insurance is upon a limited interest, for example, a mortgage on property, and not upon the property itself, the actual loss will control the amount of the recovery;⁵ and the value of any remaining interest is not admissible to depreciate the amount of the limited interest for which recovery is sought.⁶ The application of this rule has resulted in establishing other rules for the ascertainment of damages on this principle; and to some of the more prominent we will now refer. The insured offered to prove the actual cash value before the injury from which the damage caused by collision might be inferred, and thus the cash value of the property, when attacked by the fire, ascertained; and it was held that the evidence was rightly

tation Co., 12 Wall. 194-203; *Snell v. Delaware Ins. Co.*, 4 Dall. 430; *Carson v. Marine Ins. Co.*, 2 Wash. C. C. 468; *American Ins. Co. v. Griswold*, 14 Wend. 399; *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; *State Ins. Co. v. Taylor*, 14 Colo. 499, 20 Am. St. 281, 24 Pac. Rep. 333.

¹ *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415.

² *Hagar v. New England, etc. Ins. Co.*, 59 Me. 460; *Hagg v. Augusta etc. Ins. Co.*, 7 How. 595; *Ogden v. General Mut. Ins. Co.*, 2 Duer, 204; *Lord v. Neptune Ins. Co.*, 10 Gray, 109; *Morgan v. United States Ins. Co.*, 1 Wheat. 219; *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 69 Am. Dec. 308; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33; *Bradford v. Boylston, etc. Ins. Co.*, 11 Pick. 161; *Allegre v. Insurance Co.*, 6 H. & J. 408.

³ *Wallace v. Thames & M. Ins. Co.*, 22 Fed. Rep. 66.

⁴ *Aetna Ins. Co. v. Johnson*, 11 Bush, 587, 21 Am. Rep. 223; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205, 78 Am. Dec. 418; *Carson v. Marine Ins. Co.*, 2 Wash. C. C. 468.

⁵ *Hadley v. Insurance Co.*, 55 N. H. 110; *Doyle v. American F. Ins. Co.*, 181 Mass. 139, 145, 63 N. E. Rep. 394.

A contractor who undertakes to remove a house for another may recover for the loss thereof to the extent of the money and labor expended upon it and the profit he would have realized if his performance had not been interfered with. *Planters' & M. Ins. Co. v. Thurston*, 93 Ala. 255, 9 So. Rep. 268.

⁶ *Carpenter v. Providence, etc. Ins. Co.*, 16 Pet. 496; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532.

excluded; the only way to establish the damage was by ascertaining the cost of restoring the vessel to the condition she was in before the fire.¹ It is proper to observe of this case that the insured had two policies on the vessel: one covering accidents by collision, the other a fire policy, and the cause was tried on the refusal of the insurers to pay the latter loss. The evidence as to the value of the vessel, which was excluded, went to show its condition, not at the time of the accident [75] by fire, but before. The decision is a very clear recognition of the principle of the general measure of damages, and the strict application of it to the contract; and it was observed by the court that there was no other way of ascertaining such damages except to find "the cost of restoring the vessel to the condition she was in before the fire, and not her condition before the collision, which preceded and caused the fire;" and that if, in restoring her, the repairs covered the injuries by collision, as well as by the fire, the former should be excluded in fixing the amount of the loss by fire.² If goods are jettisoned, their value may be ascertained by the prime cost;³ but while this is proper evidence, it is held that it is not conclusive; the insured may prove and recover the actual amount of his loss.⁴ In this case the vessel had been purchased by the insured at a condemnation sale for a low figure, and the insurers insisted that this price should govern the amount of the damage; but the court was clearly of opinion that the insured "was entitled to prove and to recover the actual value of the vessel;" and Mr. Justice Washington observed, in the case of *Carson v. Marine Ins. Co.*⁵ (a case involving insurance on cargo), that he could see no reason for establishing this rule which would not equally apply to the case of goods insured.

§ 814. **Same subject.** The cases cited apply this rule under various circumstances. In one policy it was stipulated that "the said loss or damage be estimated according to the true actual cash value of the said property at the time the loss shall happen." The court below instructed the jury "that the

¹ *Insurance Co. v. Transportation Co.*, 12 Wall. 201, citing *Heebner v. Eagle Ins. Co.*, 10 Gray, 143.

² See *Dows v. Faneuil Hall Ins. Co.*, 127 Mass. 346.

³ *Le Roy v. United Ins. Co.*, 7 Johns. 344.

⁴ *Snell v. Delaware Ins. Co.*, 4 Dall. 430.

⁵ 2 Wash. C. C. 472.

value as estimated in the manufacture of each machine, and before it was tried in the field, would be the standard of valuation." This instruction the supreme court held to be error, and said that the true rule was "what were the machines worth at the time the fire happened, and this must be ascertained by testimony."¹ In ascertaining the value of the property insured the premium on the policy is to be added² as part of the value. So also it is held that the value insured is estimated upon the proof of value with charges upon the goods added.³ But in a case where the insured abandons the property to the insurer, who refuses to accept the abandonment, the insured cannot recover for any but necessary expenses. And if in such case, instead of selling the ship, as he may do, or laying her up and discharging the crew, the insured continue the crew in service under wages, he cannot make that expense a charge on the underwriter. The latter is answerable for the loss of the subject insured, with the necessary expenses incurred in laboring for the recovery and safety of it, but his contract reaches no other charge.⁴ The actual value of the property lost will furnish the measure of damages in all cases where there is an open policy and the amount named in it is equal to the loss.⁵ In an action brought

¹ Commonwealth Ins. Co. v. Sennett, 37 Pa. 205, 78 Am. Dec. 418.

A policy on a boat contained such a clause as is quoted in the text. The court said: "We do not consider that a depression in the value of steamers generally, from circumstances which may be only temporary, and which have no reference to the original cost or actual condition of the boat, can be taken into account to the extent that plaintiff insists upon." McCuaig v. Quaker City Ins. Co., 18 Up. Can. Q. B. 130.

² Louisville, etc. Ins. Co. v. Bland, 9 Dana, 143.

§ 806; Le Roy v. United Ins. Co., 7 Johns. 344.

⁴ Frothingham v. Prince, 3 Mass. 563; Lawrence v. Van Horne, 1 Caines, 276; Henshaw v. Marine Ins. Co., 2 id. 274; McBride v. Marine Ins.

Co., 7 Johns. 430; Barker v. Phenix Ins. Co., 8 id. 307, 5 Am. Dec. 339.

⁵ Wolfe v. Howard Ins. Co., 7 N. Y. 583; Savage v. Corn Exchange F. & I. Ins. Co., 36 N. Y. 655; Lewis v. Burlington Ins. Co., 80 Iowa, 259, 45 N. W. Rep. 749.

The insured may recover above the sum insured for the expense of labor and travel for the defense and recovery of the property insured; and where the expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer of the ship, though the freight and cargo should be incidentally benefited, and ought to contribute a proportion; leaving the insurer of the ship to recover, if he can, of the owner or insurer of the freight and cargo for their contributory share. Watson v. Marine Ins.

for the breach of an agreement to insure certain property the court held the measure of damages to be the value of the property upon proof of its loss.¹ The agreement in the case stated was to insure the property, no amount being designated; hence it was construed to be for the insurance of the property at its value. Where the breach is of a contract to insure property for a specified sum, the damages are measured by the sum named if it is not more than the value of the property.² Where the liability of the insurer, by the terms of the policy, could not exceed one-half of the value of the property destroyed, it was held that its value at the time of the loss furnished the basis upon which the damages were to be calculated. The cases on the subject are too numerous to cite, but they support the general proposition stated with practical uniformity.³ Where the loss exceeds the amount of the insurance the insured has the right to recover the whole amount of the policy;⁴ and although it contains a stipulation "that in all cases of other insurance the insured shall not be en- [77] titled to demand or recover on this policy any greater portion of the loss or damage than the amount hereby insured bears to the whole amount insured on said property," if the property exceeds in value the amount of the insurance the insurer is liable for the sum contained in the policy.⁵ The loss is usually estimated in cases of marine insurance by the value at the time and place where the cargo was to be sold.⁶ The value of the property in such case may be ascertained by its original value at the port where the voyage commenced, deducting the wear and tear; and the value of the goods is usually that which they had at the place of lading;⁷ the exception to this

Co., 7 Johns. 57; *Maggrath v. Church*, 1 Caines, 215.

¹ *Ela v. French*, 11 N. H. 356.

² *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 40 N. W. Rep. 661.

³ *Fried v. Royal Ins. Co.*, 47 Barb. 127, 50 N. Y. 243—a case of life insurance; *Wills v. Wells*, 8 Taunt. 264; *Atwood v. Union Mut. F. Ins. Co.*, 28 N. H. 234.

⁴ *Etna Ins. Co. v. Tyler*, 16 Wend. 385; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Commonwealth v.*

Hide & L. Ins. Co., 112 Mass. 136, 17 Am. Rep. 72; *Andes Ins. Co. v. Fish*, 71 Ill. 620.

⁵ *Etna Ins. Co. v. Tyler*, 16 Wend. 285; *Haley v. Dorchester Ins. Co.*, 1 Allen, 536; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray, 459.

⁶ *Rogers v. Mechanics' Ins. Co.*, 2 Story, 173; *Lee v. Grinnell*, 5 Duer, 400, 430.

⁷ *Brewer v. American Ins. Co.*, 123 Mass. 78; *Clark v. United F. & M. Ins.*

being, that where they are placed on board for a particular market, the value at that point is taken to be the real value — the general rule being that gains and profits must be insured as such, and are not included unless in the particular case specified in the general loss.

§ 815. **Loss in excess of sum fixed in policy.** The rule which limits the liability of the insurer to the amount designated in its policy does not apply in all cases of marine insurance. Independently of any particular clause in that instrument or of local usage, the insurer may be obliged to respond in a larger sum. The rule is thus stated by Gray, C. J.: "If the subject is once totally lost, either actually or constructively, it ceases to exist for the purposes of the policy, and, even if it is not entirely destroyed, the underwriter, by paying that loss, fulfills his contract and is exempt from liability for any subsequent injury to it. If a partial loss occurs, and before it is repaired a total loss ensues during the term of the policy, the underwriter is liable for the amount of the total loss only because that is equivalent to the whole damage which the insured has sustained and affords him a full indemnity. But if the partial loss is repaired by the assured, the undertaking of the underwriter to indemnify him to the amount specified continues throughout the term of the insurance, and he may therefore be charged for the amount of a partial loss as well as of a subsequent total loss, although the amount of the two sums which he is thereby obliged to pay exceeds the amount named in the policy. This was judicially stated to be the law as long ago as 1810 in this commonwealth and in England."¹ After stating the points decided in the cases referred to, the writer of the opinion continued: "A rule recognized so long and so often by such a weight of authority, and not contradicted or doubted by any judge in England or America for sixty years, is too firmly established

Co., 7 id. 345; Warren v. Franklin Ins. Co., 4 id. 518; Coffin v. Newburyport M. Ins. Co., 9 Mass. 436; Minturn v. Columbian Ins. Co., 10 Johns. 75.

¹ Matheson v. Equitable M. Ins. Co., 118 Mass. 209, 211, 19 Am. Rep. 441. The judge referred to Wood v. Lincoln & K. Ins. Co., 6 Mass. 479,

486, 4 Am. Dec. 163; Livie v. Janson, 12 East, 648, 655; Le Cheminant v. Pearson, 4 Taunt. 367, 380; Potter v. Providence Washington Ins. Co., 4 Mason, 298; Brooks v. MacDonnell, 1 Y. & C. 500, 515; Stewart v. Steele, 5 Scott N. R. 927.

to be shaken by the *obiter dicta* in the very recent case of *Lidgett v. Secretan*,¹ the still later decision of the commission of appeals in *Alexandre v. Sun Ins. Co.*,² or the doubts expressed in *Phillips on Insurance*.³

§ 816. **Damages in case of partial loss.** While the rules already stated and examples given in illustration are sufficient to furnish a guide to the measure of damages in cases of entire loss of the subject insured, they do not fully apply in a class of instances which are complicated by the fact of only a partial destruction. It becomes important, therefore, to inquire when there is a total loss, and when it may be so treated, though the loss is only in fact of a part. The American rule is, when in marine insurance the cost of repairs exceeds half the value of the property insured, the loss is regarded as total, and the insured by an abandonment becomes entitled to damages in the full amount of the insurance.⁴ In the case last cited, the vessel having been condemned by the French government, a formal abandonment was not regarded as necessary to perfect the right to recover for a total loss. If such loss *actually* occurs the assured may recover for it without an abandonment; if the loss is, however, only constructively total, a formal abandonment is necessary to complete the right to recover. But the insured is never required to abandon and claim for a total loss unless the subject is totally destroyed. He has his election to claim for a partial loss and retain that which is preserved from the peril.⁵ Assuming that a case exists which entitles him to claim as for a partial loss, and, when it not being total, he elects to receive his insurance on that part which has been lost, what is the rule? In cases where the value is fixed by the policy, the rule, as already stated,⁶ is that the insured is entitled to recover the proportion which the loss bears to the whole amount fixed in the policy, and no evidence in such cases is admissible as to the value—the policy being conclusive as to that, while the evidence is

¹ L. R. 6 C. P. 616.

² 51 N. Y. 253.

³ Vol. 2 (4th ed.), § 1743. See, also, § 1267.

⁴ *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448; *Gracie v. New York Ins. Co.*, 8 Johns. 237.

⁵ See *Gracie v. New York Ins. Co.*, 8 Johns. 237; *Snow v. Union Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349, and cases cited in the opinion.

⁶ § 806; *Harris v. Eagle F. Co.*, 5 Johns. 374.

admitted to fix the proportion of the loss to the whole amount insured. But it must be understood that a mere specification of value will not convert an open into a valued policy, when either through repugnant conditions, such as a limitation to the amount necessary to replace, the actual value is made the basis of indemnity, or when, in case of partial loss, there is no apparent means of determining the amount of indemnity apart from the actual damages. When the part lost is of a specified number of valued articles of equal worth the damage is that proportion of the valued sum.¹ A very common device of insurers, for their own protection, is to insert in the contract a provision giving the right to elect to replace the loss—in fire insurances, to rebuild—or pay the insurance; but all such arrangements are unknown to the general law of insurance, except as they are made a part of the contract by express stipulation of the parties. In such cases it is held that the contract, after the exercise of the right of election, is not simply one of insurance, but is, to use the language of the court [79] in a New York case, a “building contract,” and is to be interpreted like any other of that kind.² In the case referred to the insured, after a loss by fire, commenced to rebuild, and the insurance company concluded to avail itself of its option to “replace,” and offered to do so. The insured declined to recognize the right of the company to refuse to pay the insurance, completed his building, and then brought suit on the policy for the value of the property destroyed. The court held that the plaintiff’s policy had become a contract to “rebuild,” and nonsuited him because the defendant was not permitted to do so. While such clauses in contracts are common, and are a good means by which the insurer retrieves his misfortune, they are but inventions to escape liability or restrict it, and are hardly within the pale of legitimate insurance. When the partial loss complained of is upon an open policy the damages follow the rule—the actual cash value of the

¹ *Brown v. Quincy Mut. F. Ins. Co.*, 105 Mass. 396, 7 Am. Rep. 598; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487.

² *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Good v. Buckeye Ins. Co.*, 43

Ohio St. 394; *Fire Ass’n v. Rosenthal*, 108 Pa. 474; *Hartford F. Ins. Co. v. Peebles Hotel Co.*, 82 Fed. Rep. 546. See *Langan v. Aetna Ins. Co.*,

99 id. 374.

goods where laden, with interest and charges added. Profits are excluded because they are themselves the subject of separate insurance; the exception being that when a ship is loaded and insured for a particular market¹ the value at the port of destination is taken as the true value for which the insurer is liable in cases of contribution by way of average. If part of an insured cargo is recovered the insurer is to be credited with the value of such part, less the expense of its recovery.²

§ 817. **Losses adjusted on the principle of indemnity.** In adjusting these partial losses the guiding principle is that the contract of insurance is based on the idea of indemnity to the insured; hence all means which the law supplies, independently of the contract, for ascertaining the amount of the injury have their origin in the idea of indemnity. So, while it is true that where there has been a total loss of the subject of insurance, and the price has been fixed by the contract, that value must be taken; if the value has not been fixed, and the subject has been lost, its actual cash value, to be ascertained by competent evidence, must be accepted by the insured. On the same principle, where an insurance is effected on an entire cargo, or on all goods to which it attaches, if part of the cargo of goods is safely delivered on shore, and the balance lost, a proportionate reduction must be made from the amount [80] of the insurance; and it makes no difference whether the policy be a valued or open one, because by the delivery of part so much has been withdrawn from the liability insured against;³ and where there is insurance on the charter of a ship, or the freight of a full cargo, if less than a full weight would have been insured, had there been no loss, the insured must submit to a proportionate deduction in the event of loss.⁴ Where there is an open policy on the freight, the manner of arriving at the indemnity is to ascertain the loss by computing the entire amount of freight payable, deducting what is saved, and the balance will constitute the amount to be paid. No deduction is made for expenses in this calculation.⁵ Whilst this rule seems

¹ § 814.

² *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. Rep. 563.

³ *Tobin v. Hartford*, 13 C. B. (N. S.) 791, 17 id. 528; *Brooke v. Louisiana Ins. Co.*, 4 Mart. (N. S.) 640, 681; *New*

Orleans & N. Packet & N. Co. v. Louisville Underwriters, 45 Fed. Rep. 370.

⁴ *Forbes v. Aspinall*, 13 East, 323.

⁵ *Palmer v. Blackburn*, 1 Bing. 61.

to be a departure from the strict doctrine of indemnity, it is supported on the ground that it is the universal usage, and is analogous to the rule of fixed damages in valued policies.¹ Where the injury occurs to the ship, and the question is as to its extent, the reasonable rule is to ascertain what has been the actual cost of repairs, where they have been made, or the estimated cost, if they have not been made, and these will constitute the loss to be paid.² If the ship has been sold without repairs, under circumstances which do not entitle the owner to claim for an entire loss, the insured is entitled to recover the difference between the price she brought and her value at the inception of the risk. In order to limit the effect of this general rule, where repairs are made, the insurer is not charged with their entire cost, but one-third of the cost of the new is deducted in his favor. It would be inequitable for the owner to retain the renewed vessel without making some deduction, because he would be placed in a better position than he occupied before the loss occurred.³ But this rule is again limited, so that where he has derived no benefit, as where the vessel was new and on her first voyage, or where [81] she has been broken up or sold, the reduction is not made.⁴ In argument in the court of exchequer in this last case Sir F. Pollock said, in reply to the attempt to procure a reduction on account of repairs to a ship on her first voyage, that "a policy of insurance is a contract of indemnity, which is not to be put aside by any rule not as plain as that which makes a bill payable after three days' grace," and Lord Abinger, C. B., agreed with him. Whether charges incurred

¹ Moss v. Smith, 9 C. B. 104.

² Arnould, Mar. Ins., p. 1047.

³ Poingdestre v. Royal Exchange, R. & M. 378; Savage v. New York Ins. Co., 4 Cow. 248; Sanderson v. Marine Ins. Co., 2 Cranch, 218; Fisk v. Commercial Ins. Co., 18 La. 77; Brooks v. Oriental Ins. Co., 7 Pick. 259; Eager v. Atlas Ins. Co., 14 id. 141, 25 Am. Dec. 363; Hall v. Ocean Ins. Co., 21 Pick. 472; Orrok v. Commonwealth Ins. Co., id. 456, 32 Am. Dec. 271; Lincoln v. Hope Ins. Co., 8 Gray, 22; Paddock v. Commercial

Ins. Co., 104 Mass. 521; Hagar v. New England, etc. Ins. Co., 59 Me. 460; Kerr v. Quaker City Ins. Co., 33 Mo. 158; Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. 598, 18 N. E. Rep. 804; Crittenden v. Springfield F. & M. Ins. Co., 85 Iowa, 652, 52 N. W. Rep. 548, 39 Am. St. 321; Platt v. Continental Ins. Co., 62 Vt. 166, 19 Atl. Rep. 637; Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

⁴ Fenwick v. Robinson, 3 C. & P. 323; Pirie v. Steele, 8 id. 200.

in the preservation of vessel and cargo are recoverable as average loss, or under the provision for "suing, laboring and traveling," seems as yet uncertain. Such charges have been recovered where they were incurred before a loss, because, as the vessel became afterwards a total loss and the underwriters had to take her and pay the insurance, they took her *cum onere*—taking the place of the owner who would have been liable.¹ While the insurer is not liable for provisions or traveling expenses of a ship, and they are not recoverable from him *as insurer*, where he succeeds the owner by reason of his contract, which permits the latter to abandon to him, he becomes liable in his new character of owner.²

§ 818. **General average.** Intimately connected with the question of damages in marine insurance is the law of "general average." When, owing to stress of weather, or other great peril to which the ship and cargo are subject, extraordinary sacrifices are made of some portion of the latter or unusual expenses are necessarily incurred for their benefit, this loss is held as a lien on the balance remaining of either, to be made good to whoever has been the particular sufferer.³ The term "general average" signifies a contribution made by all parties concerned or interested in either ship or cargo towards reimbursing the individuals whose particular loss was incurred for the common benefit. Whatever is done deliberately and voluntarily under circumstances of great peril and distress for the preservation of the ship and remaining cargo may be brought into general average, and must be made good by the in- [82] surers against the peril insured against in proper proportion.⁴ And the adjustment of the general average, though made in a

¹ *Livie v. Janson*, 12 East, 648; *Le Cheminant v. Pearson*, 4 Taunt. 367.

² *Thompson v. Rowcroft*, 4 East, 34.

³ *Marsh. on Ins.* 544; *Abbott on Ship.* 296; *Strong v. New York F. Ins. Co.*, 11 Johns. 334; *Louisville, etc. Ins. Co. v. Bland*, 9 Dana, 147; *The Congress*, 1 Biss. 42; *Albany City Ins. Co. v. Whitney*, 70 Pa. 248; *Fowler v. Rathbones*, 12 Wall. 102; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *Barnard v. Adams*, 10 How. 270; *Wilson v. Cross*, 33 Cal. 61.

If a ship's engines are damaged in endeavoring to refloat her while stranded and in a perilous position damage to them and the coal used in working them is a general average loss. *The Bona*, [1895] Prob. 125.

⁴ *Russ v. Ship Active*, 2 Wash. C. C. 226; *Strong v. New York F. Ins. Co.*, 11 Johns. 333; *Louisville, etc. Ins. Co. v. Bland*, 9 Dana, 147; *British American Assur. Co. v. Wilson*, 132 Ind. 278, 31 N. E. Rep. 938.

foreign country, and upon a basis which would not be recognized where the insurance contract was made, is held to be conclusive on the insurer.¹ The English rule is less strict, and requires "clear proof" that the foreign adjustment could have been enforced where it was made.² The general rule is that all average charges for the voyage are to be determined and adjusted by the law of the place of destination.³ To entitle the loss to be brought into general average the sacrifice must not be chargeable to the fault of the owner, and must be voluntary and intended for the common benefit.⁴ Jettison of deck cargo cannot be claimed for general average, nor a loss wholly due to a sea peril.⁵ When the duty to contribute by way of general average is settled the next question is as to the sources of the contribution; and here it should be observed that goods which are sacrificed contribute equally with such as are saved; for if this were not required the loser would be in a better condition than the other contributors, as he would have the entire value returned to him, while his co-sufferers would lose a proportion.⁶ Nor does anything contribute which has not been exposed to risk; for instance, where part of a cargo has been landed or sold for the ship's necessities.⁷ Generally it is said that the ship and freight always contribute, and all goods carried for traffic whether they pay freight or not, and whether they belong to merchants, passengers, owners or masters; and they pay according to their value.⁸ Bullion and jewels contribute unless worn on the person. Baggage and

¹ Strong v. New York F. Ins. Co., 11 Johns. 384; McGivern v. Stymest, 5 Allen, 320 (N. B.); Avon Marine Ins. Co. v. Barteaux, 2 Nova Scotia Dec. 195; Depau v. Ocean Ins. Co., 5 Cow. 63, 15 Am. Dec. 431.

² Harris v. Scaramanga, L. R. 7 C. P. 481; Stewart v. West India etc. Co., L. R. 8 Q. B. 88, 362; Power v. Whitmore, 4 M. & S. 141; Wood's Mayne on Dam., sec. 466.

³ Insurance Co. of North America v. The Energia, 61 Fed. Rep. 222; Croshaw v. Ins. Co. of North America, 66 id. 604.

⁴ Butler v. Wildman, 3 B. & Ald. 402; Scudder v. Bradford, 14 Pick.

13, 25 Am. Dec. 355; Wolcott v. Eagle Ins. Co., 4 Pick. 429; Smith v. Wright, 1 Caines, 43, 2 Am. Dec. 162.

⁵ Lennox v. United Ins. Co., 3 Johns. Cas. 224; Crane v. Aiken, 13 Me. 229, 29 Am. Dec. 503; Covington v. Roberts, 2 B. & P. N. R. 378; Power v. Whitmore, 4 M. & S. 141; Providence Washington Ins. Co. v. Bradley Fertilizer Co., 33 Fed. Rep. 685.

⁶ Arnould on Ins. 918; Abbott on Ship. 505, 552 (11th ed.); Coast Wrecking Co. v. Phoenix Ins. Co., 7 Fed. Rep. 236, 13 id. 137, 20 Blatch. 557.

⁷ Arnould on Ins. 918; Abbott on Ship. 505, 552.

⁸ Brown v. Stapleton, 4 Bing. 119.

wearing apparel of passengers are exempt. Deck goods contribute¹ — though generally, as we have seen, they could not demand contribution if lost; and where a ship is ransomed from pirates the seamen contribute out of their wages; and where freight is due at the time it is subject to the con- [83] tribution. If the freight has been paid in advance it is exempt.² Neither are provisions for the ship, nor anything that belongs to the "wear and tear" liable to be brought in.³

§ 819. Same subject. The contribution is dependent on two things which are parts of one design: 1st, the method of ascertaining the loss; and 2d, the method of ascertaining the value of the property saved. Both depend upon where the adjustment is effected. If it is done at the port whence the ship sailed the loss will be the invoice price and charges added, unless the goods can be replaced, in which case the loss will be that price and shipping charges, but no insurance.⁴ Prepaid freight must also be added if the goods would have been carried on.⁵ The value of the property saved is determined by the same rule. When the adjustment takes place at an intermediate port, or at the port of destination, the property is estimated at the value it would sell for, deducting freight, duty, and landing expenses. And where the property saved has been damaged by the same accident that caused the loss, or by a subsequent disaster, its value is estimated as if all the lost and saved had arrived at port in the same condition. If the goods sacrificed are recovered before the adjustment the loss is estimated by adding to the damages sustained by them the expenses attending their recovery. The principle running all through these various rules is that equality is equity, and the intention is to do simply what is just. Rules are adopted with modifications and exceptions to effectuate this design, and are not allowed to override their real purpose of accomplishing

¹ The evidence of a custom to carry goods above deck must be clear in order that the underwriter shall be obliged to contribute. *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 235. If it is sufficiently proven the liability exists. *S. C.*, 8 id. 27; *Hazelton v. Man-*

hattan F. Ins. Co., 11 Biss. 210, 12 Fed. Rep. 159.

² *Frayes v. Worms*, 19 C. B. (N. S.) 159.

³ *Wightman v. Macadam*, 2 Brev. 230.

⁴ *Tudor v. Macomber*, 14 Pick. 34.

⁵ *Frayes v. Worms*, 19 C. B. (N. S.) 159.

what is just.¹ When damages occurring to the ship are of such a character as to amount to a partial loss the manner of computing the general average is to ascertain the cost of repairs, [84] deducting the one-third new from old.² Where there is a total loss of the ship the measure of damages, or rather the amount of the loss, is held to be the value she would have been to the owner if he could have had her in security at the time of the loss, with the gross freight she would have earned by the voyage.³ This is not the accepted law in England or in continental countries, according to Benecke, but it may be regarded as the law of this country, notwithstanding the opinion of Chancellor Kent in *Bradhurst v. Columbian Ins. Co.*⁴ The rule laid down by the supreme court of the United States is supported by very strong American authority, which is cited, and has never been modified by that court. When the ship

¹ On the subject of the manner of making adjustments the following cases may be consulted: *Miller v. Letherington*, 6 H. & N. 278, 7 id. 954; *Gould v. Oliver*, 4 Bing. N. C. 134; *Milward v. Hibbert*, 3 Q. B. 120; *Crane v. Aiken*, 13 Me. 229, 29 Am. Dec. 503; *Lenox v. United Ins. Co.*, 3 Johns. Cas. 224; *Smith v. Wright*, 1 Caines, 43, 2 Am. Dec. 162; *Dodg v. Barton*, 5 Me. 286, 17 Am. Dec. 233; *Barker v. Baltimore, etc. R. Co.*, 22 Ohio St. 43; *Barnard v. Adams*, 10 How. 307; *The Star of Hope*, 9 Wall. 236; *Dyer v. Piscataqua, etc. Ins. Co.*, 53 Me. 118; *Doane v. Keating*, 12 Leigh, 391, 37 Am. Dec. 671; *Barelli v. Hagan*, 13 La. 580; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 33 Am. Dec. 727; *Ball v. Ocean Ins. Co.*, 21 Pick. 472; *Case v. Rully*, 3 Wash. C. C. 298; *The William Gillam*, 2 Low. 154; *Eppes v. Tucker*, 4 Call, 346; *Bell v. Smith*, 2 Johns. 97; *Dabney v. New England Mut. Mar. Ins. Co.*, 14 Allen, 300; *Nelson v. Belmont*, 21 N. Y. 36; *Emery v. Huntington*, 109 Mass. 431, 12 Am. Rep. 725; *McAndrews v. Thatcher*, 3 Wall. 347; *Harris v. Moody*, 30 N. Y. 266, 86 Am. Dec. 375; *Lee v. Grinnell*, 5

Duer, 400; *Rossiter v. Chester*, 1 Doug. (Mich.) 159; *Gillett v. Ellis*, 11 Ill. 579; *Marshall v. Garver*, 6 Barb. 394; *Hobson v. Lord*, 92 U. S. 397; *Greely v. Tremont Ins. Co.*, 9 Cush. 415; *Scudder v. Bradford*, 14 Pick. 13, 25 Am. Dec. 355; *Tudor v. Macomber*, 14 Pick. 34; *Wightman v. Macadam*, 2 Brev. 230; *Slater v. Hayward Rubber Co.*, 26 Conn. 128; *Gray v. Waln*, 2 S. & R. 229, 7 Am. Dec. 642; *Carter v. Phoenix Ins. Co.*, 2 Wash. C. C. 51; *Walker v. United States Ins. Co.*, 11 S. & R. 61; *Columbian Ins. Co. v. Ashby*, 13 Pet. 331; *Lyon v. Alvord*, 18 Conn. 66; *Bent Aloe v. Pratt*, Wall. C. C. 60; *Nimick v. Holmes*, 25 Pa. 366, 64 Am. Dec. 710; *Dike v. Propeller St. Joseph*, 6 McLean, 573; *Eight Hundred Bales of Cotton*, 8 Blatch. 221; *Thornton v. United States Ins. Co.*, 12 Me. 150; *Goodwillie v. McCarthy*, 45 Ill. 186; also the treatises of Arnould and Benecke on this branch of the subject of insurance. See vol. 3 *Berryman's Ins. Digest*, p. 78 *et seq.*

² *Abbott on Ship*, (11th ed.) 551.

³ *Columbian Ins. Co. v. Ashby*, 13 Pet. 331.

⁴ 9 Johns. 13.

has been sold the price realized fixes her value in making the adjustment.¹ If she has not been sold, or has been totally lost, the value is fixed by ascertaining it when the voyage commenced; from this is subtracted the provisions and stores used up to the time of the loss, and any partial loss she may have sustained anterior to the final loss; and it is said that to this should be added any amount paid the ship as contribution on account of general average loss to herself.² The balance will be the basis of a contribution. Where there was insurance on ship, cargo and freight, the ship being insured for the sum at which she was valued in the policy, and a general average loss occurred and the sum awarded in a salvage action had to be paid, in which action the value of the ship was shown to be in excess of the sum stated in the policy, the liability of the insurer was only for that proportion of the salvage and general average losses which the sum insured bore to the proved value.³ Under the New York rule the amount recoverable from the insurer of the ship is not to be reduced in the proportion of the undervaluation thereof in the policy.⁴ The rule in Massachusetts is in harmony with that which prevails in England.⁵ The adjustment is to be made on the basis recognized in the port of discharge.⁶

The cases involving the method of the adjustment are almost without number; and the professional reader will find it to his advantage in complicated cases to consult a standard work like Arnould or Phillips, where the rules and exceptions are discussed in detail.

SECTION 2.

FIRE INSURANCE.

§ 820. **Nature of contract; how made.** Thus far the [85] subject of damages recoverable in marine insurance has been observed upon, and while the general remarks as to the character and quality of the contract are equally applicable to fire

¹ Bell v. Smith, 2 Johns. 98.

² Arnould on Ins. 986 (4th ed.).

³ Steamship Balmoral Co. v. Marten, [1902] App. Cas. 511, affirming [1901] 2 K. B. 896.

⁴ International Nav. Co. v. Atlantic Mut. Ins. Co., 100 Fed. Rep. 304,

affirmed without opinion, 108 id. 987; Providence & S. S. S. Co. v. Phoenix Ins. Co., 89 N. Y. 559.

⁵ Clark v. United F. & M. Ins. Co., 2 Mass. 365.

⁶ International Nav. Co. v. Atlantic Mut. Ins. Co., *supra*.

insurance, and many of the cases are cited from either class with propriety, there are some differences that demand notice. All that has been said as to the contract being one for the indemnity of the insured for marine losses is equally applicable to insurance against fire.¹ If the owner of property had an insurable interest to the extent of its value when the insurance was effected, the fact that the property may have cost him nothing or that if it be burned he may compel another person to replace it at his cost, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the insurer's liability in the absence of a stipulation to that effect.²

Whenever it is established that the parties have concluded a contract by which the risk insured against, the amount of the indemnity, the duration of the obligation, the amount of the premium, and manner of its payment are definitely fixed, there is an agreement which is as sacred in the eye of the law as any that can be made.³ And this contract, which must be such as to bind both parties to it,⁴ is to be interpreted and construed, except when controlled or limited by statute, by the same rules and principles which govern other contracts.⁵ Con- [86] tracts *for* insurance may be not only made by parol, but it has been held that they may be so made though the charter of the insurer requires all contracts *of* insurance to be in writing;⁶ and if the risk has been accepted and notice of the fact

¹ Washington Mills Emery Manuf. Co. v. Weymouth & B. Ins. Co. 135 Mass. 503; Illinois Ins. Co. v. Andes, 67 Ill. 362, 16 Am. Rep. 620; Foley v. Manufacturers' & B.'s Ins. Co., 152 N. Y. 131, 46 N. E. Rep. 318, 43 L. R. A. 664.

² Foley v. Manufacturers' & B.'s F. Ins. Co., *supra*, citing, besides several local cases, International Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. Rep. 239.

³ First Baptist Church v. Brooklyn Ins. Co., 28 N. Y. 153; Strohn v. Hartford Ins. Co., 37 Wis. 625, 19 Am. Rep. 777. See *Ela v. French*, 11 N. H. 356. As to agreement to insure, *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Perkins*

v. Washington Ins. Co., 4 Cow. 695.

⁴ Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619.

⁵ Portsmouth Ins. Co. v. Brinckly, 2 Ins. L. J. 842; Illinois Ins. Co. v. Marseilles Manuf. Co., 6 Ill. 236.

⁶ Security Ins. Co. v. Kentucky Ins. Co., 7 Bush, 81, 3 Am. Rep. 301; Relief F. Ins. Co. v. Shaw, 94 U. S. 575; Stoehlike v. Hahn, 158 Ill. 79, 49 N. E. Rep. 150, 55 Ill. App. 496; Phoenix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. Rep. 453; Phoenix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. Rep. 109; Brown v. Franklin Mut. F. Ins. Co., 165 Mass. 565, 43 N. E. Rep. 512, 52 Am. St. 534. See *contra*, *Head v. Providence Ins. Co.*, 2 Cranch, 127.

forwarded to the insured, though it may not have reached him until after the destruction, the insurer's obligation is complete.¹ So if fire insurance companies are authorized by their charters to insure property to only three-fourths of its value, yet if they deliberately make a valuation of property and insure three-fourths of the amount of such valuation, they are bound thereby, in the absence of fraud, collusion or misrepresentation, and cannot show in an action against them to recover a loss that the property was insured for more than three-fourths of its value.² It has been held that the contract is complete though the insurer, an incorporated company, had left the matter in the hands of an agent to determine if he had agreed to it, and the company had not received any notice of his acceptance of it.³ And the contract is complete when the policy has been forwarded to the agent for delivery to the insured, though in fact it has not been delivered.⁴ An agreement between a property owner and the agents of several insurance companies to take insurance to a gross amount will be construed to contemplate a separate policy by each company for an equal proportion of such sum.⁵

§ 821. **General rule of damages.** Assuming, therefore, the existence of a contract between the insurer and the insured against loss of or injury to the subject by fire, and that a loss has occurred, the first question is as to the amount which the insured can recover. Remembering the rule that insurance is a contract of indemnity, and that the insurer agrees for the *immediate*, not the *remote*, consequences of the loss,⁶ he is bound to pay the whole loss if within the amount of the policy, without regard to the proportion between the amount insured and the value of the property at risk,⁷ and is

¹ *Taylor v. Merchants' Ins. Co.*, 9 How. 390; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268.

² *Fuller v. Boston Mut. F. Ins. Co.*, 4 Met. 206. See *Post v. Hampshire Mut. F. Ins. Co.*, 12 id. 555, 46 Am. Dec. 702.

³ *Ellis v. Albany City Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 945.

⁴ *Hallock v. Ins. Co.*, 26 N. J. L. 268.

⁵ *Fitton v. Phoenix Assur. Co.*, 25 Fed. Rep. 880.

⁶ *Insurance Co. v. Boon*, 95 U. S. 117; *Insurance Co. v. Express Co.*, id. 227; *Case v. Hartford Ins. Co.*, 13 Ill. 676; *White v. Republic F. Ins. Co.*, 57 Me. 91, 2 Am. Rep. 22.

⁷ In an action on a policy in which the insurer promises to pay the insured all losses or damage not exceeding \$2,500 that may happen by fire to their stock of goods; and providing also that the losses or damage be estimated at the actual cash value

liable for the damage to the building or goods, excluding all gains or profits which might have come to the insured if the fire had not occurred.¹ The qualification just stated does not extend to the exclusion of evidence of the rental of buildings insured, where their value is in issue, and the evidence is [87] offered to prove such value.² When an insured building is totally destroyed, in fixing the amount of the loss there is no rule based on the estimated cost of a new building, with the difference between the new and the old structure, as in adjusting marine losses on ships;³ nor does the cost of rebuilding furnish the rule of damages. The fair value of the property destroyed, as fixed by the judgment of a jury, is accepted as decisive of the question.⁴ Under a standard fire policy which expresses that the insurer's liability shall in no

of the property at the time the same shall happen and be paid at the rate of two-thirds its cash value, held, that the losses or damages being found to be to the amount of \$2,500, and that such loss was less than two-thirds of the value of the stock of goods, the insured are entitled to recover the full sum of \$2,500, although that is the full amount of the insurance. *Ashland Mut. F. Ins. Co. v. Honsinger*, 10 Ohio St. 10; *Thompson v. Montreal Ins. Co.*, 6 Up. Can. Q. B. 319; *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. 440; *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215.

¹ *Liscom v. Boston Mut. F. Ins. Co.*, 9 Met. 205; *Underhill v. Agawam Mut. Ins. Co.*, 6 Cush. 440; *Phoenix Ins. Co. v. Cochran*, 51 Pa. 143; *Welles v. Boston Ins. Co.*, 6 Pick. 182; *Wright and Pole, Matter of*, 1 A. & E. 621; *Niblo v. North American Ins. Co.*, 1 Sandf. 551; *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. 37, 15 Atl. Rep. 563.

² *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31.

³ *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215; *Brinley v. National Ins. Co.*, 11 Met. 195. See

Parker v. Eagle F. Ins. Co., 9 Gray, 152.

⁴ *Brinley v. National Ins. Co.*, 11 Met. 195; *Waynesboro Mut. F. Ins. Co. v. Creaton*, 98 Pa. 451; *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, *supra*; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272, 42 Atl. Rep. 412; *Guinn v. Phoenix Ins. Co.*, 80 Iowa, 346, 45 N. W. Rep. 880; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 20 Am. St. 281; *Thompson v. Liverpool, L. & G. Ins. Co.*, 2 Haskell, 363 (the liability under a policy which restricts the damages to the cost of replacing the property, less its depreciation, etc., is not fairly determined by taking the difference between the value of the building and the land prior to the destruction of the former and the value of the land thereafter); *Ætna Ins. Co. v. Johnson*, 11 Bush, 587. It is said in the last case: It seems to us that the just mode of fixing the value, although the rule may not be of universal application, would be the value of the building as it stood upon the ground on the day it was destroyed as compared with a new building of the same kind and dimensions.

event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, the insurer's liability is fixed on that basis regardless of its election to rebuild.¹ It is said in a recent Massachusetts case that, ordinarily, in determining the market value of buildings, they are valued either for the purpose of removal, or, as was the case here, in connection with the land on which they stand. The first manifestly would not afford just compensation in the present instance. In the second case, the value depends on the location and other considerations entering into the value of the land, and therefore would not necessarily constitute a just criterion of the loss actually sustained by the destruction of the buildings. Buildings adapted to the land on which they stand are not bought and sold in the market separate from the land. We think that the manner in which the auditor arrived at the damages approaches more nearly the correct rule in cases like the present. We understand him to have assessed them according to the real value of the buildings at the time of the fire, and to have ascertained that by taking into account the original cost, and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, required.²

The market value of a building burned is not always a fair rule of adjustment. The contract of the insurer is not that, if the property is burned, he will pay such value, but that he will indemnify the insured. Hence it is no defense to the insurer that the payment of what will amount to an indemnity may, by reason of the insured's collateral and independent contracts, give him an advantage. Thus, where the owner of an insured building sold the land on which it stood reserving title to the structure upon it, with the right to remove it before a day named, and if it was not removed it was to become the property of the grantee, it was ruled that the measure of his recovery against the insurer was not affected by the contingency

¹ *McCreedy v. Hartford Ins. Co.*, 61 App. Div. 583, 70 N. Y. Supp. 778.

² *Wall v. Platt*, 169 Mass. 398, 406, 48 N. E. Rep. 370, citing this section, and, besides local cases, *Ætna Ins. Co. v. Johnson*, 11 Bush, 587; *State Ins. Co. v. Taylor*, *supra*; *Jackson-*

ville, etc. R. Co. v. Peninsular Land, etc. Co., 27 Fla. 1, 136, 9 So. Rep. 661; *Laurent v. Chatham Ins. Co.*, 1 Hall, 401; *Washington Mills Emery Manuf. Co. v. Commercial Ins. Co.*, 13 Fed. Rep. 646.

that the building was to be removed.¹ This is in accordance with the rule as stated by Chancellor Kent, that "if a tenant erects a building on a lot held under a lease, with liberty to renew or remove the building at the end of the lease, and the building be destroyed by fire a few days before the end of the lease, though the building as it stood was worth more than the sum insured, and if removed would have been worth much less, yet the courts look only to the actual value of the building as it stood when lost, and they do not enter into the consideration of these incidental and collateral circumstances in fixing the true standard of indemnity."² Where the loss on a building is but partial the liability of the insurer is for the difference between its value whole and damaged within the limits of the sum insured.³

The market value of personal property held for sale is to be ascertained by its worth at the time and place of the fire.⁴ But if it is provided that the cost value of the property shall not exceed what it would cost to replace it, the liability of the insurer is governed by its market price, regardless of local conditions.⁵ As respects chattels which have no market value, the rule may be otherwise. In a Massachusetts case the measure of recovery for the loss of furniture, personal effects and other like property was considered. Evidence was offered showing that such articles were bought and sold at a place not remote from that where the loss occurred. On the assumption that such place was the nearest place at which they were bought and sold, and that the market value there would be evidence of that value at the place of loss, the court was of opinion that a sum equal to the market value would not indemnify the plaintiff. "Such a value would depend largely on considera-

¹ Washington Mills Manuf. Co. v. Weymouth & B. Mut. F. Ins. Co., 135 Mass. 503; Same v. Commercial F. Ins. Co., 13 Fed. Rep. 646; Collinridge v. Royal Exchange Assur. Corp., 3 Q. B. Div. 173.

² 3 Kent's Com. 376; Laurent v. Chatham Ins. Co., 1 Hall, 41.

³ German Ins. Co. v. Everett, 18 Tex. Civ. App. 514, 46 S. W. Rep. 95.

⁴ Hickerson v. Insurance Cos., 26

Tenn. 193, 32 L. R. A. 172, 33 S. W. Rep. 1041; Western Assur. Co. v. Studebaker Brothers Manuf. Co., 124 Ind. 176, 23 N. E. Rep. 1138; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. Rep. 289; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. Rep. 422, 28 L. R. A. 405.

⁵ Fisher v. Crescent Ins. Co., 33 Fed. Rep. 544.

tions which would have nothing to do with the real value of the articles, or with their actual worth to the owner. And we think that, being in the plaintiff's possession and used and kept for use by her in her house and about her person, without any intention or expectation on her part of selling them, they should be regarded as belonging in a sense to the person of the owner, and that the damages should be assessed according to the actual worth of the articles to her for use in the condition in which they were at the time of the fire, excluding any fanciful or sentimental considerations."¹

On principles which are elsewhere stated and illustrated² the only damages which can be recovered from an insurer because of delay in making payment according to the contract, in the absence of a statute imposing liability for attorney's fees or a penalty for delay in making payment,³ is in the nature of interest,⁴ and that only from the time of default.⁵ The court has declined to permit the recovery of interest on the amount of an award where it was not claimed in the trial court and no proof of an agreement or custom in respect to it was shown.⁶ If the insured sues to set aside an award interest should not be allowed before the decree is entered; until then the damages were unliquidated.⁷ The rate of interest fixed by law at the place where the policy is payable governs.⁸

No more than the amount insured can be recovered; that is the utmost limit of the insurer's liability. If a partial loss has been compensated and thereafter a total loss occurs, only the difference between the sum already paid and the whole amount designated in the policy can be recovered.⁹ If the insured has

¹ Wall v. Platt, *supra*. See § 955, and Sun F. Office v. Ayerst, 37 Neb. 184, 55 N. W. Rep. 635.

² Ch. 8.

³ See 3 Berryman's Ins. Digest, p. 455.

⁴ Insurance Co. v. Piaggio, 16 Wall. 378.

⁵ Home Ins. Co. v. Adler, 71 Ala. 516; Hilton v. Phoenix Assur. Co., 92 Me. 272, 42 Atl. Rep. 412; Newman v. Covenant Mut. Ins. Co., 76 Iowa, 56, 40 N. W. Rep. 87, 14 Am. St. 196, 1 L. R. A. 56; Wood v. Cascade F. &

M. Ins. Co., 8 Wash. 427, 26 Pac. Rep. 267, 40 Am. St. 917; Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. Rep. 425; Hanover F. Ins. Co. v. Lewis, 27 Fla. 209, 10 So. Rep. 297. See 3 Berryman's Ins. Digest, p. 729.

⁶ Hall v. Norwalk F. Ins. Co., 57 Conn. 105, 118, 17 Atl. Rep. 356.

⁷ Stemmer v. Scottish Ins. Co. 33 Ore. 65, 49 Pac. Rep. 588, 53 id. 498.

⁸ Stepp v. National L. Ass'n, 37 S. C. 417, 16 S. E. Rep. 134.

⁹ Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. 401; Curry v. Common-

only a special interest in the property covered by the policy, the recovery cannot exceed the value of his interest, though the insurance be upon the whole property.¹ The general rule stated does not prevent the insurer from being liable for the full sum insured where it issues a policy covering the entire interest in the property with knowledge that the insured owns a partial interest only, there being no fraud or mistake.² A life tenant who obtains a policy for the full value of the fee, intending to insure the property for himself and the remainderman, may recover the whole sum insured as trustee for the latter.³ The insurer has no standing which entitles it to allege that a conditional sale made by the insured, who reserved title to the property until the consideration was fully paid, was fraudulent. The fact that more than half the purchase price had been paid was immaterial to the company because the vendor was bound to account to his vendee for the payments made.⁴

The insurer against damages by fire is responsible for the loss of goods stolen during the fire.⁵ So, also, the damage and expense caused and incurred by removing, with a reasonable degree of care suited to the occasion, insured goods from apparent immediate destruction by fire, although the building in which they were insured and from which they were then removed was not in fact burned,⁶ and damage by water thrown to extinguish the fire.⁷ If a partial loss occurs upon a policy, for a sum expressed in dollars, made here upon property situ-

wealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547; *Mechanics' Ins. Co. v. Hodge*, 46 Ill. App. 479.

¹ *Van Natta v. Mutual Security Ins. Co.*, 2 Sandf. 490; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 55 Am. Dec. 546; *Niblo v. North American F. Ins. Co.*, 1 Sandf. 551. See *Franklin v. National Ins. Co.*, 43 Mo. 491; *Borden v. Hingham Mut. F. Ins. Co.*, 18 Pick. 423, 29 Am. Dec. 614; § 829.

² *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. Rep. 13.

³ *Welsh v. London Assur. Corp.*, 151 Pa. 607, 25 Atl. Rep. 143, 31 Am. St. 786.

⁴ *Burson v. Fire Ass'n*, 136 Pa. 267, 20 Atl. Rep. 401, 20 Am. St. 919.

⁵ *Tilton v. Hamilton F. Ins. Co.*, 14 How. Pr. 363; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. 96, 75 Am. Dec. 638; *McPherson v. Guardian Ins. Co.*, Newf. Rep. (1884-96) 768.

⁶ *White v. Republic F. Ins. Co.*, 57 Me. 91, 2 Am. Rep. 22.

⁷ *Hillier v. Allegheny County Mut. F. Ins. Co.*, 3 Pa. 470, 45 Am. Dec. 656; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray, 159; *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. Rep. 393.

ated in a foreign country, the rule for estimating damages is to determine the loss at the place where it occurred in the currency of that country and then to find the equivalent in the country where suit is brought by determining the actual intrinsic value of the currency of that country as compared with the currency of the other; and it is immaterial, in reference to this, that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and of equal quality.¹ Where there is an absolute loss of any article distinctly valued in the policy the loss is to be estimated according to the valuation, it being in the nature of liquidated damages.² A mortgagor of a house whose right in equity to redeem has been seized on execution has an insurable interest in the house, and it continues so long as his right to redeem such equity exists. In case of loss such assured is entitled to recover the whole sum insured if the value of the property destroyed amounts to that sum.³ A sale on execution will not cause a forfeiture of a policy by force of a provision that if the property should be sold or conveyed in whole or in part the policy should become void.⁴ The insurable interest of a mortgagee in the property mortgaged corresponds in its amount to that of the debt.⁵

§ 822. Contribution if there is more than one policy. When property covered by several policies is destroyed the proportion of its value to be paid by each insurer is that which the amount of his policy bears to the aggregate insurance thereon, although some of the policies cover other property than is insured by all the underwriters.⁶ But a clause to that effect is operative only where the insurance covers the same interest,

¹ *Burgess v. Alliance Ins. Co.*, 10 Allen, 221.

² *Harris v. Eagle F. Co.*, 5 Johns. 368.

³ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40, 20 Am. Dec. 507.

⁴ *Id.*

⁵ *Kernochan v. New York Bowery F. Ins. Co.*, 5 Duer, 1; *Boynton v. Clinton, etc. Ins. Co.*, 16 Barb. 254. See § 829.

⁶ *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265; *Staat v. Royal Ins. Co.*,

49 Pa. 14; *Lycoming Ins. Co. v. Mitchell*, 48 id. 367; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray, 459; *Liverpool, etc. Ins. Co. v. Verdier*, 33 Mich. 138; *Westchester F. Ins. Co. v. Earle*, id. 143; *Ogden v. East River Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492; *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20; *Page v. Sun Ins. Office*, 74 Fed. Rep. 203, 20 C. C. A. 397, 33 L. R. A. 249.

and not where the second policy is upon a different interest claimed in the property.¹ If the plaintiff puts his proofs of loss in evidence and they show that there was other insurance, and the amount thereof, a clause in the policy sued upon for prorating the loss will be given effect although the defendant did not plead it.² Under other circumstances the insurer cannot take advantage of the existence of additional insurance unless it pleads it.³ The general rule stated applies where subsequent insurance is void because the first insurer was not notified thereof, its policy providing for prorating the loss whether other insurers were solvent, or liable or not.⁴ After insurers have exercised their option to repair damaged property the right to claim an apportionment of the loss cannot be asserted.⁵

§ 823. Mitigation of liability. If a premium due on the policy remains unpaid the amount should be deducted from the sum for which the insurer is liable.⁶ And if the policy provides for the deduction of the amount due on a premium note or any instalment of it, such deduction may be made, though the action to recover for a loss is not brought until the statute has barred a suit on the note.⁷ On the failure of the insured to protect the property and put it in good order the insurer may deduct the expense of doing so, it having acted at the request of the insured.⁸ Liability on a policy covering whisky in a bonded warehouse is not lessened because of the tax due thereon.⁹ An insurer of a tenant against loss from the payment of rent is not affected by an agreement between him and his landlord, made after the loss of the insured build-

¹ *Niagara F. Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. Rep. 919, 32 id. 914, 19 L. R. A. 114.

² *McFetridge v. American F. Ins. Co.*, 90 Wis. 138, 62 N. W. Rep. 938.

³ *Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. Rep. 932.

⁴ *Cassity v. New Orleans Ins. Ass'n*, 65 Miss. 49, 3 So. Rep. 138; *Bateman v. Lumbermen's Ins. Co.*, 189 Pa. 465, 42 Atl. Rep. 184; *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. Rep. 655.

⁵ *Hartford F. Ins. Co. v. Peebles' Hotel Co.*, 82 Fed. Rep. 546.

⁶ *Home Ins. Co. v. Adler*, 71 Ala. 516, 529; *Baxter v. Brooklyn L. Ins. Co.*, 119 N. Y. 450, 23 N. E. Rep. 1048, 7 L. R. A. 293; *Albert v. Mutual L. Ins. Co.*, 122 N. C. 92, 65 Am. St. 693, 30 S. E. Rep. 327; *McMahan v. Sewickly Mut. F. Ins. Co.*, 179 Pa. 52, 36 Atl. Rep. 174.

⁷ *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. Rep. 727.

⁸ *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627.

⁹ *Queen Ins. Co. v. McCoin*, 105 Ky. 806, 49 S. W. Rep. 800.

ing, giving the latter the right to enter and rebuild. Neither is the tenant's right against the insurer lessened because money paid by it to the landlord, which the latter had received from an insurer against the loss of rent, was applied by him in relief of the tenant.¹

§ 824. **What jury may consider.** It is said when the subject of the insurance has not a "ready" market value the jury have the right to form their own judgment of its value, provided it be not unfair.² The cost of replacing the thing, deterioration, its worth to a stranger, are elements proper to be considered, but are not conclusive.³ And in the case of articles having a ready sale, the market value at the time and place of the destruction is regarded as the cash value, but a temporary rise or depression of that value should not be allowed to control. Neither cost, profits nor unpaid duties are necessary elements unless the latter reduce the insurable interest; and in the case of damaged goods a fair sale at auction with the knowledge of the insurer furnishes a proper basis for fixing the damages.⁴ In the absence of a market for the quantity of the property burned at the place where it was destroyed, the market value of similar property in carload lots or the price at which the same is sold to jobbers in larger quantities should not control the recovery, since such facts are not of a conclusive nature and are to be considered in connection with other facts, such as the market value of the property in quantities in which it might be sold, the prices obtaining before and after the loss, in the local and other markets, with the expense of transportation; the cost of replacing the property and other circumstances tending to show value.⁵ In

¹ *Heller v. Royal Ins. Co.*, 177 Pa. 262, 35 Atl. Rep. 726, 34 L. R. A. 600.

² *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. Rep. 137, 25 id. 159.

³ *Brinley v. National Ins. Co.*, 11 Met. 195; *Niblo v. North American Ins. Co.*, 1 Sandf. 551; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205, 77 Am. Dec. 418; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 20 Am. St. 281.

⁴ *Wolfe v. Howard Ins. Co.*, 1 Sandf. 124; *Hoffman v. Aetna Ins.*

Co., 1 Robert. 501; *Hoffman v. Western Ins. Co.*, 1 La. Ann. 216; *Wolfe v. Howard Ins. Co.*, 7 N. Y. 583; *Clement v. British America Assur. Co.*, 141 Mass. 298, 5 N. E. Rep. 847 (the cost of manufacturing staple goods constantly sold in the market may be proved, not as a test but as one of the elements to aid the jury in finding their market value).

⁵ *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S. W. Rep. 945.

cases where the insurer restricts his liability by the policy to two-thirds, or other proportion of the actual value of the building and goods "at the time of loss," the limit applies equally to both classes of property; and when the policy provides that partial losses shall be paid in full, not exceeding the amount insured, provided the insured had on hand the lowest amount stated in the application, as if the insurance is on merchandise to the amount of \$3,000, it is not regarded as a case of partial loss, though a small amount, for example, \$20 or \$30 worth, were saved, because that was not the real intention of the parties.¹ There is no right of abandonment in fire as in marine insurance,² and goods destroyed are to be paid for at their value at the time of loss; and if they are only damaged, the difference between their value in their present and prior condition. When they are so injured as not to be salable in the ordinary way, the insured may, on notice to the insurer or with his knowledge, make a fair sale at auction, and, crediting him with the proceeds, recover the balance. If the sale is made without such notice or knowledge the insured takes upon himself the burden of proving that the goods brought all they were worth, the returns of the sale of themselves being insufficient evidence of their value.³ When the parties have agreed in the policy upon the manner of ascertaining the value of the property the law will sustain the agreement, as already stated in the opening of this chapter.⁴

§ 825. **Proof of damages.** If no such agreement exists then the law permits the insured to prove by any legal testimony what the value actually was, so as to fix the damages;⁵ and as to what testimony is admissible to establish the ultimate point in the inquiry is more a question in the law of evidence than in that of insurance. There are many varying and inharmonious decisions on what is proper testimony, but for the reason assigned they will not be further referred to.

§ 826. **General average in fire insurance.** While it is said the election of the insured to abandon the property does not exist in fire as in marine insurance, and this constitutes one of

¹ Singleton v. Boone County Ins. Co., 45 Mo. 250.

³ Id.

⁴ § 804.

² Henderson v. Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

⁵ Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386.

the distinctions between them, they have in some cases a feature in common which we would least expect to find, viz.: general average. During the progress of a fire the insured, with the approval of the insurer, procured and hung out of the windows of the building wet blankets, which proved to be of essential service in stopping the progress of the flames, and in preserving the goods in the building. On this state of facts it was held¹ that the insurer and the insured should contribute towards the loss of the blankets so used in proportion [89] to the amount which they respectively had at risk in the store and contents. It was a practical case of dry land jettison and general average contribution deduced from the "laws of the sea." Common sense and common justice proved superior to the general rule that in a loss under a policy of insurance against fire the amount is to be paid without contribution, and shows that the insurer may become liable beyond the sum named in the policy.

§ 827. Recoveries in special cases. If the contract is to the effect that the insurer will pay all losses and damages, not exceeding a specified sum, which may happen to the insured property during the term of the insurance, and that the loss and damage shall be estimated according to the true and actual value of the property at the time the fire shall occur, and be paid at the rate of two-thirds of the actual loss, the insurer's liability is not limited to two-thirds of such loss. The liability under such a contract is to pay all losses sustained by the insured within the sum named in the policy, and not exceeding two-thirds the value of the stock insured. If the goods insured were worth only the amount specified in the policy, the insurer would only be liable for two-thirds of that amount; but if the stock were worth twice the amount stated in the policy it would be liable for the whole sum stated therein, because the loss exceeded the two-thirds of value which the insurer agreed to pay.² And whenever the contract is that the insurer will pay the value, or a certain proportion of the value of the property at the time of the loss, that value is determined by its *then* value without reference to its worth

¹ Welles v. Boston Ins. Co., 6 Pick. 182. See Liscom v. Boston Mut. F. Ins. Co., 9 Met. 205.

² Ashland Mut. Ins. Co. v. Housinger, 10 Ohio St. 10; Huckins v. People's Ins. Co., 31 N. H. 238.

at the time of the inception of the risk.¹ In cases where divers lots of goods in different places or buildings, and separately valued, are insured together for a gross sum named in the policy, though only on a proportion of the value, and a loss exceeding the proportion happens to a part of the lots, the liability of the insurer is not confined to the proportion of the [90] value of the lots which are destroyed, but is to the extent of the injury, not exceeding the amount named. In a case in New Hampshire where insurance was effected for a gross sum on the plaintiff's house and sheds, valued at \$1,200, furniture therein \$250, barns \$250, barn and shed in a meadow \$250, hay and grain therein \$400, it was held in a suit involving losses to the amount of \$900, being of the barn and sheds in the meadow and the hay and grain therein, that the insurer was liable for the entire loss of all the hay in both barns, and not simply a proportion of each parcel or lot actually destroyed.² On the same doctrine it was held in Louisiana that where an insurance was taken on cotton to the amount of \$20,000, it being stored in seven different warehouses, and cotton to the value of \$17,000 was destroyed in one of them, the insured was entitled to recover the full sum lost, and was not limited to a proportion to be ascertained by a comparison of the sum in the policy to the value of the whole property insured. The court construed the policy to mean that the insurer engaged by his contract to indemnify the insured against all loss or damage on all and every part and parcel of the cotton insured, to the extent of \$20,000; and as the loss was within that sum, although six of the seven lots insured were uninjured, the insured was entitled to recover for the entire loss.³ And it may be stated as a rule, that where the amount of insurance is not distinctly apportioned between the subjects of it by the policy, the latter to its full amount will bear any

¹ *Huckins v. People's Ins. Co.*, 31 N. H. 238; *Post v. Hampshire Mut. F. Ins. Co.*, 12 Met. 555, 46 Am. Dec. 702; *Atwood v. Union Mut. F. Ins. Co.*, 28 N. H. 234.

² *Rix v. Mutual Ins. Co.*, 20 N. H. 198.

It is usual for the policy to provide that liability shall be distrib-

uted *pro rata* among the various classes or lots of property insured, in which case each is considered separately. *Insurance Co. v. Ayers*, 88 Tenn. 728, 13 S. W. Rep. 1090; *Hoffman v. Insurance Co.*, 88 Tenn. 735, 14 S. W. Rep. 72.

³ *Nicolet v. Insurance Co.*, 3 La. 371, 23 Am. Dec. 458.

loss that happens to either.¹ But if the policy is specifically limited to certain designated subjects it will not be extended beyond those specified.² In the New Hampshire case just cited it was held that on a policy for \$1,500, where the by-laws of the insurer provided that in no case should it become bound to pay more than two-thirds of the actual value of the property insured at the time of loss, and the insured proved that he had on hand at that time property of the value of \$2,250; that he might recover the full amount of \$1,500, it appearing that so much had been destroyed.

Where it is provided that the cash value of property destroyed or damaged shall in no case exceed what would be the cost to the assured of replacing it, the expense of doing that is a proper method of fixing the damages. Such cost includes the expense of removing machinery from the building in order that repairs may be made, although the machinery may have been owned by a third person, who, as between himself and the insured, was bound to remove it.³ It was stipulated in the policy that the measure of damages in case of the loss of the lumber insured should not exceed the actual cost of producing it. This was construed to mean that if the insured bought the logs out of which the lumber was manufactured, the damages would be the price paid with interest, and the cost of manufacturing and storage; if he purchased the stumpage, the price paid with interest and expenses added; if he owned the land from which the logs were cut, the fair value of the stumpage with interest and expenses.⁴ Under a standard policy limiting the liability of the insurer in case of total loss to what it would cost the insured "then" (referring to the time of the fire) to replace the insured property, the word "then" must be given controlling effect, though it be impossible to go into the open market in the vicinity of the place where the loss occurred and replace the property burned, and though the insured owns the timber to cut logs from and the mill to saw them into lumber.⁵

¹ Blake v. Exchange Mut. Ins. Co., 12 Gray, 265, and cases cited *supra*.

² *Supra*; Huckins v. People's Ins. Co., 31 N. H. 238; Storer v. Elliot Ins. Co., 45 Me. 175; Liddle v. Market F. Ins. Co., 4 Bosw. 179; Burgess v. Alliance Ins. Co., 10 Allen, 221.

³ Clover v. Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. Rep. 724.

⁴ Chippewa Lumber Co. v. Phoenix Ins. Co., 80 Mich. 116, 44 N. W. Rep. 1055.

⁵ Mitchell v. St. Paul German F. Ins. Co., 92 Mich. 549, 52 N. W. Rep. 1017.

In a recent New York case the insurance was upon oil-reducing works for the protection of specified royalties payable by the owner of the works to patentees. The contract between these parties stipulated that the royalties should amount to \$250 per month; the policy was to the effect that in case the works were damaged so as to cause a diminution of the royalties the insurer would make good to the insured the amount of such diminution during the restoration of the premises to their previous producing capacity. The recovery was not limited to the loss of royalties on the oil actually burned, as the principal damage arose from the enforced idleness of the works. It was also held that it was competent, on the question of damages, to prove the royalties paid for two months immediately preceding the fire, and those paid during the time the works were being restored and for some months thereafter.¹

§ 828. **Insurance on commission goods.** There is some difficulty in applying the measure of damages where the policy is taken upon goods which are held for sale on commission. It is clear that unless it specifies that the goods are held upon commission, and are insured for the true and actual or some named value, and insured as such, the loser cannot recover beyond the loss of his commissions. A party who sells goods on commission has such an interest as entitles him to insure them, but he must not insure them as his own; for as the contract is one of indemnity, and his interest is in fact limited, he will be restricted to his actual loss. But where the property so held is insured, as well the interest of the factor as of the consignor whom he represents, and who need not be specified or named, the policy will attach upon the thing as in other cases. And where it embraces "goods as well the property of the assured as those held by him on commission," and agrees to make good to the insured all loss and damage, to be estimated according to their true actual value at the time the loss shall happen, the insured may recover the whole value of such property, and not merely the amount of his lien or commissions.² In a Massachusetts case the insured were commission

¹National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. Rep. 337. Co., 2 Hall, 372; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 543; Johnson v. Campbell, 120

²De Forest v. Fulton F. Ins. Co., 1 Mass. 449. Hall, 84; Brichta v. New York Ins.

merchants, and took out a policy for \$10,000 on merchandise in their store, and by them held in trust. At the time of taking the policy they represented to the insurance company that they were in the habit of receiving goods for sale; that they made advances on some of them, and on some they made none; that the goods on hand were constantly changing by sales and new consignments; and that they desired to be insured on such goods to secure themselves against loss by fire, as the consignors might not be able to repay the advances. On the case stated it was decided that the insurer was liable only to the extent of *the interest* of the insured in the property lost; in other words, to such goods, and only to the extent that advances had been made or commissions attached.¹

§ 829. **Insurance by mortgagee.** Where a mortgagee [92] of property insures on his own account, it is but an insurance to the extent of his debt, and the insurer is liable only to the amount of the debt;² but if the mortgagor takes out a policy and assigns it to the mortgagee as part of the security, the latter is entitled to recover the whole amount, though if there be an overplus beyond what is due on the mortgage debt, he will be liable to account to the mortgagor for it.³ In a case arising in Massachusetts it was held that when a mortgagee at his own expense insures his interest in property against loss by fire, without particularly describing the nature of it, he is entitled on the happening of the loss to recover the amount of his loss as mortgagee to his own use without first assigning his mortgage to the insurer; nor is he compelled to account to the mortgagor for the amount so recovered in whole or in part; he retains a right to recover his whole debt from the mortgagor. And, on the other hand, when the debt is paid by the mortgagee, the money is not in law or equity the money of the insurer who has paid the loss, nor is it money

¹ Parks v. General Interest Assur. Co., 5 Pick. 34; Suffolk Ins. Co. v. Boyden, 9 Allen, 123; Foster v. Equitable Ins. Co., 2 Gray, 216; Washington Mills Manuf. Co. v. Weymouth & B. Mut. F. Ins. Co., 135 Mass. 503; Fire Ass'n v. Rosenthal, 108 Pa. 474.

² Kernochan v. New York Bowery F. Ins. Co., 5 Duer, 1, 17 N. Y. 428.

³ Tyler v. Etna Ins. Co., 16 Wend. 385; Carpenter v. Providence Ins. Co., 16 Pet. 495; Foster v. Equitable Mut. F. Ins. Co., 2 Gray, 216; McEwan v. Western Ins. Co., 1 Mich. N. P. 118; Biddeford Savings Bank v. Dwelling House Ins. Co., 81 Me. 566, 18 Atl. Rep. 293.

paid for his use.¹ It must be confessed that at first view the doctrine of *King v. State Mutual F. Ins. Co.* seems at variance with other well established principles, but a closer examination of it will show it to be sound law. If a mortgagor insures and assigns the policy to the mortgagee as a further security for his debt, or if the mortgagee agrees to insure as part of his contract with the mortgagor, it is reasonable to say that he shall, as between him and the mortgagor, have only his debt, and that the policy is but a part of the security for that debt; but when the mortgagee, for his own security, at his own expense, and for his own exclusive benefit, procures an insurance, there is no such relation between him and the mortgagor as would authorize the latter or any one subrogated to his rights to call upon the insured for any part of the money paid on such policy. The insurance company having received the [93] premium, and the event having occurred upon which its liability became fixed, could no more defend the action than in any other case of a contract liability; nor would the mortgagor have any right to call on the insured, because the money was procured on an independent contract and consideration moving from the party who received it. This case is supported by some subsequent adjudications, and seems on principle to be unassailable.² It is further announced in the case last cited from New Jersey that where a mortgagee holds other securities for the same debt and effects insurance on the mortgaged property, and subsequently parts with any of his securities, or part of his mortgage is paid, the insurer will only be liable on his policy to the amount remaining unpaid. But if the mortgagee parts with his other securities, or receives payment of part of his debt after a suit has been commenced, he is entitled to recover the full amount of his insurance. Nothing else being put in issue by the pleadings, the rights of the parties must be determined as they existed at the time the suit was instituted. If the mortgagee has been paid the debt to protect

¹ *King v. State Mut. F. Ins. Co.*, 7 F. Ins. Co., 51 Ill. 409. It is questioned in New Jersey, and the opposite rule is there recognized. *Sussex Ins. Co. v. Woodruff*, 26 N. J. L. 541.

² *Concord Mut. Ins. Co. v. Woodbury*, 45 Me. 452; *Honore v. Lamar*

or secure which the insurance was effected, or if he has impaired the rights of the insurer in any securities to the benefit of which it was entitled, the latter must resort for relief to a court of equity, his equitable claim not being a proper subject for a jury.

It is respectfully submitted that the whole difficulty here suggested is based on the erroneous notion that a contract made by one person for his own benefit, on a consideration proceeding from him, with which the other has nothing to do, may be treated as giving that other a right. Of course under the code system of pleading, where legal and equitable defenses may be mingled in the same action, the difficulty last suggested would have no existence. In New York¹ it was held that when the insurer did not have *notice* that the insurance was on a mortgage interest, it was no defense to the action on the policy by the mortgagee that the mortgage [94] was ample security for what remained unpaid on the mortgage debt, notwithstanding the loss by fire, and that therefore the plaintiff was not injured, though a loss had actually occurred. The court said that "if in any case the insurer of a mortgagee is entitled on payment of a loss to an interest in the debt and security, it is a mere equity, not arising out of the contract of insurance, but from all the circumstances of the case." And further that the insurance was not of the "debt of the mortgagor," but of the property, and upon its destruction the insured mortgagee had the right to recover. This case, to the extent the decision goes, was decided upon correct principles, though the court did not seem inclined to fully adopt the Massachusetts doctrine.

§ 830. Contracts to replace or rebuild. As has been already said, there is a class of insurance contracts in which the insurer reserves the right to replace the articles lost or rebuild the structures destroyed. This right depends wholly on the contract and does not exist independently of it. Under such a contract, if the insurer rebuilds or replaces, no action for the loss of money can be maintained. But if he fails to rebuild, the measure of damages is not what it would cost to replace or repair, but such a sum as will be a fair indemnity

¹ *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428.

for the loss.¹ And where the insurer elects to rebuild, and is not permitted by the public authorities by reason of the building being dangerous or not being in conformity with some ordinance, he must pay damages for not performing his contract.² The fact that such a structure is prohibited by governmental authority, and that a new building must be of better material — brick, for instance, instead of wood — does not excuse the insurer; he must either build in conformity to such regulations or pay the insured the actual amount of the [95] loss.³ Under a provision authorizing the insurer to elect to rebuild the property destroyed, he may place the insured in as good condition as he was before the fire by repairs or renewals which make it equal to its former condition; and in an action on the policy evidence of the repair and renewal is a good defense.⁴ The insurer may show further in defense of an action that after his liability occurred and before the time for the election to repair had expired, he had made an arrangement with the insured by which the time for making the repairs had been extended beyond the time fixed in the policy, and this will be a good defense to an action for the

¹ *Brinley v. National Ins. Co.*, 11 Met. 195; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205, 78 Am. Dec. 418; *Walburn v. Insurance Co.*, 4 La. 289.

In some jurisdictions the election to repair or rebuild converts the contract of insurance into a building contract. *Good v. Buckeye Ins. Co.*, 43 Ohio St. 394; *Heilman v. Westchester F. Ins. Co.*, 75 N. Y. 7; *Beals v. Home Ins. Co.*, 36 id. 522.

² *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Brown v. Royal Ins. Co.*, 1 E. & E. 853; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 103, 59 Am. Rep. 613.

This rule does not apply if the insurer's charter limits the amount which it may expend in building or repairing to the sum insured. *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 27.

³ *Brown v. Royal Ins. Co.*, *supra*.

In the noted case of *Hall v. Wright*

(El. B. & E. 746), in the exchequer chamber, the subject of relief from a contract where fulfillment has become impossible is fully discussed. In the American publication of that case (96 Eng. C. L. 795), the editor adds a lengthy and valuable note showing that "the American cases support the general doctrine of the case. "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine v. Jane*, Aleyn, 26; *Barker v. Hodgson*, 3 M. & S. 267; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Phillips v. Storm*, 16 Mass. 238.

⁴ *Franklin F. Ins. Co. v. Hamill*, 5 Md. 170; *Ellmaker v. Franklin Ins. Co.*, 5 Pa. 183.

loss.¹ It is also held that when the insurer reserves the option to make good the loss by "rebuilding, replacing or repairs, *the insured to contribute one-fourth of the expense,*" etc., and there is a partial loss, and the insurer makes substantial repairs, though not so perfect as the contract requires, the insured is entitled to recover the difference between the value of the buildings as repaired in part and what their value would have been had the repairs been complete. The insured in such a contract must pay one-fourth of the value of such repairs to the estate — not simply one-fourth of the cost.² If the work of repairing is so faultily done that the building collapses and becomes untenable and the insured is deprived of rent, the insurer must compensate him for the resulting damage in an action *ex delicto*.³ The failure to exercise the option to repair is not excused because a part of the building upon which repairs were made fell and damaged the part repaired, nor because a party-wall was condemned by the authorities, regardless of whether the fall was the result of defective work or of inherent defects in the construction of the building. If the insured completes the repairs he may recover the cost of doing so regardless of the sum insured.⁴

Where a standard policy statute declares that insurer shall be liable only for the actual cash value of the property at the time of loss; that such liability shall not exceed the cost of repairing or replacing the property, and that it shall be optional with the insurer to repair, rebuild or replace the property on giving notice to that effect, such option exists where a building has been wholly destroyed notwithstanding another statute is to the effect that the sum written in a policy upon real property wholly destroyed must be taken conclusively to be the amount of loss.⁵ In Texas the rule is to the contrary.⁶

If the insurer unnecessarily delays the work of repairing and additional damage results, it must, on finally refusing to repair, pay what it would cost to do the work at the time of

¹ Ellmaker v. Franklin Ins. Co., *supra*.

² Parker v. Engle Ins. Co., 9 Gray, 152.

³ Henderson v. Sun Mut. Ins. Co., 48 La. Ann. 1031, 20 So. Rep. 164, 55 Am. St. 292.

⁴ Henderson v. Crescent Ins. Co., 48 La. Ann. 1176, 20 So. Rep. 658, 35 L. R. A. 385; Smith v. Colonial Mut. F. Ins. Co., 6 Vict. L. R. (law) 200.

⁵ Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. Rep. 361.

⁶ See § 807.

such refusal.¹ If the repairs as made do not make good the loss the insured may recover the difference between the value of the building as repaired and its value as it would have been if they had been properly made.² Where repairs were begun but not finished, and the insured completed them, he recovered the cost of finishing them and damages for the delay, the rental value of the property being a proper element for ascertaining the amount of the latter.³ The insurer is not liable for rent of the premises while it is repairing them unless it occupies them for an unreasonable length of time.⁴ If two or more independent insurers elect together to rebuild, and there is a breach, full damages may be recovered from either.⁵

This brief view of the rule of damages in fire insurance cases must suffice. It might be extended almost indefinitely by a review of the numerous cases which are found in the American and English reports. Such a labor more naturally belongs to a work devoted to the topic of insurance exclusively; and as a number of such treatises are already in existence, the profession would hardly justify a further excursion into that field.

SECTION 3.

LIFE AND ACCIDENT INSURANCE.

§ 831. **Definition of life insurance.** As already stated,⁶ a life insurance contract is an agreement upon the part of the insurer with the person who takes the policy that upon the death of the person whose life is insured during the time for which it is so insured, or, if generally upon his life, upon the occurrence of his death, the insurer will pay the amount of the policy to the person holding the same.

§ 832. **Character of the contract.** The discussion as to whether life insurance is or is not a contract of indemnity makes it necessary to do what has been omitted in the notice [97] of marine and fire insurance contracts, viz.: discuss

¹ American Central Ins. Co. v. Mc-Lanahan, 11 Kan. 533, 553.

² Morrell v. Irving F. Ins. Co., 33 N. Y. 429, 78 Am. Dec. 396.

³ Fire Ass'n v. Rosenthal, 108 Pa. 474.

⁴ St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill. 598.

⁵ Morrell v. Irving F. Ins. Co., *supra*. See Good v. Buckeye Ins. Co., 43 Ohio St. 394; Hartford F. Ins. Co. v. Peebles, Hotel Co., 82 Fed. Rep. 546.

⁶ § 802.

briefly the nature of the contract itself, as this influences in a degree the measure of recovery in particular cases. It is well settled in England that a life insurance contract is not one of indemnity. The weight of authority and the majority of judicial *dicta* in this country are in harmony with this view. Except in a particular class of cases arising under these contracts the question is an abstract one, but in that class it becomes vital, and hence important to be considered. Whenever the amount of the recovery may be determined or limited by the idea of its being given by way of indemnity it is essential to fix the nature of the contract. It was at first held in England, in *Godsall v. Boldero*,¹ that a life insurance policy was a contract for indemnity. It is now settled there to the contrary that such a policy is a simple contract to pay a specified sum at the death of the person named therein, whose life is insured, and neither more nor less than that sum with interest from that event can be recovered.² It seems that the original case in England³ was acquiesced in by the parties, no steps having been taken to reverse it, but was generally disregarded in practice, and after many years has been overruled by the unanimous decision of six judges sitting in the exchequer chamber.⁴ Baron Parke said that "the contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of annuity being calculated in the first instance according to [98] the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity." The overruled case proceeded upon the statute of Geo. III., c. 48, but upon an erroneous construction of it. That statute, to prevent wagering policies, required that the person effecting for himself the insurance should have an interest in the continu-

¹ 19 East, 72.³ *Godsall v. Boldero*, *supra*.² *Dalby v. India & L. L. Assur. Co.*,
15 C. B. 365; *Law v. London, etc. Assur. Co.*, 1 K. & J. 223.⁴ *Dalby v. India & L. L. Assur. Co.*,
supra.

ance of the life insured and limited the recovery to that interest. The overruling case held that wagering policies were not void at common law, and that the statute only required an interest to support the insurance when it was effected, and limited the recovery to the interest then existing.

In this country wagering contracts, by statute and by the common law, have generally been held void as immoral and contrary to public policy; and hence the right of one person to obtain for his own benefit insurance on the life of another is more restricted. Such insurance is permitted if it is not in fact intended in whole or in part as a wagering venture. A person who has an interest in the continuance of the life which is the subject of the insurance may effect an insurance upon it. The amount of it is chiefly important as an evidentiary fact in the determination of its validity—in determining whether it is speculative. If such an interest exists at the time the insurance is effected the contract has a valid inception. Whether it will continue valid if that interest afterwards ceases is an open question in nearly all the state courts, though it has been recently ruled by the supreme court of the United States¹ and the court of last resort in Pennsylvania² that a policy procured in good faith and valid at its inception is not avoided by the cessation of the insurable interest, unless as a consequence of its own provisions. There are two New York cases in which this rule must have been acted upon. They hold that the assignee of a policy which was obtained *bona fide* may recover thereon without proving his interest in the life of the assured or the consideration paid for the assignment.³ In the case first referred to the English case of *Dalby v. Insurance Co.*⁴ was thus remarked upon: "It seems quite remarkable that any other view should be taken of this question. The contract is not to make any loss good or to make compensation. The debt is not insured. It is an absolute contract to pay, not the amount of a loss or damage

¹ *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 461.

² *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. Rep. 213.

³ *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 74 Am. Dec. 280; *St. John v. Same*, 13 N. Y. 31. See *Provident L. Ins. Co. v. Baum*, 29 Ind. 236.

⁴ 15 C. B. 365.

arising from a death, but a specified sum of money upon the termination of the life insured." *Dicta* to the like effect may be found in other cases,¹ and to the contrary in Connecticut.²

§ 833. **Same subject.** The interest required to support a contract of life insurance when it is obtained should probably be pecuniary, but when insusceptible of definite measurement in money, the amount fixed in the policy will not affect its validity without other proof tending to show an inten- [99] tion to speculate on the chances of the life; nor will it be subject to modification by intrinsic proof.³ Policies which are subject to no objection at their inception or afterwards, for being unsupported by the requisite interest in the beneficiary, are enforced not only in England but in this country; not on the principle of indemnity, but as valued policies, imposing on the insurer the obligation, upon the happening of the death, to pay the precise sum the life was insured for.⁴ When a legal policy upon a life is made, all that remains is to follow its terms. If, in consideration of certain premiums paid or to be paid, annually or otherwise, a person enters into a contract

¹ *Mowry v. Home L. Ins. Co.*, 9 R. L. 346, 354; *Johnson v. Trenton Mut. Ins. Co.*, 24 N. J. L. 576 (the doctrine of this case is that wager policies are not illegal); *McKenty v. Universal L. Ins. Co.*, 3 Dill. 448 (federal district court for Minnesota, per Nelson, J.).

In *Forbes v. American Mut. L. Ins. Co.*, 15 Gray, 249, 254, 77 Am. Dec. 360, Hoar, J., said: "As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; and that the only essential inquiry is whether the object of the contract is to obviate the objections to a mere wager upon the chances of human life."

² *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn. 244. See *Rivers v. Gregg*, 5 Rich. Eq. 274.

³ *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 461; *Bevin v. Con-*

necticut Mut. L. Ins. Co., 23 Conn. 244; *Loomis v. Eagle Ins. Co.*, 6 Gray, 396; *Miller v. Eagle Ins. Co.*, 2 E. D. Smith, 268; *Equitable L. Ins. Co. v. Patterson*, 41 Ga. 338, 5 Am. Rep. 535; *Chisholm v. Capital L. Ins. Co.*, 52 Mo. 213; *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 104; *Valton v. National L. Assur. Co.*, 22 Barb. 9, 20 N. Y. 32; *Hoyt v. New York Ins. Co.*, 3 Bosw. 440; *Morrell v. Trenton F. & L. Ins. Co.*, 10 Cush. 282, 57 Am. Dec. 92; *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 33; *Mitchell v. Union L. Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529.

⁴ *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn. 244; *Lord v. Dall*, *supra*; *Goodwin v. Massachusetts Mut. L. Ins. Co.*, 73 N. Y., 480, 497; *Rittler v. Smith*, 70 Md. 261, 16 Atl. Rep. 890, 2 L. R. A. 844; *Manhattan L. Ins. Co. v. Hennessy*, 99 Fed. Rep. 64.

with another to the effect that at a given time or on the occurrence of an event he will pay that other so much money, the failure to pay after the occurrence is a breach of the contract, affording to that other a perfect right of action for the precise sum agreed to be paid. The party agreeing to pay has received the consideration in the premium money, and whether we call the resulting express obligation an indemnity, a debt, or a penalty, it becomes due as a liquidated sum under the contract; and any attempt to question the right of the policy-holder is only to raise a question as to whether the obligor in any contract may not repudiate it, and still keep the benefits of full performance of the provisions in his favor. When one person has such an interest in the life of another as to be entitled to effect an insurance on that life, and does so, paying his own money for the policy, it is a contract between the insurer and the holder of the policy; and any inquiry as to whether the interest of the insured has continued, and is in existence at the [100] time the death occurs, either by the insurer or the representatives of the deceased, is on principle immaterial and irrelevant. The motive of A. to insure the life of B. is probably self-interest, but it is of no consequence to C., who issues a policy to A., what the real motive is if it be lawful and furnishes to C. the agreed consideration for the engagement. If A. buys and pays for a particular thing which C. delivers, no other party has any legal or equitable interest in the transaction. The insurer gets his premium, and the person advancing it is entitled to the benefit of the contract as much as if he had sold a lot of merchandise and the purchaser had agreed to pay, a stated price at a certain time.¹ It has been held that inter-

¹ Professor De Morgan, in his *Essay on Probabilities*, page 244, has so thoroughly annihilated the theory of the case of *Goodsall v. Boldero*, and the cases following and adopting it, that I cannot forbear quoting. He says: "The word *insurance* or *assurance* has given rise to some wrong notions, and it will be worth while to examine the nature of the contract. A. & Co engage with B. that, in consideration of 1*l.* a year, paid by him during his life, they will pay

20*l.* to his representatives as soon as he shall be dead. Both parties run a risk: A. & Co. that of having to pay B. more than they receive; B. that of paying more than will at his death produce 20*l.* But the risk of the office is of immediate loss; and that of B. of deferred loss; that of the former is also continually lessening, and that of the latter increasing; until, should B. live long enough, both risks become certainties. If the insurance be only for a term of

est in a policy on the life of one member of a firm in its favor ceases upon the dissolution of the partnership.¹

§ 834. When life insurance collateral security. When [101] a person takes an insurance on his life, paying the premiums,

years, B. runs the risk of losing his premiums altogether. The office does not inquire what reason B. may have for assuring his own life or that of another person, nor do any possible contingencies, except those of life, affect the office calculations. We cannot, therefore, be too much surprised at the ignorance shown by that judge who declared that life insurance was of its own nature a contract of indemnity; that is, if, by any lucky chance, B. can be proved to have accomplished the object for which he insured by other means, he has no claim upon the office. The circumstances are as follows; and the absurd conclusion is law, and would be practice, if the insurance offices had not refused to acknowledge the decision, or protect themselves by the precedent: A. & Co. covenanted with B. to pay 500*l.* if C. should die within the term of seven years next ensuing, in consideration of the usual premium. C. did die within the term; A. & Co. in answer to a claim of 500*l.*, replied that the intention of B. in insuring the life of C. was to obtain security for the payment of a debt of 500*l.* due by C. to B., which debt had already been paid by C.'s executors; consequently they owed nothing to B. An action was brought by B., and defended by A. & Co. on the above plea; and a special case being made, the case was decided by the court of queen's bench against the plaintiffs, thereby establishing the principle that life insurance is a thing similar to fire or ship insurance; namely, a contract of indem-

nity, to be fulfilled with allowance of salvage.

"The defendant's case rested upon the asserted nature of the contract and the statute of 14 Geo. III, ch. 48, which enacts that 'no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life.' The act does not state at what time the interest is to be reckoned, but the plaintiffs contended that *the time of death* was the meaning of the statute; the defendants averred, and the court decided, that *the time of bringing the action* was to be understood. The plaintiffs contended that the debt was not the object of insurance, but the life of the insured; the court decided that 'this action is, in point of law, founded upon a supposed damnification of the plaintiffs occasioned by the death, existing and continuing to exist at the time of the action brought; and, being so found, it follows, of course, that if, before the action was brought, the damage which was at first supposed likely to result to the creditor was wholly obviated and prevented by the payment of his debt, the foundation of the action on his part, or the ground of such insurance, fails.' This sentence contains nothing but very good sense, and no doubt very good law; but the application of it was accompanied by a mistake as to the nature of the damnification which the plaintiffs had sustained. The counsel on both sides, the court, the insurance office, and the plaintiffs themselves, showed a very partial knowledge of the nature of the con-

¹ Cheeves v. Anders, 87 Tex. 287, 22 S. W. Rep. 274, 47 Am. St. 107.

and assigns the policy as collateral security to his creditor for a debt, there is no question that the assignee is a trustee for [102] the proceeds beyond the amount of the debt. In such case the policy is merely pledged as collateral, and follows the

tract; and I make no doubt that almost every person who heard it agreed with the court, however much they might impugn the decision on other grounds, that the damage to the creditor was 'wholly obviated and prevented by the payment of the debt.'

"In order to show that such was not the case, we must suppose that an exactly similar transaction had taken place before any insurance office existed. How this could have been may not be apparent, if we take the notion which the law formerly entertained of such an office; namely, that it is a species of gambling house; but if we prefer to consider it as a savings bank, with an equalization system, which is unquestionably the correct notion, we may return to the circumstances which the case would have presented had there been no insurance. C., a person whose credit has become doubtful, is indebted to B. to an amount which B. could not afford to lose; consequently B., knowing that the chance of payment is precarious, resolves to diminish his expenses, hoping by economy to restore to his family the sum which he may have lost by his engagements with C. He collects, accordingly, a small fund, which he places with his banker, avowing the purpose of its collection. In the meantime C. dies, and some friends pay off his debts, and that due to B. among the rest. The latter having now no further occasion for such economy draws upon his banker for the amount and is answered that, since the purpose of the saving was fulfilled by the payment of C.'s debt, he, B., has no

further claim upon his own money. An action is brought and the courts decide that the banker is right, and that B., having really attained his object in one way, has no right of property in the proceeds of another attempt to serve the same purpose.

"The only distinction between the case just put and that which actually occurred is that the banker was a person who gained his profits by receiving such savings during a contingent term, and guarantying a fixed sum; standing the loss, if there were any, and paying himself for it out of the gain which would accrue in another instance; the premium having been calculated so as to insure a moral certainty of profits upon the average of similar cases. It is not pretended on either side that the chance of indemnification at the hands of C.'s executors was made to lessen the consideration paid by B. for the guaranty; and the legal iniquity of the decision may, I think, be made clear as follows:

"It will hardly be disputed, firstly, that the legislature is the judge of what shall constitute valuable consideration; and secondly, that a consideration which is expressly allowed to be good in a statute should be admitted as such in the decisions of the courts. Now, the contract of insurance, be it gambling or be it not, rests entirely upon the permission given by the law to consider a high chance of a small sum as good consideration for a low chance of a large sum. If I now pay 2*l.* of premium for 100*l.* in case I should die in a year, and if my executors can maintain an action for 100*l.*, it must be because the law sanctions the notion that 2*l.*,

general rule applicable to all such securities; the proceeds are applied in payment of the debt secured, and the surplus [103] goes to the debtor or his representatives; and on this principle the case of *American Life & H. Ins. Co. v. Robertshaw* was rightly decided.¹ But as has already been said of the case of a mortgagee who insures the mortgaged property on his own account against loss by fire, this furnishes no reason for either the insurer or the debtor to demand an inquisition into the contract.² The contract is to pay to the holder of the policy the sum specifically mentioned on the death of the person named; and the duty of the insurer is plain, so long as contracts are regarded as things to be enforced or kept as they are made. In a recent case in the supreme court of the United States³ the duty of a creditor to account to the estate of his debtor for the overplus received by him on a policy beyond the amount of his debt is distinctly recognized and enforced; but it is nowhere intimated that if the creditor had procured a policy on the life of his debtor, paying the premiums himself, that

nearly certain, may, with consent of parties, be considered as an actual equivalent for a distant chance of 100%; as much so as one weight of silver for another of bread, or food, clothing and wages for personal services. It is true that the same law, fearing certain reputed immoral practices to which the power of making a particular bargain offers temptations, may limit the circumstances under which it will permit such bargains to be made; but this is equally true in regard to the other sort of contracts mentioned; indeed, there is no sort of bargain which is not under regulation. The law, then, allows risk, and permits unequal chances to be compensated by giving odds; the courts declare that, after the cost shall have been made, and one of the parties shall have stood his risk, which turns out in his favor, the other party shall receive an *ex post facto* release from the conditions of his bargain, because circumstances afterwards arise,

which, had they existed at the time of making the bargain, would have made it illegal. The several principles on which the decision was founded, well carried out, as they say in parliament, would require that the previous contracts of a man who became insane should be null and void; that the meat which a man buys for his dinner should be returnable to the butcher under the cost, if a friend should invite him in the meantime; and, in the case before us, supposing that C. should have outlived the term, and his debt were paid, as before, then B. might have brought his action against the office for the return of the premiums; alleging that, as it turned out, the office would have been indemnified, and, therefore, should be considered as having run no risk."

¹ 26 Pa. 189.

² *King v. State Mut. Ins. Co.*, 7 Cush. 1, 54 Am. Dec. 683; § 828.

³ *Page v. Burnstine*, 102 U. S. 664.

any such duty to account would have arisen. The case was this: P. insured his life for \$3,000 in November, 1866. In 1871 P. was owing B., and being embarrassed and unable to pay the accruing premiums, made an assignment of the policy to B., who annually paid the premiums until 1873, when an absolute assignment and transfer of the policy was made to B. It was conceded that the original assignment, and the final one, had their origin in the loan of B. to P. in 1871, and the court construed the last assignment, though absolute in form, as simply intended by the parties as an appointment of B. to receive from the company, upon the death of P., such sum as would then become due on the policy, and, after reimbursing himself to the extent of his loans to P., to pay the balance to the persons entitled, viz.: P.'s legal representatives. It was accordingly [104] decreed that B. was the trustee of the estate for the balance remaining in his hands after repaying the loan and the advances for premiums. No effort was made by the company to compel the holder of the policy to accept the simple amount of his loan as an indemnity, and the case is in entire harmony with the doctrine herein maintained.

§ 835. **Accident policies.** Where the injury to the person does not produce death, these policies are entirely different, and are clearly contracts for indemnity.¹ In this class of cases the damages are not estimated by any proportion between the injury sustained and the amount payable had death occurred, but the damage is the amount of injury the insured has actually sustained not exceeding the sum mentioned in the policy. The expenses incident to the injury, and compensation for the suffering resulting therefrom to the insured, are the basis of the estimate. Remote consequences are not to be considered; for instance, the special loss which the accident may impose upon an individual growing out of his profession, occupation, or the state of his business; the damages are such as naturally follow the effects of the injury; like the loss of a limb, or an eye, and the attendant loss of time, suffering, expense, etc.² Under an accident

¹ Theobald v. Railway Passenger Assurance Co., 10 Ex. 45; South Staffordshire Tramways Co. v. Sick-ness & Accident Assur. Ass'n, [1891] 1 Q. B. 402.

² Hadley v. Baxendale, 9 Ex. 354; Theobald v. Railway Passenger Assur. Co., *supra*.

policy covering indemnity for twenty-six consecutive weeks and requiring that proofs of claim be made within seven months, there cannot be a recovery for any period after the date of the final proofs.¹

§ 836. **Difference between English and American decisions as to scope of recovery.** The English case last cited limits the right to recover in case of an accident insurance to the suffering and expenses of the injured party, and the ruling is followed in at least one American court.² This, however, seems not to be the accepted doctrine in this country; and upon principle is not sustainable. The action in such case is upon the contract, and if loss of time follows, it seems reasonable that it should be the subject of compensation. If a person, as the direct consequence of an injury, loses his time and money in treating his injury, to say that the latter shall be paid back and the former be without compensation is both unjust and illogical. Indemnity requires it, and the [105] general and accepted rule in analogous cases fully supports it.³ Some of the cases cited were actions for breach of contract, and are therefore precisely in point; others were based on the defendant's negligence, and were for personal injuries resulting therefrom, and upon principle are apposite to the point under review. The liability of an insurer to its insured for loss of time is not mitigated because the latter's employer allowed him wages during the time he could not work.⁴

§ 837. **Restatement of the measure and elements of damage.** As a conclusion, the rule of damages measuring the right of recovery in life insurance is: 1. Upon the death of the party insured the insurer becomes liable to pay the amount of the policy, and interest upon that sum, if there be delay. 2. When there is an injury not fatal, the accident insurer is liable to pay the insured damages, such as a jury may find included in

¹ Bickford v. Travelers' Ins. Co., 67 Vt. 418, 32 Atl. Rep. 230.

² Francis v. St. Louis Transfer Co., 5 Mo. App. 9.

³ Ransom v. New York & E. R. Co., 15 N. Y. 421; Williams v. Vanderbilt, 28 N. Y. 224, 84 Am. Dec. 383 (per Balcom, J.); Howe Machine Co. v. Bryson, 44 Iowa, 159, 24 Am.

Rep. 735; Drinkwater v. Dinsmore, 16 Hun, 250; Indianapolis v. Gaston, 58 Ind. 224; Morris v. C., B. & Q. R. Co., 45 Iowa, 29. See Bean v. Travelers' Ins. Co., 94 Cal. 581, 29 Pac. Rep. 1113.

⁴ Globe Accident Ins. Co. v. Helwig, 13 Ind. App. 539, 41 N. E. Rep. 976, 55 Am. St. 247.

the following elements: (1) Expense incurred. (2) Suffering resulting from the hurt received. (3) Loss of time during the disability caused by the injury.

§ 838. **Insurer's liability for terminating the contract.** A contract of life insurance is executory. If the insurer discontinues its business and transfers its assets and liabilities to another company, each policy-holder has a right to consider his contract at an end, and demand such damages as he may be entitled to.¹ If an insurer wrongfully refuses to receive a premium when it is tendered, some authorities hold that it is liable to the insured or the policy-holder for the full amount he has paid, with interest from the time each payment was made.²

¹ Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 274, 4 Sup. Ct. Rep. 390, and cases cited in the following notes.

² Alabama Gold L. Ins. Co. v. Germany, 74 Ga. 51; Meade v. St. Louis Mut. L. Ins., 51 How. Pr. 1; Helme v. Philadelphia L. Ins. Co., 61 Pa. 107, 100 Am. Dec. 621; Piedmont & L. Ins. Co. v. Fitzgerald, 1 Tex. Civil Cas. 784, 788; Suess v. Imperial L. Ins. Co., 64 Mo. App. 1; McCall v. Phoenix Mut. L. Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558; Fischer v. Hope Mut. L. Ins. Co., 69 N. Y. 161 (it seems); Braswell v. American L. Ins. Co., 75 N. C. 8; Insurance Co. v. Tullidge, 39 Ohio St. 240 (it seems); Union Central L. Ins. Co. v. Bernard, 33 id. 459; American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. Rep. 256; Lovick v. Providence L. Ass'n, 110 N. C. 93, 14 S. E. Rep. 506; Burrus v. Life Ins. Co., 124 N. C. 9, 32 S. E. Rep. 323; Marshall v. Franklin L. Ins. Co., 176 Pa. 628, 35 Atl. Rep. 204, 34 L. R. A. 159; Thompson v. New York L. Ins. Co., 21 Ore. 464, 28 Pac. Rep. 628 (it seems). This rule was formerly in force in Missouri (McKee v. Phoenix Ins. Co., 28 Mo. 383, 75 Am. Dec. 129), but is not now. Smith v. Charter Oak L. Ins. Co., 64 Mo. 330.

This measure of damages is sustained on the theory that the plaintiff

has not received any actual benefit from the contract. It was said in American L. Ins. Co. v. McAden, *supra*, that the plaintiff may in some sense, perhaps, be said to have enjoyed the protection which the policy afforded in the event of the death of the insured, but as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff, and no real disadvantage to the defendant. The parties, for anything that appears, upon the plaintiff's recovery, are placed precisely in the same situation they were in before the contract was made.

One who has been induced by fraud to take a policy and pay premiums thereon may, on receiving the contract, recover from the agent who perpetrated the fraud the sum paid. Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25.

If because of the negligence of insurer's agent in not forwarding an application for insurance it is not accepted prior to the death of the applicant, and it would have been accepted prior thereto, the company is liable in action of tort for the amount for which the policy would have been issued. Carter v. Manhattan L. Ins. Co., 11 Hawaii, 69.

This measure of damages is rested upon the principle that a party to an entire contract, who, after part performance, refuses to completely perform, can recover nothing for what he has done. The fault to be found with it lies in this: it ignores the fact that the insured has received a consideration for the money he has expended. A more just rule and one which affords the insured compensation for the wrong done him is that which prevails when the insurer becomes insolvent or is dissolved, and a claim is preferred against its assets or the fund which has been deposited to secure policy-holders. In such cases the insured has a claim for the value of the policy,¹ which is the amount it would cost on the day of dissolution or insolvency to purchase from a solvent company a policy of the same kind for a like sum and rate of premium. This is ascertainable by treating the difference between the premiums paid the first and to be paid the new insurer as an annuity for the assured's expectation of life, and calculating its cash value.² This rule applies to participating policies, except where bonuses have been declared and not paid, in which case their amount is to be added to the sum originally insured.³ Where the insurer's breach occurs and suit is brought during the insured's life, but he dies before judgment, "the value of the policy is its present worth as at the date of the repudiation of the contract by the company of the sum insured and payable at the death of the person whose life was insured, to be abated, however, by the present value at the same date of the premiums subsequently accrued, and also by the amount of the premiums previously accrued (which are unpaid) and interest thereon."⁴

¹ *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. Rep. 390; *People v. Security L. Ins. & A. Co.*, 78 N. Y. 114, 34 Am. Rep. 522; *Attorney-General v. Guardian Mut. L. Ins. Co.*, 82 N. Y. 336.

² *Universal L. Ins. Co. v. Binford*, 76 Va. 103; *Clemmitt v. New York L. Ins. Co.*, id. 355; *Bell's Case*, L. R. 9 Eq. Cas. 706; *Holdich's Case*, 14 id. 72; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 727.

In Pennsylvania the insured may elect to acquiesce in the action of the

defendant, treat the contract as at an end, and recover the consideration paid, or refuse to recognize the action of the defendant as terminating the contract, go into the market and purchase what the defendant has refused to provide and call upon it to indemnify him against the cost of obtaining what he has been deprived of. *Marshall v. Franklin F. Ins. Co.*, *supra* (breach of contract for perpetual insurance against fire).

³ *Bell's Case*, L. R. 9 Eq. Cas. 706.

⁴ *Clemmitt v. New York L. Ins. Co.*,

If the insurer holds premium notes the amount they represent is, of course, to be deducted.¹

The measure of damages for refusing to continue a policy in force may depend upon the circumstances of the parties at the time the wrong is done, at least in jurisdictions where the recovery is not measured by the premiums paid. It is said in a Minnesota case: If at that time plaintiff's health had become impaired to such an extent as made it impossible to secure other insurance, the extent of his damages would be different than if new insurance could be had. If he could at that time have taken out other insurance in a similar company, the measure of damages would be the difference between the cost of such new insurance for the term of his natural life, according to the mortuary tables, and the cost of carrying the canceled policy for such term according to the rates established by the defendant's rules as of the age of entry. But if his health had become impaired, and new insurance could not have been procured, then the measure would seem to be the present value of such policy as of the date of death, according to such tables, less the estimated cost of carrying the same from the date of cancellation at his then age. The rates, as of the age of entry, as fixed by such rates, would be, *prima facie*, the cost of such insurance, and the burden would be upon defendant to show it otherwise.²

The cases which allow the insured to recover the premiums paid and interest thereon when the insurer refuses to receive such payments as are necessary to keep the policy alive are sustainable only on the theory that there has been a total failure of consideration. This is not correct, because the insured has had insurance during the life of the policy, and had the event happened which would have imposed liability upon the company, his right to recover would have been absolute.³ Further, that measure of liability might under some circumstances result in the recovery of a sum in excess of that for which the insurer is liable, as where the policy had been continued for a great many years, the insured life exceeding the

76 Va. 355, 363; *People v. Security L. Ins. & A. Co.*, *supra*.

¹ *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. Rep. 390.

² *Ebert v. Mutual Reserve Fund L. Ass'n*, 81 Minn. 116, 83 N. W. Rep. 506, 84 id. 457.

³ *Id.*

average. In *Speer v. Phoenix Mutual Life Ins. Co.*¹ a son had insured his father's life. The insurer refused, after the policy had been in force for some years, to receive further premiums. The court observed that the son had two remedies—one, to enforce the policy in equity by compelling the company to receive the premium and continue the insurance in force, the other to recover at law such damages as he had sustained.² The action was of the latter class, and the recovery was of the full amount paid as premiums with interest. Speaking for the court, Davis, P. J., said: "When the company broke this contract and the plaintiff decided to sue for damages instead of compelling the continuance of the contract, he was entitled to recover a sum that equaled the value to him of the policy; or, in other words, that would make good to him the loss he sustained by its breach. One mode of ascertaining that would be to determine the actual value of the policy at the time of the breach. By that is not meant what the company would be willing to pay for it as the surrender value under some rule of its own, but what it would cost the plaintiff to replace the broken contract by another of equal value to him for the same amount of insurance and at the same rate of annual premium. His father, on whose life the policy was taken, had advanced in years and doubtless in infirmities. The difference in cost in a responsible company of a policy upon his life, assuring the same at \$10,000 during life, would make good the loss caused by the breach. . . . Either this must be the true rule of damages if the life continue to be insurable, or if it has ceased to be insurable their mode of ascertainment should be one which shall determine the actual value of the policy at the time of the breach, as being a valid and obligatory one against an entirely responsible company.³ What that actual value

¹ 36 Hun, 322; *Brooklyn L. Ins. Co. v. Weck*, 9 Ill. App. 358; *Day v. Connecticut L. Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 693; *Connecticut L. Ins. Co. v. Houser*, 89 Ind. 258, 111 id. 266, 12 N. E. Rep. 479.

² Doubtless he might have tendered the premium as often as it became due, and, on the policy becoming payable, have tried the question of

forfeiture in an action to recover on it. *Day v. Connecticut L. Ins. Co.*, *supra*.

³ "If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in death, the insurers ought not to be permitted to escape the payment of the amount for which the life was insured, by putting an

might in that case be would depend upon facts and circumstances susceptible of proof, but not now before the court. The injustice of the mode actually adopted can be illustrated by the fact that if the plaintiff's father continued to live, and the plaintiff continued to pay the premiums, and the defendant to reserve them for a few years longer, the amount to be recovered upon the breach, under the rule applied in this case, would soon have exceeded the sum insured upon the life."

A surety company which breaches its contract to become surety upon a contractor's bond is liable to him for the expense incurred in procuring a new bond, though such company was one of two sureties.¹ Purely fraternal benefit associations are not liable for the unlawful cancellation of a membership because they act merely as trustees to collect and distribute a sick or death fund, and have no other fund, and no power to collect money for any purpose other than to meet such demands.²

§ 839. Refusal to issue paid-up policy. In an action by the holder of an ordinary life policy to recover for the breach of an agreement to issue in lieu thereof a paid-up life policy the damages are not measured by the amount paid as premiums because the action is not in disaffirmance of the contract, but by the difference between the value of the two policies,³ or the value of the paid-up policy and interest thereon.⁴ A policy on the joint lives of a husband and his wife stipulated that if default should be made in the payment of any premium after the second that the company would issue a paid-up policy for a sum equal to the full amount of the annual premiums paid at the time of default. An action was brought for the breach of this agreement while both the insured were living. No damages were proved, and therefore the recovery was limited to a nominal sum. In considering the difficulty of arriving at the measure of damages on account

end to the contract." *Piedmont & A. L. Ins. Co. v. Fitzgerald*, 1 Tex. Civ. Cas. 784, 789.

¹ *Samuels v. Fidelity & C. Co.*, 49 Hun, 122, 1 N. Y. Supp. 850.

² *Lavalle v. Societe St. Jean Baptiste*, 17 R. I. 680, 24 Atl. Rep. 467, 16 L. R. A. 392.

³ *American L. Ins. & T. Co. v. Schultz*, 82 Pa. 46; *Farley v. Union Mut. L. Ins. Co.*, 41 Hun, 303.

⁴ *Rumbold v. Penn Mut. L. Ins. Co.*, 7 Mo. App. 71; *Union Central L. Ins. Co. v. McHugh*, 7 Neb. 66; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410.

of the uncertainty of the duration of the lives of the insured, Valentine, J., said: "Evidently then, while both the parties are living, they should not be entitled to recover in an action for a failure to issue the policy more than one of them would be entitled to recover on such a policy at the death of the other. In fact, it would not seem that they would be entitled to recover as much. The use of the money is surely worth something. If one of the parties should die before judgment were rendered, then the amount of the judgment should probably be the amount for which the policy should have been issued, together with interest from the date of such death. If, however, both of the parties were living at the date of the judgment, the judgment should probably be for a sum which would purchase such a policy in a good and responsible life insurance company."¹ If the action for the breach of a clause in a policy which stipulated that it was non-forfeiting after a certain number of premiums have been paid is against a mutual company, and the insured held a participating policy, the reserve fund governs the extent of his recovery.² The presumption is that a company doing business has on hand such a fund as will meet the demands of policy-holders, and the *onus* is on the insurer to show the contrary.³

§ 840. **Liability of re-insurer.** Re-insurance is a contract of indemnity, and binds the re-insurer to pay the re-insured the loss sustained in respect to the subject insured, to the extent for which he is re-insurer.⁴ "Since the decision of the French court of admiralty at Marseilles in December, 1848,⁵ it has been uniformly held that, where the first insurer becomes insolvent, and, on a compromise with his creditors, pays only a certain percentage of the loss, the re-insurer is, nevertheless, bound to pay the re-insured the full amount of the loss to the extent of the re-insurance. The most carefully considered case, and perhaps the leading case upon this sub-

¹ Missouri Valley L. Ins. Co. v. Kelso, 16 Kan. 481.

² Nashville L. Ins. Co. v. Mathews, 8 Lea, 499. See Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; New York L. Ins. Co. v. Statham, 93 U. S. 24.

³ Nashville L. Ins. Co. v. Mathews, 8 Lea, 499.

⁴ May, Ins., § 11; National Mut. Ins. Co. v. Home Benefit Society, 181 Pa. 143, 37 Atl. Rep. 519, 59 Am. St. 666.

⁵ Cited, says Longworth, J., in Emerigon *Traité des Assurance*, Meredith's Translation, 202.

ject, is *Hone v. Mutual Safety Ins. Co.*¹ In this case the decision of the French admiralty court is followed, and the court repeat with approval the language of Emerigon and Roccus to the effect that the re-insurer is bound to pay the whole loss which is incurred by the first insurer."² The reason is that the insolvency of the original insurer in no wise affects the contract of re-insurance. There is no privity of contract between the original insured and the re-insurer. The contract of re-insurance is totally distinct from and unconnected with the original insurance, the holder of which has no kind of claim against the re-insurer, but only against the first insurer. Policies of re-insurance usually contain a condition that the loss, if any, is payable *pro rata*, and at the same time and in the same manner as by the re-insured company. Under such a clause the sum paid by the latter company is the measure of the re-insurer's liability.³ But where the latter's policy does not contain that clause it is liable to the re-insured for the amount named therein, if it does not exceed the amount of the loss, though the original insurer has not paid the full amount for which it was liable.⁴ If a claim is made against the insurer and notice thereof is given the re-insurer, the latter must exercise its election to contest or admit it within a reasonable time. If it does not disapprove of a suit or authorize the re-insured to settle it, the presumption is that it authorizes the litigation, and by just implication it must indemnify the re-insured against the costs and expenses necessarily and reasonably incurred in defending the suit.⁵ The effect of failing to defend after notice is to make the first insurer, by opera-

¹ 1 Sandf. 137, 2 N. Y. 235.

² Per Longworth, J., in *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11, 17, 43 Am. Rep. 413. To the same effect is *Blackstone v. Allemania Ins. Co.*, 56 N. Y. 104; *Consolidated Real Estate & F. Ins. Co. v. Cashow*, 41 Md. 59; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Strong v. American Central L. Ins. Co.*, 4 Mo. App. 7.

³ *Illinois Mut. F. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362.

⁴ *Insurance Co. v. Insurance Co.*,

38 Ohio St. 11, 43 Am. Rep. 413; *Gantt v. American Central Ins. Co.*, 68 Mo. 503, 540.

⁵ *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story, 458; *Gantt v. American Central Ins. Co.*, 68 Mo. 503; *Faneuil Hall Ins. Co. v. Liverpool, etc. Ins. Co.*, 153 Mass. 63, 26 N. E. Rep. 244, 10 L. R. A. 423; *Jackson v. St. Paul Ins. Co.*, 99 N. Y. 124; *Consolidated Ins. Co. v. Cashow*, 41 Md. 59.

tion of law, the agent of the re-insurer. Hence a judgment rendered against the former, after a defense made in good faith, would bind the latter; but it would be otherwise as to a judgment obtained by collusion.¹

It is incumbent upon the re-insured to prove the loss in order that it may have a cause of action against the re-insurer; this it must do in the same manner as the person insured must have proved it against the original insurer.²

¹ *Gantt v. American Central Ins. Co.*, 68 Mo. 503.

² *Yonkers, etc. F. Ins. Co. v. Hoffman Ins. Co.*, 6 Robert. 316.

CHAPTER XX.

LANDLORD AND TENANT.

SECTION 1.

LANDLORD AGAINST TENANT.

- § 841. Action for use and occupation.
842, 843. Same subject; measure of recovery.
844. Actions for rent; abandonment of lease.
845. Same subject; amount as affected by subsequent facts.
846. Recovery of rent payable in specific articles or as taxes.
847. Termination of lease by lessor.
848. Recovery of rent barred by eviction of lessee.
849, 850. Apportionment of rent.
851. Effect of partial destruction of demised property.
852. Effect of entire destruction of demised premises.
853. Effect of taking demised premises for public use.
854. Lessee's liability for interest.
855. Covenants for repairs.
856-858. Measure of liability for not making repairs.
859. Liability of assignee of lease for repairs.
860. Damages for repairs and non-repairs in special cases.
861. Covenants not to sublet or assign; liability for breach; proximate cause of loss.
862. Covenants to insure.

SECTION 2.

TENANT AGAINST LANDLORD.

863. Lessor's covenant for quiet enjoyment.
864. Same subject; the general rule of damages.
865, 866. Same subject; special, consequential and exemplary damages.
867-870. Same subject; recovery for damages to business.
871. Mitigation of damages by lessee.
872. Lessor's covenant to repair, etc.
873. Lessee's duty concerning repairs.
874. Same subject; liability for special and consequential damages.
875. Removal of fixtures.
876. Recoupment.

SECTION 1.

LANDLORD AGAINST TENANT.

[106] The principal claim of a landlord against his tenant is that for rent, or for compensation in some form for the use of the demised premises. Leases generally contain, however, other covenants or stipulations for breach of which the land-

lord may recover damages: as covenants to repair, not to sublet or assign, and to insure. All these will be discussed in their order.

§ 841. Action for use and occupation. This is an action of general *assumpsit* for reasonable compensation for the use of real estate with the permission of the owner, or one who is, as to the occupant, entitled to the rights of a landlord. In England this action is supposed to have been given by a statute of Geo. II.,¹ and it is probable that it did so originate; but the weight of American authority is that it is maintainable on the principles of the common law.² It must be founded upon contract, express or implied, creating the relation of land- [107] lord and tenant, and imposing upon the defendant the obligation to pay for the use of the premises.³ The form of the

¹ 11 Geo. II., ch. 19, sec. 14. "That act enabled the landlord to bring an action on the case for use and occupation, without being liable to be defeated by proof of a parol demise or agreement. But the action of debt for use and occupation lay at common law, and could not be defeated by proof of a demise not under seal reserving a certain rent." Smith's *Landlord & T.* 200.

² *Crouch v. Briles*, 7 J. J. Marsh. 255, 23 Am. Dec. 404; *Roberts v. Tennell*, 3 T. B. Mon. 247; *Burnham v. Best*, 10 B. Mon. 227; *Gould v. Thompson*, 4 Met. 227; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Eppes' Ex'rs v. Cole*, 4 Hen. & Munf. 161, 4 Am. Dec. 512.

In *Hogsett v. Ellis*, 17 Mich. 351, 371, *Christiancy, J.*, said: "Since the old notion that such a claim savors of the realty, and could therefore be recovered only by an action of a higher nature, has been quite generally exploded, and especially since the true theory of implied promises in *assumpsit* has come to be better understood and settled, and such promises no longer rest merely upon the inference that a promise *in fact* has been made, but upon the *duty* of

the defendant to *pay*, a duty which he will not be heard to deny that he has promised to perform, courts in this country have very properly held that *assumpsit* for use and occupation may be maintained at common law. And we are certainly unable to see why the implied promise to pay a reasonable compensation for the use of the owner's premises does not, within the limitations above laid down, come clearly within the principle of an implied promise at common law, as the like promise to pay for the use of a horse or the reasonable value of goods purchased."

³ *Taylor's Landlord & T.*, § 636; *Hood v. Mathis*, 21 Mo. 308; *Edmonson v. Kite*, 43 Mo. 176; *Kittredge v. Peaslee*, 3 Allen, 235; *Davidson v. Ernest*, 7 Ala. 817; *Bradley v. Dav-enport*, 6 Conn. 1; *Henwood v. Cheeseman*, 3 S. & R. 500; *Pierce v. Pierce*, 25 Barb. 243; *Dalton v. Laudahn*, 30 Mich. 349; *Logan v. Lewis*, 7 J. J. Marsh. 3; *Cook v. Medbury*, 150 Mass. 499, 23 N. E. Rep. 225; *Henderson v. Detroit*, 61 Mich. 378, 28 N. W. Rep. 133; *Alexander v. Alexander*, 52 Ill. App. 195; *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. Rep. 534; *Marr v. Ray*, 151 Ill. 340, 37 N. E. Rep. 1029, 26 L.

action, however, does not imply that it is based upon an express contract, nor does it presuppose a demise;¹ still if there be an actual lease not under seal² this action will lie, and such lease is admissible to establish the relation of landlord and tenant and to fix the amount of rent.³ A contract may be competent evidence for that purpose, though not valid as a lease under the statute of frauds.⁴ On a verbal lease for more than a year no action will lie where the statute requires it to be in writing; but if the statute has not declared such a lease to be void any use may be made of it by either party except that of bringing an action upon it. If the lessee enters under such a lease he may use it for the purpose of showing that he is not a trespasser, and after he has enjoyed the leased premises for the term he will be liable for the rent, not upon the express contract, but upon that implied by law from his use and oc-

R. A. 799 (the rule has been extended by statute in Illinois); Sievers v. Brown, 34 Ore. 454, 45 L. R. A. 642, 56 Pac. Rep. 171.

In Alabama a judgment or decree awarding damages for use or occupation or for the *mesne* profits incident to the wrongful possession of land is based upon the tort, and the defendant cannot claim exemptions as against the same. Gunn v. Hardy, 130 Ala. 642, 21 So. Rep. 443.

¹ Chambers v. Ross, 25 N. J. L. 293; Wilkinson v. Wilkinson, 62 Mo. App. 240; Skinner v. Skinner, 38 Neb. 756, 57 N. W. Rep. 534.

² In Michigan an action for use and occupation will lie on a sealed lease. Beecher v. Duffield, 97 Mich. 423, 56 N. W. Rep. 777, citing cases.

In New Hampshire *assumpsit* lies against a lessee holding under a sealed lease the covenants of which have been broken, to recover for any beneficial use in excess of the damage resulting from a breach of the covenants. Meredith Mechanic Ass'n v. American Twist Drill Co., 67 N. H. 450, 39 Atl. Rep. 330.

³ Burnham v. Best, 10 B. Mon. 227; Sargent v. Ashe, 23 Me. 201; Osgood

v. Dewey, 13 Johns. 240; Stevens v. Coffeen, 39 Ill. 148; Perrine v. Hankinson, 11 N. J. L. 181; Williams v. Sherman, 7 Wend. 109; Crawford v. Jones, 54 Ala. 459; Syllivan v. Stradling, 2 Wils. 214; Birch v. Wright, 1 T. R. 387; Wilkins v. Wingate, 6 id. 62; Brewer v. Palmer, 3 Esp. 213; Baker v. Holtzaffell, 4 Taunt. 45; Egler v. Marsden, 5 id. 25; Smith v. Stewart, 6 Johns. 46, 5 Am. Dec. 186; Van Beuren v. Wotherspoon, 74 App. Div. 123, 77 N. Y. Supp. 543; Bancroft v. Wardwell, 13 Johns. 489, 7 Am. Dec. 396; Weil v. Defenbaugh, 65 Ill. App. 489; Marr v. Ray, 151 Ill. 340, 37 N. E. Rep. 1029, 26 L. R. A. 799; Evans v. Winona Lumber Co., 30 Minn. 515, 16 N. W. Rep. 404; Steele v. Anheuser-Busch Brewing Ass'n, 57 Minn. 18, 58 N. W. Rep. 685; Gulf, etc. R. Co. v. Dunman, 85 Tex. 176, 19 S. W. Rep. 1073. See Williams v. Ladew, 171 Pa. 369, 33 Atl. Rep. 329, stated in § 842.

⁴ De Medina v. Polson, Holt's N. P. 47; Nachbour v. Wilner, 34 Ill. App. 237; Warner v. Hale, 67 Ill. 595; Herrmann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343.

cupation of the premises, and either party, it is believed, may use the contract to fix the amount to be recovered.¹

§ 842. **Measure of recovery.** Circumstances in the [108] conduct of the parties may suffice to show that the occupation was with the owner's permission, notwithstanding a notice to quit and a tacit agreement in respect to the amount of rent paid. Thus, a tenant had been occupying at a stipulated rent of \$250 a month, and the landlord served him with a notice to quit, having the effect to terminate the tenancy at the expiration of the current rent period; but it appeared that, before such service, the tenant had proposed to the landlord, through a third person, to continue his tenancy at \$300 per month; that the landlord expressed himself satisfied with it, though there was no evidence that he notified the tenant of his acceptance. The tenant remained in possession, and in an action for the rent the court said, "the inference is that he did so with the consent of the plaintiff, and that the proposal was accepted. We must infer this, or infer that he kept possession against the plaintiff's will and as a trespasser; and of the two inferences we adopt the former."² Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuance of the same terms is so strong that it is adopted as a rule of law.³ And where the assignee or the mortgagee of goods in a store building held under an

¹Roberts v. Tennell, 3 T. B. Mon. 247; Parker v. Hollis, 50 Ala. 411.

²Hoff v. Baum, 21 Cal. 120; Brinkley v. Walcott, 10 Heisk. 22; Griffin v. Knisely, 75 Ill. 411. See Keegan v. Kinnare, 123 Ill. 280, 14 N. E. Rep. 14.

In Chambers v. Ross, 25 N. J. L. 293, it was held that a landlord does not deprive himself of the right to recover rent of a tenant by erroneously disclaiming the relation, unless such disclaimer has been acted on by the tenant or prejudiced him.

³Butterfield v. Kirtley, 115 Iowa, 207, 88 N. W. Rep. 371; Baker v. Root, 4 McLean, 572; Ames v. Schuessler, 14 Ala. 600; Schilling v. Holmes, 23 Cal. 227; Whittenmore v. Moore, 9 Dana, 815; Carter v. Collar, 1 Phila.

339; Phillips v. Monges, 4 Whart. 226; Hemphill v. Flynn, 2 Pa. 144; Osgood v. Dewey, 13 Johns. 240; Evertson v. Sawyer, 2 Wend. 507; McCarty v. Ely, 4 E. D. Smith, 375; Clapp v. Noble, 84 Ill. 62; Parker v. Hollis, 50 Ala. 411; Meaher v. Pomeroy, 49 Ala. 146; Quinette v. Carpenter, 35 Mo. 502; Laugerenne v. Dougherty, 35 Pa. 45; Prickett v. R. tter, 16 Ill. 96; Weston v. Weston, 102 Mass. 514; New York, etc. R. Co. v. Randall, 102 Ind. 453, 26 N. E. Rep. 122; Roley v. Crabtree, 72 Ill. App. 581; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Goldsborough v. Gable, 152 Ill. 594, 38 N. E. Rep. 1025; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. Rep. 94, 28 Am. St. 636; German State Bank v. Herron, 111 Iowa, 25, 82 N.

unexpired lease to the assignor or mortgagor takes possession of the goods and uses the building in the ordinary way, he is liable for the stipulated rent, and not merely for a *quantum meruit* for use and occupation.¹ But the rule does not apply, and such an agreement is not implied where the lease contains collateral stipulations which could not be performed in a subsequent term;² nor where the intention to continue the same terms is otherwise rebutted by the provisions of the lease³ or the conduct of the parties;⁴ where notice is given that a higher [109] rent will be claimed,⁵ or the tenant gives notice of a different intention.⁶ A tenant of a city, in possession of a

W. Rep. 430; Dubuque Lumber Co. v. Kimball, 111 Iowa, 48, 82 N. W. Rep. 458.

¹ Hatch v. Van Dervoort, 54 N. J. Eq. 511, 34 Atl. Rep. 938; Cameron v. Nash, 41 App. Div. 532, 58 N. Y. Supp. 643; Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049.

A receiver has, subject to the order of the court, the right to elect whether he will perform the executory contract of his insolvent or not, and is entitled to a reasonable time after taking possession of the estate in which to make such election. But if he takes possession of the insolvent's leasehold estate and occupies the premises until the lease expires he must, in the absence of an agreement or notice to the contrary, pay the stipulated rent, though the lessor did not formally require an election. Spencer v. World's Columbian Exposition, 163 Ill. 117, 45 N. E. Rep. 250.

So long as an order of court providing for the payment by the receiver of the contract rent remains in force he cannot, though the lessor has become insolvent and judicial proceedings were pending to determine to whom the monthly rental should be paid, escape the payment of such rent. Liability for rent at that rate is not affected because the lessee deposited with the lessor a

sum of money which the lease provided should be liquidated damages if the lessee failed to carry out his contract. In other words, the receiver cannot apply such sum as part payment of the rent for the time of his occupancy of the premises if the damages sustained by the lessor because of the lessee's breach of the contract exceeds it. Blackall v. Morrison, 170 Ill. 152, 48 N. E. Rep. 705.

On electing to accept such an estate the receiver must take it as a whole; and after taking and holding possession of the premises for three months and conducting the business carried on therein by the insolvent, the receiver cannot, in the absence of any order by the court which appointed him, escape liability for rent by giving the lessor notice and surrendering possession. De Wolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. Rep. 1049.

² Diller v. Roberts, 13 S. & R. 60, 15 Am. Dec. 578.

³ Abbot v. Shepherd, 4 Phila. 90, 15 Am. Dec. 581, note.

⁴ Ossowski v. Wiesner, 101 Wis. 238, 77 N. W. Rep. 184.

⁵ Hoff v. Baum, 21 Cal. 120; Griffin v. Knisely, 75 Ill. 411; Mack v. Burt, 5 Hun, 28.

⁶ Delano v. Montague, 4 Cush. 42; Rand v. Purcell, 58 Ill. App. 228.

stall in a market, who continues in possession after the adoption of an ordinance discontinuing the market is liable only for the reasonable worth of the premises, regardless of the rent stipulated for in the lease.¹

Where the lease was not for an annual rent it has been held not to govern after the term expired, but other evidence was admissible to show what was a reasonable annual rent.² So it has been held that circumstances affecting the condition of the premises may be shown to diminish or increase the rent.³ The old lease is only evidence of a continuing agreement at a like rate in connection with the silence or other conduct of the parties evincing consent to abide by its terms for an extended time. Hence, any facts are admissible which contradict the inference of such consent.⁴ Thus, after a sufficient notice to quit to terminate a pending lease, a landlord served the tenant with notice that if he continued in possession after the date when the tenancy ceased under the notice, he would be charged with an increased rent, and it was held that such increased rent was recoverable.⁵ So where a tenant was let into possession during the currency of a term, the rent then being 47*l.*, with an agreement that at the end of the term he was to pay 80*l.*; and he paid the 47*l.*, but the agreement was abandoned in consequence of disputes arising in regard to it, though he continued to occupy, it was held that the jury should consider what was a fair rent for the continued holding, and that no necessary inference could be drawn from the former holding at 47*l.*⁶ If a tenant enters with the consent of two owners, but afterwards promises one to pay him his half, this has been held sufficient to entitle him to recover separately for his share.⁷

A special action may be maintained on an agreement which is absolute to pay rent for the use of real estate, though the tenant has not taken possession, where there is a demise, parol or otherwise, and the lessor is not at fault in preventing actual

¹ *Detroit v. Gleason*, 116 Mich. 564, 47 N. W. Rep. 880.

² *Evertson v. Sawyer*, 2 Wend. 507.

³ *Whittemore v. Moore*, 9 Dana, 315; *Clapp v. Noble*, 84 Ill. 82, 25 Am. Rep. 429. See *McCarty v. Ely*, 4 E. D. Smith, 375.

⁴ *Thomas v. Zumbalen*, 43 Mo. 471.

⁵ *Higgins v. Halligan*, 46 Ill. 173;

Amsden v. Blaisdell, 60 Vt. 386, 15 Atl. Rep. 332. See *Canning v. Fibush*, 77 Cal. 196, 19 Pac. Rep. 376.

⁶ *Thetford v. Tyler*, 8 Q. B. 95.

⁷ *Sargent v. Ashe*, 23 Me. 201.

enjoyment.¹ But general *assumpsit* for use and occupation [110] will not lie if the tenant has never gone into possession; though if he has taken a lease for a specified term, agreeing to pay rent, and gone into possession so as to vest the term, this action will lie for the rent of the whole term, although the tenant may have abandoned the possession before the stipulated period expired.² A mere tenant at will has no term vested in him and is only liable for actual occupation.³ He is liable in *assumpsit* for use and occupation for the interval between the termination of his lease and the election of the lessor to treat him as a trespasser. Where such tenant's right was confined to the use of water the damages were to be determined by the amount the plaintiff could reasonably and probably have got for its use from others if the defendant had surrendered possession at the end of his lease. The cost to him of water elsewhere or the loss if he did not get it were not material. While it was competent for the plaintiff to show that the sum named as consideration for the lease was not the entire consideration, it was error to receive testimony showing a mere incidental advantage to the landlord from the business conducted by the defendant.⁴ In order that there may be a recovery for use and occupation the plaintiff must show an actual use. Where the action was to recover for a building consisting of a store and lofts, they not being connected, the delivery of the key to the store and the continued use and occupation of the latter was not such a delivery of the lofts as supported a recovery for their use and occupation.⁵

§ 843. **Same subject.** Where the agreement was not signed by the lessee, and the lessor failed to fulfill on the point which was the principal inducement to it, it was held that the lessee

¹ Tully v. Dunn, 42 Ala. 262.

² Pinero v. Judson, 6 Bing. 206; Jones v. Reynolds, 7 C. & P. 335; Woolley v. Wathling, id. 610; Edge v. Strafford, 1 Cr. & J. 391; Sullivan v. Jones, 3 C. & P. 579; Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Adreon v. Hawkins, 4 Har. & J. 319; McGunnagle v. Thornton, 10 S. & R. 251; Coit v. Planer, 7 Robert. 413; Ward v. Wilcox, 1 Denio, 37;

Hoffman v. Delihanty, 13 Abb. Pr. 388; Hall v. Western Transportation Co., 34 N. Y. 284; Little v. Martin, 3 Wend. 219, 20 Am. Dec. 688; Westlake v. De Graw, 25 Wend. 669.

³ Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499.

⁴ Williams v. Ladew, 171 Pa. 369, 33 Atl. Rep. 329.

⁵ Herrmann v. Curiel, 3 App. Div. 511, 38 N. Y. Supp. 343.

could hardly be said to have enjoyed under the agreement, and the jury were instructed to allow compensation only according to the benefit he actually received.¹ The court said "that an eviction of part of the premises being shown; the jury was to ascertain, independently of any agreement, what the defendant ought to pay." The lessee not having executed the lease, he was not thereby bound to pay the rent reserved; and not having enjoyed what it purported to grant, the rent so reserved could not be regarded as the measure of recovery. In a later English case the lessors had not executed the indenture which purported to grant certain tolls for a year. It was held that the grantee, although he enjoyed the tolls for the full term, was not bound by the covenant on his part to pay the sum reserved as the consideration. Such sum, it was concluded, was fixed as the price of the conveyance of an estate or right in the tolls for a year, and though the grantee had received the tolls, the right or estate had not been granted; that in fact he had occupied under a mere license, and therefore there could be no recovery except on a *quantum meruit*.² Where the amount of rent or compensation for the use has not been fixed by agreement it is a *quantum meruit* claim; the landlord is only entitled to what it was reasonably worth, [111] and this must be ascertained by the jury upon evidence. If the property was untenanted that fact will affect the amount of recovery.³ If it might have been leased but for the defendant's occupancy the sum which it would have rented for measures the recovery,⁴ though the defendant did not use it for the purpose for which it was adapted, but for one which did not require the use of all the premises.⁵ The liability of the occupier is measured by the value of his occupancy at the time he enters upon the property. Subsequent fluctuations in its value do not affect the amount which may be recovered of him.⁶

¹ Tomlinson v. Day, 2 B. & B. 680.

² Swatman v. Ambler, 8 Ex. 72.

³ Brolaskey v. Loth, 5 Phila. 81;

Potter v. Truitt, 3 Harr. 331; Meeker v. Gardella, 1 Wash. 139, 23 Pac. Rep. 837; Vandervoort v. Gould, 36 N. Y. 639; Knox v. Singmaster, 75 Iowa 64, 39 N. W. Rep. 183.

⁴ Galveston Wharf Co. v. Gulf, etc. R. Co., 72 Tex. 454, 459, 10 S. W. Rep. 537.

⁵ Horton v. Cooley, 135 Mass. 589.

⁶ Pope v. United States, 26 Ct. of Cls. 11; Johnson v. Same, 2 id. 391.

A tenant in common who ousts his co-tenant from possession is liable for the reasonable rental value of the land, and not merely for such sum as he received therefor.¹ One who is a joint owner of one-fourth of a building, the other three-fourths of which have been leased to a tenant who necessarily occupied the whole of it, cannot affect the rights of the tenant under his lease by failing to agree with him as to the rent to be paid for his interest. And where such owner has received rent at the same rate as his co-owners, he cannot claim more; that will be deemed to be a reasonable rent.² Where an entry was made upon land and certain rights were acquired upon condition that the party acquiring them should fill with water once a week a tank owned by the other party, and on failure to do so the owner sued for the land and for damages, thus terminating the contract, he was entitled to recover the value of the use and occupation of the land and privileges held by the other party subsequent to the time of bringing suit; the damages prior to that time were measurable by the contract and consisted of the loss from the failure to fill the tank.³

The action to recover for use and occupation is an equitable one, and the plaintiff can recover no more than is equitably due.⁴ Where the defendant was turned out of possession of a demised farm, after making preparations for crops which he could not reap, so that he received no benefit from the occupation, it was held that the plaintiff could recover nothing.⁵ A certain share of the profits of a tavern and farm was stipulated to be paid for their use, and it was held to be a money rent; though the amount was uncertain, that was no impediment to recovery on a count for use and occupation. The uncertainty would be removed by such proof as the plaintiff might be able to produce. If unable to prove the actual profits, he might resort to proof of the value. And the defendant whose appropriate duty it was to keep and render an account of the profits, as well as to pay the plaintiff his share, might

¹ *Boggs v. Douglass*, 105 Iowa, 344, 75 N. W. Rep. 185. See *Collins v. Collins*, 8 App. Div. 502, 40 N. Y. Supp. 902.

² *Nott v. Owen*, 86 Me. 98, 29 Atl. Rep. 943, 41 Am. St. 535.

³ *Gulf, etc. R. Co. v. Dunman*, 85 Tex. 176, 19 S. W. Rep. 1073.

⁴ *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 66 N. H. 539, 30 Atl. Rep. 1119.

⁵ *Wheeler v. Shed*, 1 D. Chip. 208; *Gilhooley v. Washington*, 4 N. Y. 217.

exhibit proof of the actual profits in order thereby to limit the demand against him.¹

To establish the rental value evidence may be received showing what the property had rented for in years immediately preceding the period in question, and also what other similar tenements rented for in the same neighborhood at and about the same time.² On this point Whitman, C. J., said: "Nothing is more common, in ascertaining the value of one thing, than to compare it with others of known value and of a similar description. Money itself is but a thing of known and fixed value; and we are continually comparing all other things with it by way of fixing their value. If two dwelling-houses are nearly contiguous, and one of them has a known and fixed value and the other has not, but its value has to be ascertained, resort may be had to a comparison of the one with the other for that purpose. Our constant course of reasoning is from things known to things unknown; and our deductions depend upon it. Our conclusions from circumstantial evidence are of this nature; and the evidence here relied upon to prove the value of a tenancy is of this class. The leases of the store in question in former years, to which one of the defendants was a party, were properly admissible. These show what he had admitted the value of the tenancy to be in years immediately previous. If rents had fallen, it would have been competent for the defendants to have shown it by way of lessening the effect in a greater or less degree arising from such admission."³ But evidence of what one had paid for the use of the property is not admissible as a ground and measure of his recovery against another.⁴ The opinions of witnesses, having knowledge of the particular subject, are generally held admissible on questions of value.⁵

§ 844. Actions to recover rent—Abandonment of lease. Actions for the recovery of rent are generally for a fixed sum, either reserved by a written instrument or made certain by oral agreement. In either case, when the contract is proved the jury have but to ascertain the amount in arrear and in-

¹ Perrine v. Hankinson, 11 N. J. L. 181.

² Fogg v. Hill, 21 Me. 529.

³ Id.

⁴ Moore v. Harvey, 50 Vt. 297.

⁵ Gulf, etc. R. Co. v. Dunman, 85 Tex. 176, 182, 19 S. W. Rep. 1073, citing the text. See §§ 444, 445, 654.

terest, unless on some ground of defense there is a right to an abatement, or the right of action or liability is divided by conveyance of the reversion or assignment of the term. The only difference in substance between an action directly on the terms of the lease and an action for use and occupation is that in the one the declaration is special and in the other general; the purpose of both actions is the same, and both arise upon contract.¹ If the lessee removes from or refuses to occupy the premises during the term or to pay rent, and an action is brought to recover before the term has expired, the recovery may include the amount due up to the time of the trial,² and no reason is perceived why it might not embrace the whole sum which will become due according to the terms of the lease.³ An action may be brought to recover each successive installment of rent as it falls due.⁴ The stipulated rent is not to be diminished because the lessee has paid for water which was essential to the enjoyment of the premises, the lessor not having agreed to pay for it.⁵ In the absence of an agreement that monthly rent shall be paid in advance, it is not due until the end of the month.⁶ A statute making a tenant liable for double rent for the time he remains in possession of the premises after the expiration of his term applies where he so remains because of necessity.⁷ It is not a defense to an action for rent that after the tenants took possession they used the leased premises for lewd purposes and the landlord took no steps to put them out.⁸ If the landlord, without being bound so to do, makes repairs with the consent of the tenant, and while he is in possession, completing them with reasonable

¹ *Dalton v. Laudahn*, 30 Mich. 349.

² *Cummins v. Hanson*, 10 Daly, 493.

³ *Cleveland v. Bryant*, 16 S. C. 634.

It is held in *Lennox v. Vandalia Coal Co.*, 158 Mo. 473, 59 S. W. Rep. 242, that a landlord cannot amend his petition so as to include a claim for rents accrued since the suit was brought; to do so, it is said, would be to state a new cause of action.

⁴ *McDole v. McDole*, 106 Ill. 452; *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. Rep. 807, 75 Am. St. 181.

⁵ *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. Rep. 254.

The landlord is bound to pay water rents in New York if it is not otherwise agreed. *Darcey v. Steger*, 23 N. Y. Misc. 145, 50 N. Y. Supp. 638.

⁶ *Dauchy Iron Works v. McKim Gasket & Manuf. Co.*, 85 Ill. App. 584; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312.

⁷ *Regan v. Fosdick*, 18 N. Y. Misc. 556, 42 N. Y. Supp. 471.

⁸ *Cogle v. Densmore*, 57 Ill. App. 591.

promptness, the tenant's liability for rent is not affected, although he was excluded from the premises while the repairs were being made.¹ The defense of *ultra vires* will not prevent the collection of past-due rent by a lessor corporation to a lessee corporation which has secured the payment thereof by sureties, the contract not being *malum in se*, or expressly prohibited by law, but not being within the expressed or implied powers of the lessor.²

The damages for the abandonment of a lease by the tenant are measured by the difference between the rent agreed to be paid and the sum the landlord could have realized from the premises by the use of due diligence after they came into his possession.³ The landlord does not release his tenant from liability under the lease by re-entering the premises after they have been abandoned; the tenant's only right is to be credited with the amount the landlord may realize from them.⁴ Where the reletting is done for the benefit of the tenant he cannot complain of the terms — as where a tenant was secured for the remaining three months of the lease on condition that no rent should be paid for the first two months.⁵

The general rule that the party injured by the breach of a contract or by a tort is bound to take reasonable measures to mitigate his damages finds its principal exception in cases of

¹ *Petz v. Voigt Brewing Co.*, 116 Mich. 418, 74 N. W. Rep. 651.

² *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. Rep. 390, 36 L. R. A. 664. See *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. Rep. 808; *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. Rep. 528, 92 Ill. App. 175.

³ *Resser v. Corwin*, 72 Ill. App. 625; *Cleveland v. Bryant*, 16 S. C. 634; *Segal v. Ensler*, 16 N. Y. Misc. 43, 37 N. Y. Supp. 694; *Rich v. Doyenn*, 85 Hun, 510, 33 N. Y. Supp. 341.

Where a total and final breach of a lease occurs by the insolvency of a banking corporation which was the lessee and the repudiation of the lease by its receiver, the lessor should

immediately declare the breach to be total, and is entitled to establish his claim against the estate. The damages are measured by the difference between the rent stipulated in the lease and the actual rental value for the balance of the term. *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. Rep. 1024, 38 L. R. A. 415; *Ex parte Inglis*; *In re Paulin*, 4 N. Z. L. R. (Sup. Ct.) 1338; *Ex parte Llynvi v. Coal & Iron Co.*; *In re Hide*, L. R. 7 Ch. 28.

⁴ *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. Rep. 807, 75 Am. St. 181; *Bradley v. Walker*, 93 Ill. App. 609; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. Rep. 713.

⁵ *James v. Rubino*, 30 N. Y. Misc. 452, 63 N. Y. Supp. 468.

this kind. The landlord is under no obligation to rent premises which have been abandoned by a tenant.¹ On the abandonment of a contract to rent rooms with table board for a term stated and at a price fixed, "with no deduction in case of absence," the damages are not limited to the profits the plaintiff would have made if there had been no breach, but include the contract price.² Where the lessee entirely abandons his contract and stands by after notice given and acquiesces in the sale at auction of the lease contract as stated in the notice, being fully informed that he would be responsible for whatever difference there might be between the price obtained at the sale and that which he contracted to pay, he cannot complain that his liability is so measured, the sale being fairly made. If he alleges that the amount bid at such sale was not the fair value of the lease he has the burden of establishing that fact. The lessor may be the purchaser at such sale, and the damages may be recovered at once before the expiration of the term. In computing such damages no account is to be taken of a covenant in the lease for its renewal at the option of the lessee.³

§ 845. Amount of rent recoverable as affected by subsequent facts. In certain cases the amount of rent depends on subsequent facts — as where it is a certain proportion of the profits to be realized from the use of the demised premises;⁴ where it is to be calculated at some rate upon the production of a mine or quarry,⁵ or must be fixed by arbitration.⁶ If after

¹ *Aberdeen Coal & Mining Co. v. Evansville*, 14 Ind. App. 621, 43 N. E. Rep. 316; *Milling v. Becker*, 96 Pa. 182; *Patterson v. Emerich*, 21 Ind. App. 614, 52 N. E. Rep. 1012; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. Rep. 914; *Rice v. Dudley*, 65 Ala. 68; *Ledoux v. Jones*, 20 La. Ann. 539; *Randall v. Thompson*, 1 W. & W., § 1102; *Respini v. Porta*, 89 Cal. 464, 26 Pac. Rep. 967, 23 Am. St. 488; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. Rep. 576; *Bowen v. Clarke*, 11 Ore. 566, 30 Pac. Rep. 430, 29 Am. St. 625; *Gray v. Kaufman Dairy & Ice Cream Co.*, 9 App. Div. 115, 41 N. Y. Supp. 73;

Clendinning v. Lindner, 9 N. Y. Misc. 682, 30 N. Y. Supp. 543.

² *Wilkinson v. Davies*, 146 N. Y. 25, 40 N. E. Rep. 501.

³ *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. Rep. 417.

⁴ *Perrine v. Hankinson*, 11 N. J. L. 181.

⁵ *Brainerd v. Arnold*, 27 Conn. 617; *Cross v. Tome*, 14 Md. 247; *Maloney v. Love*, 11 Colo. App. 288, 52 Pac. Rep. 1029.

⁶ *Viany v. Ferran*, 5 Abb. Pr. (N. S.) 110.

In order that a party may be entitled to relief in equity on the

agreeing to so fix the rent one of the parties refuses to act in selecting an arbitrator a court may execute this feature of the contract by a reference.¹ Under a covenant in a lease that if the landlord re-entered for the non-payment of rent he [113] might relet the premises as the tenant's agent, and that the tenant should be liable for any deficiency, the landlord, if he re-enters and relets and brings an action for a deficiency before the rent under the new lease becomes due, can only recover the difference between the rent reserved by the original lease and that agreed to be paid by the new tenant. By commencing the action without waiting to see if the new tenant pays according to his agreement he assumes the hazard of his default. In such an action the landlord cannot recover for the expenditures made by him upon the premises after re-entry, although by reason thereof he was enabled to relet at an enhanced rent.²

In a case where the rent reserved was a certain fixed proportion of the price of stone which the lessees might get out of the demised premises and sell, to be paid to the lessor in a reasonable time after the stone should be sold and paid for, it was held that the lessees were under an obligation to work the quarries in a reasonable manner during the term. The case was deemed analogous to a letting of land upon shares, as it is termed, where it is said it would hardly be claimed it would be optional with the lessee whether he would cultivate it or not. The very nature of the contract in these cases implies that the property is to be cultivated for the mutual benefit of

ground that the appraisers have overvalued the property, for the purpose of fixing the rent, it must be shown that there was either illegality in the appointment of the appraisers, in their procedure, or as to matters considered by them, or a violation in some way of the provisions of the lease concerning the making of the valuation, or something equivalent to fraud or mistake, other than error of judgment. *Board of Education v. Frank*, 64 Ill. App. 367. See *Zorkowski v. Astor*, 13 N. Y. Misc. 507, 34 N. Y. Supp. 948.

¹ *Viany v. Ferran*, 5 Abb. Pr. (N. S.) 110. See *Mostyn v. Fitzsimmons*, [1902] 1 K. B. 512, as to liability for the costs of a reference.

A court of equity will determine the value of property as the basis for fixing rents under a lease providing for periodical valuations if an appraisalment cannot be secured as contemplated in the lease, and it is provided therein that in such case either party may resort to the courts. *Springer v. Borden*, 154 Ill. 668, 39 N. E. Rep. 603, 54 Ill. App. 557.

² *Hackett v. Richards*, 13 N. Y. 138.

the lessor and lessee.¹ This obligation is more precisely defined in a Pennsylvania case. Upon a lease of coal land at a fixed price per bushel for all that should be mined, there being no stipulation as to the quantity to be mined, it was held that the lessors were entitled to recover in an action of covenant the stipulated rate for all that could reasonably have been mined, but deducting on the part not mined its value unmined.² In a more recent case in the same court a farm was leased for the purpose of exploring for and producing oil. The lessee was bound to continue with diligence and without delay to prosecute the business to success or abandonment;³ and in the former case to go on without interruption and pay a royalty of one-eighth of the production. Two wells were bored, both of which produced oil; the lessee refused to bore others. In an action for the breach of the covenant the following instruction, given the jury, was approved by the appellate court: "Ascertain how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the time when it should have been delivered to him; from this deduct the cost of producing what ought to have been produced at the time, under the circumstances, and with the appliances then known, and add to this remainder the interest on it from the time when the oil ought to have been produced to the present time, and this will be the measure of damages sustained by the plaintiff." It is said in the opinion of

¹ *Brainerd v. Arnold*, 27 Conn. 617; *Koch & Balliet's Appeal*, 93 Pa. 434 (equity will not take jurisdiction to compel the lessee to prosecute work; an action at law for breach of the covenant clearly lies).

In an Iowa case the lessee of coal land agreed to begin work as soon as practicable and to mine coal, provided there was found a workable vein of merchantable coal, and in that case to pay a stipulated monthly royalty. No effort was made by him to find coal, and there was no evidence, aside from an allegation in the complaint, that it could be found. It was ruled that there could be no recovery of royalty and that the

damages were nominal. *Carl v. Granger Coal Co.*, 69 Iowa, 519, 29 N. W. Rep. 437. See *Cook v. Andrews*, 36 Ohio St. 174; *Cleopatra Mining Co. v. Dickinson*, 28 Wash. 211, 68 Pac. Rep. 456.

² *Lyon v. Miller*, 24 Pa. 392, approved in *Martin v. Berwind-White Coal Mining Co.*, 114 Fed. Rep. 553; *Cross v. Tome*, 14 Md. 247. See *Filey v. Meyers*, 43 Pa. 404.

³ See *Glasgow v. Chartiers Oil Co.*, 152 Pa. 48, 25 Atl. Rep. 232; *McKnight v. Manufacturers' Natural Gas Co.*, 146 Pa. 185, 23 Atl. Rep. 164, 28 Am. St. 790; *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. Rep. 502; *Hamilton v. Oil Co.*, 8 Ohio Dec. 372.

the supreme court: "We do not think damages for not securing flowing oil are to be ascertained exactly as if they were a stationary mineral. If oil be not utilized at a proper time it may be lost forever by reason of others operating near by. Not so with stationary mineral. It remains for future development. While there is some difficulty in the way the damages were ascertained in this case, yet no better or more accurate manner is pointed out."¹ In a case in which the lessee, in order to avoid the payment of royalties under an oil and gas lease, instead of drilling wells on the leased property, drilled a well on adjoining property which he controlled in such a manner as to drain the oil from the leased land, and it was impossible to determine how much oil was obtained from the latter, he was adjudged liable for royalties on all the oil produced.² But on a reargument of the case the court concluded that the doctrine applied was harsh, and held the lessee liable for royalties on a portion of the oil produced through such well, ascertained by comparing it with the total production in the proportion the lessee's land, within the circle drained, bore to the whole area drained, the producing capacity of every part being the same.³ Where a demise was made for a term of years of all the lessor's right in the coal in a certain estate, reserving 8*d.* per ton of coal worked, raised or got in each year, not exceeding thirteen thousand tons in any year, or that amount in money, viz., 43*3*l. 6*s.* 8*d.*, each year as fixed rent, whether the coal should be worked or not, and the lessee covenanted accordingly, it was held that the whole rent [114] stipulated for was payable, although the mine was so exhausted that the lessee could not raise thirteen thousand tons in a year. The court held that a fixed rent was stipulated, coupled with a covenant that the mine should be worked to that extent; and the covenant did not carry with it, by any implication, a condition that there should be coal to that amount capable of being worked.⁴

¹ *Bradford Oil Co. v. Blair*, 113 Pa. 83, 4 Atl. Rep. 218. See *Harris v. Oil Co.*, *Hamilton v. Oil Co.*, *supra*.

² *Kleppner v. Lemon*, 197 Pa. 430, 47 Atl. Rep. 353.

³ *Kleppner v. Lemon*, 198 Pa. 581, 48 Atl. Rep. 483.

⁴ *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Jervis v. Tomkinson*, 1 H. & N. 195. Compare *Clifford v. Watts*, L. R. 5 C. P. 577. See *Swan v. Brown*, 8 Kan. App. 505, 56 Pac. Rep. 141.

In *Prestons v. McCall*, 7 Gratt. 121,

Under a lease stipulating for the payment of certain royalties upon the product of a mine, and that if they fell in any year below \$1,000 the lessee should pay such additional sum as shall make the royalty for that year amount to \$1,000, which sum was to be taken to be the royalty for that year, the amount named was to be paid annually as rent if the royalties fell below it.¹ A covenant that not less than a specified number of bushels of coal shall be mined annually, and a fixed royalty be paid on each bushel, and that, in default of mining such quantity, the stipulated royalty thereon should be paid, is valid as a provision for liquidated damages,² which may be collected notwithstanding the receipt of royalty on the coal actually mined. Such provision was not void because the coal mined was of an inferior quality, it not being unmerchantable.³ A mining lease provided for a stated royalty and for a minimum monthly production and a minimum rental; it also gave the lessee the privilege of using a shaft on the leased land for the purpose of mining coal from adjoining land. The lessee's liability for the monthly rental continued so long as he used the shaft, notwithstanding the coal on the lessor's land was exhausted.⁴ A condition in a lease for a reduced rent if the lessee failed to secure a retail liquor license has application where such license was granted for the first year of the lessee's occupation, but was refused thereafter.⁵ If a tenant of a coal mine is to pay the lessor in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is his duty to deliver it in a mar-

the tenant of a salt works was bound to pay as rent two-thirds of the salt manufactured, and to manufacture at least sixty thousand bushels per annum. He failed to manufacture that quantity. It was held that the rent to be distrained for or recovered was governed by the actual amount manufactured; that for failure to manufacture the required amount in any one year the proper action would be for damages occasioned thereby, and not for specific rent of sixty thousand bushels of salt.

¹ *Lehigh Zinc & Iron Co. v. Bam-*

ford, 150 U. S. 665, 14 Sup. Ct. Rep. 219.

² *Martin v. Berwind-White Coal Mining Co.*, 114 Fed. Rep. 553.

³ *Coal Creek Co. v. Tennessee Coal, etc. Co.*, 106 Tenn. 651, 63 S. W. Rep. 162; *Powell v. Burroughs*, 54 Pa. 329. See *Lehigh, etc. Coal Co. v. Wright*, 177 Pa. 387, 39 Atl. Rep. 919; *Central Appalachian Co. v. Buchanan*, 73 Fed. Rep. 1006, 20 C. C. A. 33.

⁴ *Lennox v. Vandalia Coal Co.*, 158 Mo. 473, 59 S. W. Rep. 242.

⁵ *Rea v. Ganter*, 152 Pa. 512, 25 Atl. Rep. 539.

ketable condition; and if not so delivered the expense necessarily incurred by the landlord in preparing it for market may be charged to the tenant.¹ And if such a lessee, in violation of his covenants, neglects to keep *data* showing for what coal he is liable to pay royalty, and mixes up different classes of coal so as to render it difficult to prove for how much he is liable to pay royalty, the court will presume against him, and will not in assessing the amount pare it down too carefully.²

Where the lessee was to pay cash rent equal to the value of a fixed per cent. of the crops raised and \$3 per acre for all meadow and ground left untilled, he was not liable for such amount as to a tract of land which could not be tilled because of excessive rains, but was liable therefor as to another tract which was capable of cultivation, but which he made no effort to till.³ In the absence of evidence showing the loss of profits resulting from the breach of a contract to give a performance at a theater and to pay a fixed percentage of the gross receipts as rental, there can only be a recovery of the expense incurred by the lessor under the contract in preparing the theater for the use of the lessee. Evidence of the rental value of the theater is immaterial.⁴ The insolvency of a lessee is not a "fortuitous event," *i. e.*, "that which happens by a cause which we cannot resist," so as to exempt him from payment of rent under a lease conditioned therefor.⁵ Where the lessee's obligation is to pay rent for such time as he occupied the premises he may show that a third person was in possession of them with the lessor's consent.⁶

§ 846. Recovery of rent payable in specific articles or as taxes. If rent is payable in specific articles the measure of damages for failure to deliver them is the same as upon other contracts for the delivery of specific articles — their value when they should have been delivered.⁷ Where the rent is a fixed amount so payable, the lessee is entitled to pay in that

¹ Audenried v. Woodward, 28 N. J. L. 265.

² Brown v. Samson, 8 N. Z. L. R. 284.

³ Monnett v. Potts, 10 Ind. App. 191, 37 N. E. Rep. 729.

⁴ Hughes v. Robinson, 60 Mo. App. 194.

⁵ Taylor v. Syme, 162 N. Y. 513, 57 N. E. Rep. 83.

⁶ Ladd v. Hawkes, 41 Ore. 247, 63 Pac. Rep. 422.

⁷ Brooks v. Cunningham, 49 Miss. 108; Brown v. Adams, 35 Tex. 447. See Safely v. Gilmore, 21 Iowa, 588, 89 Am. Dec. 592.

mode at the time when the rent is due; but if he does not avail himself of that privilege he is bound to pay that amount in money with interest after it becomes due. In other words, it is like any other debt payable in specific articles.¹ It has been adjudged that where there is no stipulation concerning the manner of cultivating land which is leased for a share of the crops, the lessor has no claim because of the negligence or incapacity of the tenant;² but the better rule is that bad husbandry is a proper subject of recoupment under the general issue.³

On the breach of a covenant to leave as much wheat growing upon the ground as there was upon the farm at the date of the lease, if there has been a failure to sow a part of the farm, and there is no evidence to show what such part would have produced if it had been sown, the lessee is liable upon the basis of the deficiency from the last crop, estimated at the market price at the time of the breach.⁴ If a tenant has bound himself to pay a part of the crop or its value, he cannot avoid that obligation by showing that a part of the crop could not be gathered without much inconvenience and unusual expense. The failure to perform can only be excused by the act of God, the public enemy or the landlord.⁵

A covenant to pay all taxes and assessments which shall be levied upon the demised premises during the term is broken when the neglect to so do occurs. The amount, as between the lessor and lessee, becomes the latter's debt, for which he is not liable to the lessor until he has paid it. The sum levied constitutes the measure of the lessee's liability.⁶ Liability under a lease for taxes, assessments for paving, flagging or repairing streets, but not for assessments for opening streets, squares, or for other

¹ See § 657.

² *Patton v. Garrett*, 37 Ark. 605.

³ *Gregory v. Tomlinson*, 68 Vt. 410, 35 Atl. Rep. 350.

⁴ *Button v. Kinnetz*, 88 Hun, 35, 43 N. Y. Supp. 522.

⁵ *Johnson v. Bryant*, 61 Ark. 312, 32 S. W. Rep. 1081.

Where the lease contained the lessor's promise that in case of loss of crops by hail or drought he would stand one-half the loss, the conclusion

was reached that one-half of the value of what is estimated to be an average crop, at the market price thereof in a year when crops are a failure, is too remote and conjectural to constitute a proper measure of damages. *Hotchkiss v. Patterson*, 5 Kan. App. 358, 48 Pac. Rep. 435.

⁶ *Trinity Church v. Higgins*, 48 N. Y. 532; *Fontaine v. Schulenberg & B. L. Co.*, 109 Mo. 55, 18 S. W. Rep. 1147.

public purposes of an extraordinary character, or for permanent improvements, does not include the expense of laying a new pavement of a different material on the street, the expense thereof being equal to two years' rent; such pavement is a permanent improvement.¹ In an English case² the lessee, under a lease determinable by six months' notice, stipulated to pay charges, duties, assessments and impositions against the premises or upon the lessor in respect thereof. The expense of paving a new street was included, notwithstanding the work was commenced after notice to determine the lease had expired, the local authorities having given the lessor notice of the apportionment and charge, which made the latter operative. A covenant to pay all taxes, rates, duties and assessments whatsoever which shall become payable for or in respect of the premises, whether parliamentary, parochial or otherwise, except the lessor's property tax, covers the cost of drainage works put in pursuant to local authority.³ The obligation to pay drainage rate and all other rates, etc., taxed, charged, assessed or imposed upon the premises, or on the lessor for or in respect of them, includes the duty to repair a drain pursuant to an order of the public authorities, and on failure to do so the lessee is liable for expenses incurred by the lessor in complying with such order.⁴ A covenant to pay all taxes during the existence of the lease does not include taxes which were a lien before the term began, and were levied for a period wholly anterior to it, though they were payable during the term.⁵ The obligation to pay all taxes laid during the term includes taxes assessed during the term.⁶ Under a lease providing that the tenant shall pay all assessments levied or charged during his term, liability exists where a portion of the leased land has been taken for street widening purposes and an assessment is made against the property on account of benefits, notwithstanding an apportionment of such assessment by public officers between the leasehold and the reversion, and irrespective of the amount

¹ *Ten Eyck v. Rector, etc.*, 65 Hun, 128. See *Foulger v. Arding*, [1902] 194, 20 N. Y. Supp. 157, affirmed K. B. 700.

without opinion, 141 N. Y. 588.

⁴ *Smith v. Robinson*, [1893] 2 Q. B. 53.

² *Wix v. Rutson*, [1899] 1 Q. B. 474.

⁵ *McManus v. Fair Shoe & Clothing*

³ *Farlow v. Stevenson*, [1900] 1 Ch. Co., 60 Mo. App. 216.

⁶ *Elliot v. Gantt*, 64 Mo. App. 248.

of an award to the landlord.¹ The obligation to pay the charge imposed according to law for water used on the demised premises, consisting of a six-story and basement building, the lessee having possession of two floors and the basement, cannot be enforced where one meter measures all the water used in such building.²

§ 847. Termination of lease by lessor. If the landlord accepts a surrender,³ puts an end to the lease for any cause before [115] the expiration of the term,⁴ or evicts the tenant from any part of the demised premises his right to rent will thereupon cease or be suspended;⁵ and if this be done between the days specified in the lease for its payment the rent for the current period will be lost, for there can be no apportionment for a

¹ *Arthur v. Harty*, 17 N. Y. Misc. 641, 40 N. Y. Supp. 1091.

² *Bristol v. Hammacher*, 30 N. Y. Misc. 426, 62 N. Y. Supp. 517.

³ *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. Rep. 1080; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. Rep. 820, 37 Am. St. 248; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. Rep. 957; *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. Rep. 629; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 52 N. W. Rep. 986; *Mackellar v. Sigler*, 47 How. Pr. 20; *Hall v. Burgess*, 5 B. & C. 332; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Whitney v. Meyers*, 1 Duer, 266; *Elliott v. Aiken*, 45 N. H. 30.

⁴ *Day v. Watson*, 8 Mich. 535; *Crane v. Hardman*, 4 E. D. Smith, 339; *Zale v. Zale*, 24 Wend. 76, 35 Am. Dec. 600.

⁵ *Miller v. Michel*, 13 Ind. App. 190, 41 N. E. Rep. 467; *Smith v. McEnany*, 170 Mass. 26, 48 N. E. Rep. 781, 64 Am. St. 272; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Morse v. Goddard*, 13 Met. 177, 46 Am. Dec. 728; *Shumway v. Collins*, 6 Gray, 227; *Leishman v. White*, 1 Allen, 489; *Billany v. Smith*, 4 Houst. 113; *Hunt v. Cope*, 1 Cowp. 242; *Watts v. Coffin*, 11 Johns. 495; *Christopher v. Austin*, 11 N. Y. 216; *Wright v. Lattin*, 38 Ill.

293; *Giles v. Comstock*, 4 N. Y. 270; *Marsh v. Butterworth*, 4 Mich. 575; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Wade v. Halligan*, 16 Ill. 507; *Bentley v. Sill*, 35 Ill. 414; *Tone v. Brace*, 8 Paige, 597; *Holbrook v. Young*, 108 Mass. 83; *Lewis v. Payn*, 4 Wend. 423; *Dyett v. Pendleton*, 8 Cow. 727; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Upton v. Townsend*, 17 C. B. 30; *Vaughan v. Blanchard*, 1 Yeates, 175; *Blair v. Claxton*, 18 N. Y. 539; *Tunis v. Grandy*, 22 Gratt. 109; *Poston v. Jones*, 2 Ired. Eq. 350, 38 Am. Dec. 683; *Hart v. Windsor*, 13 M. & W. 85; *Smith v. Wise*, 58 Ill. 141; *Wolf v. Weiner*, 7 Phila. 274; *Holmes v. Guion*, 44 Mo. 164; *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 356; *Mirick v. Hoppin*, 118 Mass. 587; *Dewey v. Gray*, 2 Cal. 374; *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415; *Bennet v. Bittle*, 4 Rawle, 339; *Briggs v. Hall*, 4 Leigh, 484, 26 Am. Dec. 326; *Maverick v. Lewis*, 3 McCord, 130; *Sneed v. Jenkins*, 8 Ired. 27; *Chatterton v. Fox*, 5 Duer, 64; *Smith v. Shepard*, 15 Pick. 147, 25 Am. Dec. 432; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *First Nat. Bank v. Adam*, 34 Ill. App. 159, 168.

part of a rent period unless there is an agreement therefor.¹ Where there is an agreement for an apportionment it will be made accordingly. Thus, where a lease for three years required and recited the payment of all the rent in advance, and provided that in case the premises should be destroyed by fire during the term the rent reserved, or a proportionate part thereof, should be suspended or abated until the premises should be put in proper condition for use and habitation by the lessor, or the lease should be thereby determined and ended at the election of the lessor, and during the term the building was destroyed by fire and the lessor elected not to rebuild, it was held that the lessee was entitled to recover a proportionate part of the rent paid in advance, because the provision for suspension or abatement could apply to nothing but the rent which had been mentioned as having been paid in advance, and the only way of abating it was by allowing a proportionate [116] part to be recovered.² On the acceptance of a surrender of the lease the tenant is entitled to so much of a sum of money deposited with the landlord to secure the payment of rent as is not needed for that purpose,³ and to interest thereon from the time the lease was terminated.⁴

§ 848. Recovery of rent barred by eviction of lessee. Eviction by a stranger having a paramount title also bars rent subsequently payable.⁵ It is a bar because it deprives the tenant of the consideration.⁶ Eviction by the lessor, even from a part of the leased premises, suspends the rent for the whole. Quiet enjoyment of the premises, without any molestation on the part of the landlord, is the implied condition on which the tenant is bound to pay rent.⁷ And when his possession is in-

¹ *Zale v. Zale*, 24 Wend. 76, 35 Am. Dec. 600; *Skaggs v. Emerson*, 50 Cal. 3; *Briggs v. Hall*, 4 Leigh, 484, 26 Am. Dec. 326; *Chatterton v. Fox*, 5 Duer, 64; *Campbell v. Shields*, 11 How. Pr. 565; *Kessler v. McConachy*, 1 Rawle, 485.

² *Rich v. Smith*, 121 Mass. 328; *May v. Rice*, 108 id. 150, 11 Am. Rep. 328.

³ *Scott v. Montells*, 109 N. Y. 1, 15 N. E. Rep. 729; *Hawthorne v. Cour- sen*, 18 N. Y. Misc. 447, 41 N. Y. Supp. 995.

⁴ *Carson v. Arventes*, 10 Colo. App. 382, 50 Pac. Rep. 1080.

⁵ *Anderson v. Robbins*, 82 Me. 422, 19 Atl. Rep. 910, 8 L. R. A. 568; *Morse v. Goddard*, 13 Met. 177, 46 Am. Dec. 728; *Hegeman v. McArthur*, 1 E. D. Smith, 147.

⁶ *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Dyett v. Pendle- ton*, 8 Cow. 727; *Taylor's Landlord & T.*, § 378; *Evans v. Murphy*, 1 Stew. & P. 226.

⁷ *Id.*; *Hyman v. Jockey Club Wine*,

terfered with in such manner as to amount to an eviction by the landlord as to a part of the premises, it is a wrong done to one whom he was bound to protect, and the law will not permit him to apportion it so as to compel the lessee to pay anything for the enjoyment of the residue. While an eviction from part by the landlord continues he cannot recover from his tenant for his occupation of any other part, either upon the lease or in an action for use and occupation.¹ "The tenant may continue in possession of the remainder of the premises, and his possession will not be construed as consent to the eviction, nor will the subsequent payment of rent, according to the terms of the lease, as a voluntary act operate as a waiver. Nothing but a new contract by the tenant to pay rent in substitution for the original lease will renew his obligation to pay."² The fact that the tenant has recovered damages for the eviction does not restore the landlord's right to rent while the ouster continues.³ The rule is otherwise in some states, unless it is shown that the tenant surrendered or entirely abandoned possession of the premises. His liability to pay is discharged only *pro tanto* if he remains in undisturbed possession of a portion of the property.⁴ Where the eviction from

Liquor & Cigar Co., 9 Colo. App. 299, 48 Pac. Rep. 671; Wreford v. Kenrick, 107 Mich. 389, 65 N. W. Rep. 234; The Richmond v. Cake, 1 D. C. App. Cas. 447; Penny v. Fellner, 6 Okl. 386, 50 Pac. Rep. 123; McClung v. Price, 59 Pa. 420, 98 Am. Dec. 356; Dolton v. Sickel, 66 N. J. L. 492, 49 Atl. Rep. 679.

¹ Wreford v. Kenrick, Penny v. Fellner, *supra*; Morris v. Kettle, 57 N. J. L. 218, 30 Atl. Rep. 879; Shumway v. Collins, 6 Gray, 227; Leishman v. White, 1 Allen, 489; Skaggs v. Emerson, 50 Cal. 3; Lewis v. Payn, 4 Wend. 423; Christopher v. Austin, 11 N. Y. 216; Lawrence v. French, 25 Wend. 443; Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Fitchburg Cotton Manuf. Corp. v. Melven, 15 Mass. 268; Briggs v. Hall, 4 Leigh, 484, 26 Am. Dec. 326; Tunis v. Grandy, 23 Gratt. 109; McClung v. Price, 59 Pa. 420, 98 Am.

Dec. 356; Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N. W. Rep. 502; Collins v. Karatopsky, 36 Ark. 316, 329; Lynch v. Baldwin, 69 Ill. 210.

There are some old English cases and one Irish case to the contrary. Stokes v. Cooper, 3 Camp. 514, note; Grand Canal Co. v. Fitzsimmons, 1 Hudson & B. 449. The case in Campbell was ruled at *nisi prius* by Dallas, C. J. It is not now authority in England, though the early English authors accepted it as such. The contrary rule was established by Upton v. Townend, 17 C. B. 30, 74.

² Morris v. Kettle, 57 N. J. L. 218, 30 Atl. Rep. 879.

³ Peck v. Hiler, 24 Barb. 178.

⁴ Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Chamberlain v. Godfrey, 50 Ala. 530; Cook v. Anderson, 85 id. 99, 4 So. Rep. 713; Cheairs v. Coats, 77 Miss. 846, 28 So. Rep. 728.

part of the demised premises is by a stranger asserting a superior title, it is only a bar *pro tanto*.¹ If one of two tenants in common makes a lease, and his co-tenant afterwards takes possession of the common property, the same rule applies to exonerate the lessee *pro tanto*.² Such an eviction is a discharge of so much of the rent as is in proportion to the value of the land from which the tenant is evicted.³ So, if the lessor [117] accepts a surrender of part, or rightfully enters upon part for a forfeiture, or by special condition for entry, the rent may be apportioned.⁴

Physical expulsion is not necessary. Any act of a permanent character, done by the landlord or by his procurement,⁵ with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons the possession, may be treated as an eviction.⁶ To constitute an eviction the tenant must be disturbed in his possession, and in pleading the eviction an ouster must be alleged.⁷ But there are a variety of circumstances short of physical force or legal process which are deemed such a disturbance of possession as to constitute an eviction. It has been held that any interference on the part of the landlord which impairs the beneficial enjoyment of the

¹Peters v. Grubb, 21 Pa. 455; Christopher v. Austin, 11 N. Y. 216; Moffat v. Strong, 9 Bosw. 57; Fillebrown v. Hoar, 124 Mass. 580; Johnson v. Oppenheim, 12 Abb. Pr. (N.S.) 448; Giles v. Dugro, 1 Duer, 331; Smart v. Allegart, 14 Phila. 179; Seabrook v. Moyer, 88 Pa. 417.

²Hoopes v. Meyer, 1 Nev. 433.

³Cornell v. Jackson, 3 Cush. 506; Leiter v. Pike, 127 Ill. 287, 20 N. E. Rep. 23; Stevenson v. Lombard, 2 East, 575; Carter v. Burr, 39 Barb. 59; Hunt v. Cope, 1 Cowp. 242; Lansing v. Van Alstyne, 2 Wend. 661; Lawrence v. French, 25 Wend. 443.

⁴Coke Litt. 148a; Dolton v. Sickel, 66 N. J. L. 492, 49 Atl. Rep. 679.

⁵The landlord is not responsible for the acts of others lawfully done on their own premises. He is liable only for his own acts and for such

acts of others as it was his duty to protect his tenant from. Oakford v. Nixon, 177 Pa. 76, 35 Atl. Rep. 588, 34 L. R. A. 575.

⁶Coulter v. Norton, 100 Mich. 389, 59 N. W. Rep. 163, 43 Am. St. 458, citing the text; Jennings v. Bond, 14 Ind. App. 282, 42 N. E. Rep. 957; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Smith v. Raleigh, 3 Camp. 513; Upton v. Townsend, 17 C. B. 30; Morris v. Tillson, 81 Ill. 607; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446 (subject to the qualification stated *ante*); Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N. W. Rep. 502.

⁷Vernam v. Smith, 15 N. Y. 327; Kerr v. Shaw, 13 Johns. 236; Waldron v. McCarty, 3 id. 471.

premises, such as the creation of a nuisance in another part of the same building, or the like, is sufficient.¹ An eviction may result from the default of the lessor as well as from his positive overt act, if such default renders the tenement dangerous to the life or health of the occupants. "If A. rents to B.

¹*Dyett v. Pendleton*, 8 Cow. 727; *Rogers v. Ostram*, 35 Barb. 523; *Haligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Cohen v. Dupont*, 1 Sandf. 260; *Moffat v. Strong*, 9 Bosw. 57; *Wright v. Lattin*, 38 Ill. 293; *Morse v. Goddard*, 13 Met. 177, 46 Am. Dec. 728; *Leadbeater v. Roth*, 25 Ill. 587; *Maywood v. Logan*, 78 Mich. 135, 43 N. W. Rep. 1052, 18 Am. St. 431 (nuisance in well); *Conlon v. McGraw*, 66 Mich. 194, 33 N. W. Rep. 388; *Skally v. Shute*, 132 Mass. 367; *Sherman v. Williams*, 113 id. 48; *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. Rep. 514, 49 Am. St. 659; *Marks v. Delaglio*, 27 N. Y. Misc. 652, 59 N. Y. Supp. 707; *Tallman v. Murphy*, 120 N. Y. 346, 24 N. E. Rep. 716; *Bass v. Rollins*, 63 Minn. 226, 65 N. W. Rep. 348 (insufficient heat - furnished); *Kansas Investment Co. v. Carter*, 160 Mass. 421, 430, 36 N. E. Rep. 63; *Adams v. Werner*, 120 Mich. 432, 79 N. W. Rep. 636; *York v. Steward*, 21 Mont. 515, 55 Pac. Rep. 29, 43 L. R. A. 125; *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. Rep. 984; *Jones v. Freidenburg*, 66 Ga. 505, 42 Am. Rep. 86; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

The service of a notice by the board of health upon the lessee of a stable requiring him to remove all horses therefrom and to discontinue the stabling of horses thereat, and stating that any application for extension of time or for suspension of any of the requirements of the notice must be made within three days, does not authorize a vacation of the premises without making such application. *Forster v. Eberle*, 7 N. Y. Misc. 490, 27 N. Y. Supp. 986.

A landlord who is not liable for the erection of a nuisance is not responsible for any act, not negligently or wrongfully done, in trying to abate the nuisance at the tenant's request. *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072, 48 Am. St. 671.

An outbreak of scarlet fever in a hotel will not relieve a person who voluntarily vacates his apartments in it through fear of contagion to himself and family from liability for rent, the landlord having adopted the usual precautions to prevent the spreading of the disease. *Majestic Hotel Co. v. Eyre*, 53 App. Div. 273, 65 N. Y. Supp. 745.

"The authorities are uniform in holding that a landlord out of possession is not responsible for a nuisance occurring after the execution of the lease, unless he is in some manner at fault for its creation or continuance. *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. Rep. 188, 54 Am. Rep. 672. When the landlord has not covenanted to keep the premises in repair, the duty is imposed upon the tenant, under the implied covenants of the lease, to so use the property as to avoid the necessity for repairs. *Powell v. Dayton R. Co.*, 16 Ore. 33, 16 Pac. Rep. 863, 8 Am. St. 25; and in such cases, if the property was in good condition at the time of the demise, and leased for a purpose that would not create a nuisance, the tenant, and not the landlord, is liable to third persons for injury from the creation of any nuisance upon the leased premises. *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422." *Fleischner v. Citizens' Investment Co.*, 25 Ore. 119, 35 Pac. Rep. 174.

the second story of a house for a term of years, he cannot suffer, through neglect to repair, the first story to become ruinous so that the house is liable to fall and kill B. and his family, and still hold B. bound to occupy and pay rent. There is no legal difference between such a default and tearing down the first story."¹ The tenant must, however, quit the possession in consequence of such interference or default.² There is no implied warranty in a general lease that the demised building is safe, well built, or fit for any particular use;³ and this absence of an implied covenant not only refers to the beginning but to the whole term. Even the landlord's default in not repairing, when he is bound by custom or covenant to do so, though in consequence the buildings become unfit for

¹ *Alger v. Kennedy*, 49 Vt. 109, 118, 24 Am. Rep. 117; *Lathers v. Coates*, 18 N. Y. Misc. 231, 41 N. Y. Supp. 373; *Marks v. Delaglio*, 27 N. Y. Misc. 652, 59 N. Y. Supp. 707.

² *Barrett v. Boddie*, 158 Ill. 479, 43 N. E. Rep. 367, 49 Am. St. 172; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *De Witt v. Pierson*, 112 Mass. 8; *Scott v. Simons*, 54 N. H. 426; *Leiferman v. Osten*, 167 Ill. 93, 47 N. E. Rep. 203; *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072, 48 Am. St. 671; *Humphreville v. Billinger*, 62 Ill. App. 125; *Flint v. Sweeney*, 49 Minn. 509, 52 N. W. Rep. 136; *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 4 N. Y. Misc. 207, 23 N. Y. Supp. 900; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. Rep. 460; *International Trust Co. v. Schumann*, 158 Mass. 287, 33 N. E. Rep. 509; *Horberg v. May*, 153 Pa. 216, 25 Atl. Rep. 750; *Sibley v. Ross*, 10 Ohio Dec. 683, affirmed without opinion, 52 Ohio St. 668; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Cram v. Dresser*, 2 Sandf. 120; *Gilhooly v. Washington*, 4 N. Y. 217; *Fuller v. Ruby*, 10 Gray, 285; *Skally v. Shute*, 132 Mass. 367; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 id. 293, 43 Am. Rep. 170. But see *Con-*

lon v. McGraw, 66 Mich. 194, 33 N. W. Rep. 338.

Remaining in possession of premises notwithstanding they are in a condition which unfavorably affects the health of the tenant is not an election to continue a tenant if there are subsequent and increased defects rendering the premises unfit for occupancy. *Damkroger v. Pearson*, 74 Minn. 77, 76 N. W. Rep. 960.

³ *Humiston v. Wheeler*, 175 Ill. 514, 51 N. E. Rep. 893; *Blake v. Dick*, 15 Mont. 236, 38 Pac. Rep. 1072, 48 Am. St. 671; *Bowe v. Hunking*, 135 Mass. 380; *Clyne v. Helmes*, 61 N. J. L. 358, 39 Atl. Rep. 767; *Boyer v. Commercial Building Investment Co.*, 110 Iowa, 491, 81 N. W. Rep. 720; *York v. Steward*, 21 Mont. 515, 55 Pac. Rep. 29, 43 L. R. A. 125; *Hanley v. Banks*, 6 Okl. 79, 51 Pac. Rep. 664; *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43; *McGlashen v. Tallmadge*, 37 Barb. 313; *Cleves v. Willoughby*, 7 Hill, 83; *Hart v. Windsor*, 12 M. & W. 68; *Welles v. Castles*, 3 Gray, 323; *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229; *Donner v. Ogilvie*, 49 Hun, 229, 1 N. Y. Supp. 633; *Edwards v. New York & H. R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659. See § 851.

occupancy, does not authorize the tenant to quit or refuse to pay rent.¹ But in Michigan if through the acts of the landlord the building is rendered practically useless for the purpose for which it was leased, and he then undertakes to make repairs, which result in making the condition worse, the tenant may, although he covenanted to repair, consider himself evicted.² The breach of a covenant by the lessor not to rent other property in the locality for the same business as the lessee is engaged in does not warrant an abandonment of the premises or a refusal to pay rent. The effect of such a [118] breach is to reduce the rent, the reduction to be proportioned over the whole term.³ A breach by the lessor of his covenants in the lease for repairs or improvements is no defense, except by way of recoupment, to his demand for rent covenanted to be paid unless by the terms of the lease the performance of his covenants is made a condition.⁴ Nor can the tenant in summary proceedings at the instance of the landlord to obtain possession set up his breaches of covenants in the lease as a counter-claim.⁵

Where the landlord, by the terms of the lease of a store being erected by him, undertook to finish it for immediate occupancy as a store by a given time, it was held that the lessee, by entering at that time, notwithstanding that the store was not finished so that the term was vested, waived the condition precedent, though not the right to have the work done. Thereafter the lessor's default in not completing the store was no defense to an action for rent except as a counter-claim. If the lessee had not taken possession he could only

¹ *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Huber v. Ryan*, 26 N. Y. Misc. 428, 56 N. Y. Supp. 135.

² *Adams v. Werner*, 120 Mich. 432, 79 N. W. Rep. 636.

³ *Allegaert v. Smart*, 2 Penny. 320.

⁴ *Chicago Legal News Co. v. Browne*, 103 Ill. 317; *La Farge v. Mansfield*, 31 Barb. 345; *Kelsey v. Ward*, 16 Abb. Pr. 98, 38 N. Y. 83; *Etheridge v. Osborn*, 12 Wend. 529.

In Michigan if a landlord who has expressly covenanted to have the leased building in suitable condition

for the tenant's business on the day he is to take possession, and to keep the premises in good repair, fails to perform his covenants he cannot collect rent for the unexpired term of the lease, the premises having been vacated. *Pierce v. Joldersma*, 91 Mich. 463, 51 N. W. Rep. 1116.

⁵ *People v. Kelsey*, 14 Abb. Pr. 372; *McHoy v. Ryan*, 27 Mich. 110; *D'Armond v. Pullen*, 13 La. Ann. 137; *Eldred v. Leahy*, 31 Wis. 546; *Lunn v. Gage*, 37 Ill. 19.

have been made liable for rent upon his covenant, as for a breach of an executory contract; and to entitle the lessor to recover he would be obliged to show that he had performed his part.¹ Tortious conduct of the landlord on the demised premises which does not disturb the tenant's possession, though it may diminish his beneficial enjoyment, will not amount to an eviction nor have the effect to suspend the rent.² Eviction is no answer as to rent which has already accrued and [119] become due before it took place.³ And this is so, according to some authorities, though the rent be payable in advance, and the eviction takes place during the rent period for which it was payable.⁴ Nor will eviction bar rent which accrues after it has ceased if the tenant continues in possession.⁵ Giving a note for the rent during eviction from part of the premises is a waiver of the objection, and the moral obligation from partial enjoyment is a sufficient consideration.⁶

¹ *La Farge v. Mansfield*, 31 Barb. 345; *Lunn v. Gage*, 37 Ill. 19.

² *Fuller v. Ruby*, 10 Gray, 285; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Luckey v. Frantzke*, 1 id. 47; *Johnson v. Oppenheim*, 12 Abb. Pr. (N. S.) 449; *Edgerton v. Page*, 20 N. Y. 281; *Lounsberry v. Snyder*, 31 id. 514; *Cram v. Dresser*, 2 Sandf. 120; *Mortimer v. Brunner*, 6 Bosw. 653; *Vatel v. Herner*, 1 Hilt. 149; *McFadin v. Rippey*, 8 Mo. 738. See *Leostzky v. Canning*, 33 Cal. 299.

³ *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. Rep. 732, 14 L. R. A. 151; *Livingston v. L'Engle*, 27 Fla. 502, 8 So. Rep. 728; *Leary v. Meier*, 78 Ind. 393; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Hutchins v. Hodges*, 98 N. C. 404, 4 S. E. Rep. 46; *Vernam v. Smith*, 15 N. Y. 327; *McKeon v. Whitney*, 3 Denio, 452; *New York Academy v. Hackett*, 2 Hilt. 217; *Pepper v. Rowley*, 73 Ill. 262; *Kessler v. McConachy*, 1 Rawle, 435; *Salmon v. Smith*, 1 Saund. 202; *May v. Diaz*, 42 Ala. 383; *Giles v. Comstock*, 4 N. Y. 270; *Johnson v. Oppenheim*, 55 id. 280; *Hinsdale v. White*, 6 Hill, 507; *Cushingam v. Phillips*, 1 E. D.

Smith, 416; *Dawson v. Donati*, 2 id. 121; *Crane v. Hardman*, 1 id. 448; *Whitney v. Meyers*, 1 Duer, 266.

⁴ *Whitney v. Meyers*, 1 Duer, 266; *Healy v. McManus*, 23 How. Pr. 238; *Giles v. Comstock*, 4 N. Y. 270; *Barkley v. McCue*, 25 N. Y. Misc. 738, 55 N. Y. Supp. 608; *Hunter v. Reiley*, 43 N. J. L. 482. *Contra*, *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 9 Colo. App. 299, 306, 48 Pac. Rep. 671; *The Richmond v. Cake*, 1 D. C. App. Cas. 447, 464.

⁵ *Ogden v. Sanderson*, 3 E. D. Smith, 166.

⁶ *Anderson v. Chicago, etc. Ins. Co.*, 21 Ill. 601.

In *Merritt v. Closson*, 36 Vt. 172, the plaintiffs, tenants, had paid a part of the rent of leased premises, when they were ousted by the defendant, who took all the crops. Held, that in estimating the damages the defendant is entitled to have the unpaid rent deducted from the value of the crops, though he could not maintain an independent action to recover it. *Poland, C. J.*, said: "The court told the jury that the defendant, by thus ousting the

[120] § 849. **Apportionment of rent.** It is a general principle that there can be no apportionment of rent in respect to time. By this is meant that the sum accruing between one time of payment and another is a single, entire debt; it is due from the tenant only on the condition of enjoying the premises for the whole rent period, and to the owner of the reserved rent only when it becomes payable. These rent payments may be successively recovered by different persons; but in the absence of an agreement therefor there can be no recovery for occupation for a part only of the time between rent days. If, therefore, the enjoyment be interrupted, the rent for the current rent period is lost.¹ And if a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for a year, reserving rent half yearly,

plaintiffs, forfeited all right to that portion of the rent unpaid, and that therefore the crops taken by him were to be estimated at their full value without deducting anything for the unpaid rent. It is undoubtedly true the defendant could not, if he ousted his tenant during the term, maintain any action to recover the rent to be paid for the term. But the question here was, what damage or loss had the plaintiffs suffered by the wrongful act or breach of contract on the part of the defendant? What would they have gained or been entitled to if the defendant had allowed them to remain on the premises till the end of the year? They would have had the use of the premises and the personal property to the end of the year, subject to the payment of the balance of the rent and the expense of keeping the stock. By being ousted from the premises, the plaintiffs lost the use of the premises for the residue of the year, the crops on the farm and the use of the personal property; but they also were relieved from the burden of paying the balance of the rent, and from keeping the stock through the winter. The true rule of damages

was the difference in value between the two conditions. The county court recognized this in part, and decided that nothing should be allowed to the plaintiffs for the loss of the use of the premises for the residue of the year, as the evidence showed that the unpaid rent was more than the value of such use, and if they remained they would have the rent to pay. So the jury were directed, if they found that the keeping of the stock through the winter would cost the plaintiffs more than the worth of the use of the stock, the difference should be deducted from the value of the crops. If there was still, after the allowance of these deductions, any sum of unpaid rent which the plaintiffs would have had to pay if they had not been ousted, in order to entitle them to have the crops as their own by the terms of the lease, that should have also been deducted. In actions for breach of contract where the damages are open and unliquidated the true rule of damages is to requite the party for what he has actually lost by the violation of the contract by the other."

¹ Grimman v. Legge, 8 B. & C. 324.

and should die before the end of a half year, there could be no legal demand for the rent of that period. The executor or representative of the lessor would not be entitled to it although there was no eviction, because the lessor's title ceased at his death; and by the nature of the contract the tenant was not bound to pay, and the lessor was not entitled to receive, rent except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, he does so under some new contract with the party on whom the estate has devolved.¹ If the lease continues, although intermediate the days of payment the reversion passes wholly into new hands, the obligation of the lessee to pay rent will continue also. Thus, in the middle of a quarter the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mortgage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is therefore payable as though they did [121] not occur; but it is payable only in the sums and at the times specified in the demise. The reversion may be transmitted to a new owner during the period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wheresoever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum, and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time.² The covenant to pay rent creates no debt until the day of payment arrives.³

¹ *Marshall v. Mosely*, 21 N. Y. 280; *Perry v. Aldrich*, 13 N. H. 343. Compare *Foote*, Appellant, 23 Pick. 299, and *Price v. Pickett*, 21 Ala. 741.

² *Porter v. Sweeney*, 61 Tex. 216; *Hearne v. Lewis*, 78 id. 276, 14 S. W. Rep. 572; *Price v. Pickett*, 21 Ala. 741. See *Mixon v. Coffield*, 2 Ired. 301; *Sutliff v. Atwood*, 15 Ohio St. 186.

³ *Wood v. Partridge*, 11 Mass. 488; 3 Kent's Com. 470; *Stanley v. Turner*, 68 Vt. 315, 35 Atl. Rep. 321; *Anderson v. Robbins*, 82 Me. 422, 19 Atl. Rep. 910, 8 L. R. A. 568; *Russell v. Fabyan*, 23 N. H. 543.

If rent is payable monthly in advance a tenant who is dispossessed during the month for which a partial payment is made is not entitled to recover any part of the sum paid as an overpayment. *Kahn v. Tobias*, 16 N. Y. Misc. 83, 37 N. Y. Supp. 632.

Hence where a mortgagor in possession verbally leases the premises at a rent payable quarterly, and the mortgagee fifteen days before the expiration of a current quarter, duly enters and takes possession for condition broken, and, on demand of the mortgagee, the tenant pays him the rent for the whole quarter, the mortgagor cannot recover from the lessee for the time preceding the mortgagee's entry.¹

Where the entire reversion is transferred, subject to the lease, by sale or descent, by act of the lessor or operation of law, the rent which becomes payable afterwards follows the reversion, unless reserved or otherwise specially disposed of, and belongs to and may be recovered by the party so succeeding to it.² Nor is it necessary, in such cases, to perfect the reversioner's right to the entire rent afterwards falling due, or to discharge the tenant's liability to the lessor therefor that such tenant should attorn or be evicted.³

A covenant for rent runs with the land and, at common law, rent may be apportioned either on severance of the land from which it issues, or of the reversion to which it is incident.⁴ It must be divided and apportioned whenever several persons succeed to the right of the lessor to receive the rent; also when the demised premises, by assignment of the lessee's estate, go in parcels or otherwise to other persons. When the severance [122] of the reversion is by the act of the lessor the consent of the tenant is necessary to the apportionment, unless the persons who become the owners liquidate and settle the proportions to be paid them respectively.⁵ If not so adjusted it may

¹ *Anderson v. Robbins, supra.*

² *Wise v. Falkner*, 51 Ala. 359; *Daley v. Grimes*, 27 Md. 440; *Fay v. Holloran*, 35 Barb. 295; *Getzandaffer v. Caylor*, 38 Md. 280; *Bloodworth v. Stevens*, 51 Miss. 475; *Dorsett v. Gray*, 98 Ind. 273.

³ *Id.*; *English v. Key*, 39 Ala. 113.

⁴ *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451; *Stevenson v. Lombard*, 2 East, 575; *Astor v. Miller*, 2 Paige, 68; *Cruger v. McLaury*, 41 N. Y. 219; *Van Horn v. Crane*, 1 Paige, 455; *Merceron v. Dowson*, 5 B. & C. 479; *Wollasten v. Hakewill*, 3 M. & G. 297; *Ingersoll v.*

Sergeant, 1 Whart. 337; *Van Rensselaer v. Chadwick*, 22 N. Y. 32; 2 Platt on Leases, 131, 132; *Marshall v. Moseley*, 21 N. Y. 282; *Crosby v. Loop*, 13 Ill. 625; *Cole v. Patterson*, 25 Wend. 456; *Linton v. Hart*, 25 Pa. 193, 64 Am. Dec. 691; *Reed v. Ward*, 22 Pa. 144; *Biddle v. Hussman*, 23 Mo. 597; *Higgins v. California Petroleum & Asphalt Co.*, 109 Cal. 304, 41 Pac. Rep. 1087; *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222.

⁵ *Bliss v. Collins*, 5 B. & Ald. 876; *Roberts v. Snell*, 1 Man. & Gr. 577; *Ryerson v. Quackenbush*, 26 N. J. L. 236; *Taylor's Landlord & T.*, § 383.

be apportioned by the jury according to the relative value of the several parts held by each of the owners.¹ But if the severance of the reversion is by act of the law, or where it occurs by descent to several heirs, or a judicial sale of part, an apportionment may be made without the consent of the tenant; he will have two or more landlords instead of one, and be bound to pay rent to each according to his interest.² When a tenant has assigned a part of his estate under the lease in which he has covenanted to pay rent, he is not thereby relieved from his obligation. If the lessor thinks proper to rely on his covenant he is at liberty to do so without resorting to the assignee. When the lessee has covenanted to pay rent he cannot exonerate himself, either wholly or in part, by such an assignment. Nor can he apportion the rent between himself and his assignee without the concurrence of the landlord, so as to liquidate the liability of the assignee.³

§ 850. **Same subject.** The action for rent against the lessee's assignee is based on privity of estate; hence he is only liable so long as he remains in the legal relation of assignee to the premises. If he assigns to another, and the latter accepts the assignment, the liability of the former is at an end.⁴ The assignee of a lease is liable for rent only by reason of the privity of estate between him and the lessor, and this privity is the assignee's right of possession under the assignment and not his actual possession; and in an action by the lessor [123] against the assignee for rent the measure of the latter's liability is the extent of his possessory right, though it be to an undivided part, and not the extent of his actual possession.⁵

¹ Cuthbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderry v. Flannagan, 1 Har. & G. 308; 3 Kent's Com. 370.

² Cole v. Patterson, 25 Wend. 456; Wotton v. Shirt, Cro. Eliz. 742.

³ See Ghegan v. Young, 23 Pa. 18; Frank v. Maguire, 42 Pa. 77; Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64; Taylor's Landlord & T., § 384; Pitcher v. Tovey, 1 Salk. 81; Buckland v. Hall, 8 Ves. 92; Bailiff of Ipswich v. Martin, 1 Roll. Abr. 285.

⁴ Seifke v. Koch, 31 How. Pr. 383; Sutliff v. Atwood, 15 Ohio St. 186; Hintze v. Thomas, 7 Md. 346; Journey v. Brackley, 1 Hilt. 447; Armstrong v. Wheeler, 9 Cow. 88; Lekeug v. Nash, 2 Str. 1221; Taylor v. Shum, 1 B. & P. 21; Paul v. Nurse, 8 B. & C. 486; Graves v. Porter, 11 Barb. 592; Hannen v. Ewalt, 18 Pa. 9. See McKeon v. Whitney, 3 Denio, 452.

⁵ St. Louis Public Schools v. Boatmen's Ins. Co., 5 Mo. App. 91. In this case a lease was made to two persons, one of whom by deed as-

[125] The assignee of the whole premises is liable for the rent of the whole though only in possession of a part;¹ and if he remains in their actual possession and beneficial enjoyment his liability as assignee will continue though he may have as-

signed his undivided half interest therein to a third person who entered into exclusive possession and occupied the whole of the leased premises; the lessor sued the assignee for the amount of the rent reserved in the lease. Held, that the assignee was liable only for the undivided half. Bakewell, J., said: "In the consideration of this case we have no aid from any direct authority on the very point involved. The precise question seems never to have come up for judicial determination except in a single instance. In that case the reported opinion is deprived of the weight it would otherwise have, from the unfortunate circumstance that the premises of the learned judge who delivered it being wholly untenable, one is compelled to distrust the conclusion arrived at, which of course can only be correct by accident, and must be erroneous if arrived at by any process of right reasoning.

"There can be no question that the assignee of a lease is liable only by the privity of estate between himself and his landlord. Arch. Landlord & T. 70; Smith, Landlord & T. 292; Hannen v. Ewalt, 18 Pa. 9. But it is assumed by the learned judge delivering the opinion in the case referred to (*Damainville v. Mann*, 32 N. Y. 197, 88 Am. Dec. 324), that perhaps the assignee is not liable by virtue of the privity of estate; and he puts the liability on the ground of actual possession. It has not, we believe, ever been held that an actual entry under the assignment is necessary to make the assignee liable in respect of assign-

ments by deed which are regarded as effecting a transfer, not only of title, but also of the legal possession. The acceptance of the assignment creates the liability, and the legal possession which ownership implies is all that is required. Woodf. Landlord & T. 166, 289; Taylor, Landlord & T. 450-452; Smith v. Brinker, 17 Mo. 148, 57 Am. Dec. 265. In *Walker v. Reeves*, 2 Doug. 461, note, quoted in the New York case, the question was discussed whether the assignment imposed the obligation to pay the rent. Lord Mansfield says that it does; that the actual possession is immaterial; and that the possession in law, by the assignment of the title which passed the possessory right, is sufficient. The case was that of a mortgagee who had not taken possession, and it was distinguished from that of an absolute assignee, who was assumed to be liable without entry. Although the cases in which the assignee in bankruptcy is held not liable to pay rent are put expressly upon the ground that an assent to the assignment is necessary to bind him, and the question of actual possession is considered in such cases only as it bears upon this assent (*Turner v. Richardson*, 7 East, 335), the learned judge in the New York case asserts that the true grounds of the decision in these cases is the question of possession, which seems to be not the fact.

"After quoting a remark by [124] Sheppard, the well-known author of the *Touchstone*, in an argument prefixed to the report of *Webb v. Russell*, 3 T. R. 394, which he interprets

¹ *Negley v. Morgan*, 46 Pa. 281.

signed to another person.¹ The assignee of a separate part is liable only for the rent of that part.² One who becomes assignee of a lease which contains a covenant against its assignment is liable to his assignor for rent although he has not

by the light of his peculiar view of the law, the learned judge boldly concludes that there is no privity of estate between the lessor and the assignee of the lease where there is only constructive possession; and, having found an imaginary resting place for his feet, he proceeds to construct thereon a fabric which can have no greater value than any other poetic fiction, because, like the stags of Tityrus, it rests on air. He proceeds to argue that the owner of the other undivided half of the lease in the case before him, who took by a separate assignment, is under no obligation to pay rent, not being in possession. This, clearly, is not the law. Coote's *Landlord & T.* and textbooks and cases *passim*. Yet, on the truth of this proposition, he proceeds, mainly, to rest the decision of the whole question. It follows, he says, that defendant in possession is taking the property of the landlord without any responsibility to him (as if the lessor, before the determination of the term, had any right to say who should occupy the premises); and this, he thinks, is manifestly unjust, because the assignee in possession, having all that is useful in the premises, should pay the rent as the condition of his enjoyment. But why, it may be asked, should he pay a rent which he has never agreed to pay, and which may at the time of his possession be ten times the actual rental value? For, having what is useful in the premises, it would seem that he should only pay what may be shown to be the reasonable value of their use. But that is not the theory of this

action, and is not what the lessor is seeking to recover from the assignee. However, whilst holding that defendant is liable, the learned judge says that he adopts this conclusion not without considerable hesitation. We cannot adopt this conclusion at all; and we think that this case, properly considered, even tells against the respondent in the case at bar. It seems to be admitted in the opinion, that, but for an assumption which we cannot but consider as wholly unwarranted, the decision should be the other way. The lessor looks for his rent, not to the person in possession, but to the lessee; and if he rents to two, and by agreement between themselves, or otherwise, one of them has exclusive possession, or if they choose to keep the premises vacant, this in no way concerns the lessor. The relation of landlord and tenant does not exist between the landlord and the mere occupier; nor can one merely occupying land be sued for rent in an action of debt or covenant. On the other hand, it is nowhere intimated in the books that the assignee is liable on a *quantum meruit*, as for use and occupation. He is liable at the rate fixed by the lease of which he is the assignee. If the rent is not paid, the assignee in possession may be put out; but we can see no reason whatever why the assignee of an undivided interest in a lease, though in the actual possession of the whole premises, should be made to pay the whole rent reserved. Any such rule might work very great hardship in cases that may be easily supposed; while there seems to be no hardship

¹ *Negley v. Morgan*, 46 Pa. 281.

² *Astor v. Miller*, 2 Paige, 68.

paid the lessor, the latter not having consented to the assignment.¹

If a national bank has paid rent for the premises occupied by it up to the time a receiver is appointed, the latter is not bound to take possession of them and pay rent; neither is the claim for rent during the unexpired term enforceable against the assets in his hands. After the charter of the bank is forfeited there is no party with whom the lessor can deal in reference to the lease, and it necessarily terminates.²

If several tenants in common of land chargeable with rent make partition, each assuming the payment of his equitable share, each will still be liable to the lessor for the rent, but as between themselves each will be liable to the others for any amount either may be compelled to pay beyond his proportionate share.³ A release by the lessor to one of the

in holding the assignee in possession liable only according to his interest as shown by the assignment itself. His interest by virtue of the assignment created his liability; and we do not see why the assignee of an undivided, and perhaps infinitesimally small, interest should, any more than a stranger, be liable for rent for the whole premises at the rate reserved in the lease, and which, obviously, may be no measure of their actual rental value, merely because his possession is, as it may well be, larger than his interest. If the landlord does not get his rent, he may forfeit the lease and put out any one in possession, whether assignee or sub-tenant. The reason of the case seems clear. Where a lease is made to two, there is a privity of estate and privity of contract between lessor and lessee; by the terms of the contract, and by virtue of the contract and not of the privity of estate, each lessee is liable for the whole rent, though each has only an undivided half of the estate. Where one of these two men assigned his interest, there is now no privity of contract between the as-

signee and the landlord; but there is privity of estate; and that privity of estate, and that alone, creates the liability for rent. The liability for rent, in such a case, does not arise from privity of contract, for that is at an end; nor from possession, for it is held in Missouri (17 Mo. 148, 57 Am. Dec. 265), and elsewhere, that possession can never be material in establishing the liability of an assignee of a lease, except so far as it may serve to determine the question of acceptance of the assignment,—that is, the question whether the defendant is in fact the assignee. The ground of liability is privity of estate alone. The only question that remains, then, is as to the extent of that privity; and this, we think, is determined by the extent of the estate.”

¹ Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. Rep. 1014.

² Fidelity Safe Deposit & Trust Co. v. Armstrong, 35 Fed. Rep. 567. See § 844.

³ Van Rensselaer v. Chadwick, 24 Barb. 333; Graves v. Porter, 11 id. 592; Van Rensselaer v. Gifford, 24 id. 349.

tenants in common, given subsequently to the partition, discharging him from the payment of rent on his divided part, will not extinguish the liability of the others. Such a release makes the lessor a party to the partition and apportionment; thereafter he cannot claim from the others more than the portion of the rent fixed between the lessees by their [126] contract of partition.¹ In making such apportionments the ratio of values and not of quantities governs.² If there is no proof of relative values the whole premises will be presumed to be of equal value; then an apportionment made according to the relative quantities will be deemed *prima facie* right.³ But in a case against the assignee of part of the demised premises, where upon the trial the court had apportioned the rent as matter of law according to the number of acres, there being no evidence of value, it was held to be error. Beardsley, C. J., said: "The amount due would necessarily depend on the proportionate value of the part of which the defendant was assignee, there being no evidence that the amount to be paid on his part had been adjusted by agreement between the parties in interest. I see no *data* in the case before us upon which the defendant's share could be determined as a matter of law, and very little to aid the jury in ascertaining it as a matter of fact. Possibly there was enough to have upheld a verdict if the amount had been determined by the jury; but the judge refused to submit the question to their decision, in which, I think, he clearly erred."⁴

§ 851. Partial destruction of demised property. A tenant who has made an unconditional contract to pay rent for a term cannot claim an apportionment or abatement of it for being deprived of any beneficial enjoyment of the premises by their being out of repair, or untenable, or unfit for the use for which they were leased.⁵ Nor if the buildings or premises

¹ Van Rensselaer v. Gifford, *supra*.

² Van Rensselaer v. Gallup, 5 Denio, 454; Same v. Jones, 2 Barb. 643; Same v. Bradley, 3 Denio, 135, 45 Am. Dec. 451; Cuthbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderry v. Flannagan, 1 Har. & G. 308.

³ Van Rensselaer v. Jones, *supra*.

⁴ Van Rensselaer v. Bradley, 3 Denio, 135, 45 Am. Dec. 451.

⁵ Smith v. McLean, 123 Ill. 210, 14 N. E. Rep. 50; Westlake v. De Graw, 25 Wend. 669; Cleves v. Willoughby, 7 Hill, 83; Welles v. Castles, 3 Gray, 323; Dalton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45; Hart v. Windsor, 12 M. & W. 68; Sutton v. Temple, id. 52.

are destroyed or rendered useless by fire, tempest, flood, war or other inevitable casualty.¹ In Nebraska a majority of the court have repudiated the prevailing rule, and held that the lessee, in the absence of an assumption of liability therefor, is entitled to an apportionment of the rent accruing after the destruction of a substantial part of the leased property without his fault.² One of the Texas courts of appeal has intimated

¹ *Cook v. Anderson*, 85 Ala. 99, 4 So. Rep. 713; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 435; *Smith v. McLean*, 123 Ill. 210, 14 N. E. Rep. 50; *Paradine v. Jane*, Aleyn, 26; *Wagner v. White*, 4 Har. & J. 564; *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457; *Belfour v. Weston*, 1 T. R. 310; *Monk v. Cooper*, 2 Ld. Raym. 1477, 2 Str. 763; *Fowler v. Bott*, 6 Mass. 63; *Izon v. Gorton*, 5 Bing. N. C. 501; *Arden v. Pullen*, 10 M. & W. 321; *Helburn v. Mofford*, 7 Bush, 169; *Robinson v. L'Engle*, 13 Fla. 482; *Smith v. Ankrum*, 13 S. & R. 39; *Gibson v. Perry*, 29 Mo. 245; *White v. Molyneux*, 2 Ga. 124; *Gates v. Green*, 4 Paige, 355; *Patterson v. Ackerson*, 1 Edw. 96; *Peterson v. Edmonson*, 5 Harr. 378; *Vale v. Trader*, 5 Kan. App. 307, 48 Pac. Rep. 458; *Humiston v. Wheeler*, 175 Ill. 514, 51 N. E. Rep. 893; *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. Rep. 115; *Davis v. George*, 67 N. H. 393, 39 Atl. Rep. 979.

The same rule applies to leased chattels if the lessee has agreed to return them or others of equal value at the end of the term. *Davis v. George*, 67 N. H. 393, 39 Atl. Rep. 979.

If the tenant's negligence causes the loss of chattels he is liable, but is not liable for rent for their use after the loss. *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. Rep. 1105.

A much narrower statement of the rule is made in *Whitaker v. Hawley*, 25 Kan. 674: "If the interest of the lessee in a part of the demised premises was destroyed by the

act of God or the public enemy, so as to be incapable of any beneficial enjoyment," the rent is to be apportioned.

In a Georgia case the tenant covenanted to keep up all repairs at his own expense, except such as might be made necessary by fire or providential cause. The code requires, in accordance with the rule of the civil law, that the landlord must keep the premises in repair. The lease covered farming lands and a gin-house situated thereon; the gin-house was destroyed. The whole rent was recoverable. *Mayer v. Morehead*, 106 Ga. 434, 32 S. E. Rep. 349.

A lease of mill property provided for an abatement of rent in case any part of the property should be damaged by fire during the term. A boarding house on the premises used by the mill operators was destroyed by fire; and it was held that the abatement to be made was not limited to the actual value of the building destroyed, but included any depreciation in the rental value of the remainder of the premises, if caused by its destruction. *Cary v. Whiting*, 118 Mass. 363. See p. 2539, n.

Payment of rent in advance is a voluntary payment, and, in the absence of a covenant in the lease to repay it in case of the loss of the premises, it cannot be recovered. *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. Rep. 115.

² *Wattles v. South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. Rep. 785, 36 L. R. A. 424.

that there should be an apportionment of rent on the partial destruction of the property leased, but refused to make it where land was subject to erosion, and about two-thirds of it was under water, the lessee knowing the facts and having got all he contracted for.¹ In Newfoundland there is a local usage or established custom which gives lessees the right to surrender premises and be relieved from liability for rent after they have been partially burned.² There is no implied warranty by the landlord of the fitness of the premises for the use [127] the tenant has in view or against accidental destruction; nor is there any implied undertaking to 'repair or rebuild.'³ But it has been ruled where real and personal property is leased by the same instrument for a gross sum, and the personalty is a substantial part of the whole, that its destruction without the fault of the lessee entitles him to an apportionment of the rent.⁴ The rule as to the absence of an implied warranty of fitness extends to a furnished house which is leased,⁵ but not to furnished rooms in a lodging house or a

¹ Galveston City R. Co. v. Gulf Land Co., 2 Tex. Civ. App. 326, 21 S. W. Rep. 959.

² Kitchen v. Fenelon, Newf. Rep. (1884-1896), 740.

³ Davis v. George, 67 N. H. 393, 39 Atl. Rep. 979; Doyle v. Union Pacific R. Co., 147 U. S. 413, 429, 13 Sup. Ct. Rep. 333; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. Rep. 147; Franklin v. Brown, 118 N. Y. 110, 23 N. E. Rep. 126, 16 Am. St. 744, 6 L. R. A. 770; Davis v. Smith, 15 Mo. 469; Jonas v. Springfield Waterworks Co., 65 Mo. App. 388; Taylor's Landlord & T., § 372; Sheets v. Selden, 7 Wall. 416; Johnson v. Oppenheim, 43 How. Pr. 433; Westlake v. De Graw, 25 Wend. 669; McGlashan v. Tallmadge, 37 Barb. 313; Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, id. 68. See Doupe v. Genin, 37 How. Pr. 5, 45 N. Y. 119, 6 Am. Rep. 47.

⁴ Whitaker v. Hawley, 26 Kan. 277.

This was ruled in England so long ago as 1544. Taverner's Case, 1 Dyer, 56a. There is an *obiter* remark to

the contrary in Bussman v. Ganster, 72 Pa. 285.

Where the lease was of a tannery and other real property and the tools belonging to the former, it was held that the tools should be deemed part of the realty. "Rent cannot be reserved out of chattels personal. If such chattels are demised with land at an entire rent, the rent issues out of the land only." Fay v. Holloran, 35 Barb. 295. See Jones v. Smith, 14 Ohio, 606; Sutliff v. Atwood, 15 Ohio St. 186.

It is said in Vale v. Trader, 5 Kan. App. 307, 311, 48 Pac. Rep. 458, that where land is rented for one-half the crop and a house thereon is burned, it is impossible to determine how much, if anything, it added to the rental value of the land; that, regarding the house as personalty, the damage resulting from its loss was too conjectural and indefinite to authorize a reduction of the rent on account of it. See p. 2538, n.

⁵ Davis v. George, 67 N. H. 393, 39

furnished house at a watering place let to a tenant for a few weeks without inspection by him.¹

Under a statute providing that the lessee of any building which shall, without his fault or neglect, be destroyed or so injured as to be untenable or unfit for occupancy shall not be liable or bound to pay rent after such destruction or injury, unless it be otherwise agreed, and the lessee may thereupon quit and surrender possession, the liability for rent continues after the destruction of the leased building unless the possession of the premises is surrendered.² The election to retain possession or terminate the lease must be made within a reasonable time, and cannot be revoked. By remaining in possession two and a half months after the premises were partially destroyed and one month after the injuries had been substantially repaired by the lessor, the election to retain the lease was made.³ The tenant has the *onus* of showing that the injury to the premises rendered them untenable and unfit for occupancy.⁴ Under a statute expressing that a tenant shall not be bound to pay rent for buildings after their destruction by fire, without negligence on his part, unless he has contracted to do so, he is entitled, on showing himself to be within such provision, to an abatement of the rent in the proportion that the value of the destroyed property bears to the value of the use of the whole premises leased.⁵ In New York it was provided by a statute enacted in 1860 that the lessees or occupants of any building which shall, without their fault or neglect, be destroyed or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be bound to pay rent after such destruction or injury, etc. It was at first ruled that this statute contemplated a sudden destruction or injury by the elements, and not the gradual deterioration produced by the ordinary action of the

Atl. Rep. 979; Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45.

¹ Smith v. Marrable, 11 M. & W. 5; Chester v. Powell, 52 L. T. Rep. 722; Wilson v. Finch-Hatton, 2 Ex. Div. 336.

² Roach v. Peterson, 47 Minn. 291, 50 N. W. Rep. 80.

³ Roach v. Peterson, 47 Minn. 462, 50 N. W. Rep. 601.

⁴ Wampler v. Weinmann, 56 Minn. 1, 57 N. W. Rep. 157; Gilchrist v. Weil, 10 Ohio Dec. 687. See Weeber v. Hawes, 80 Minn. 476, 83 N. W. Rep. 447.

⁵ Taylor v. Hart, 73 Miss. 22, 18 So. Rep. 546, 30 L. R. A. 716.

elements.¹ A later case modifies that statement and determines that all that the former case necessarily decided was that "such injuries as are the result of failure to make ordinary repairs, when the landlord has not agreed to make them, do not come within the statute, because it was not intended to modify or change the relative duties of the parties to the lease in that respect."² Where the premises at the time of the lease were in such a state that by gradual deterioration they fell into such a condition that heavy rains soaked into or ran into and flooded the cellar, so as to render the premises untenable, the water was considered the proximate cause of the injury, and the statute applied.³ Under the Ohio statute a lessee is not justified in abandoning premises unless the injury renders them unfit for occupancy,—they must be in such condition that they are not reasonably fit to accommodate the tenant. If the whole premises are in that condition, it is immaterial where the fire occurred; but if only a small portion of them are rendered unfit for occupancy, the lease as a whole is not terminated; the lessee's liability is reduced to a proportionate part of the stipulated rent. The lessor's offer to restore the premises does not affect the lessee's right to surrender them.⁴

§ 852. Entire destruction of demised premises. Where the estate out of which the rent issues is gone and the demised tenement has ceased to exist, the rent terminates and the obligation to pay is at an end. Thus, by the lease of apartments in a building for the purpose of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartments rented and necessary thereto, and if they are totally destroyed by fire this interest ceases; the relation of landlord and tenant, upon such a lease, is dissolved thereby, and thenceforth the lessee has no interest in or right to the land.⁵ This rule has been applied where a leased

¹ *Suydam v. Jackson*, 54 N. Y. 450.

² *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. Rep. 716.

³ *Meserole v. Linn*, 34 App. Div. 33, 53 N. Y. Supp. 1072.

⁴ *Gilchrist v. Weil*, 10 Ohio Dec. 687, affirmed without opinion, 52 Ohio St. 677.

⁵ *Utah Optical Co. v. Keith*, 18 Utah, 464, 472, 56 Pac. Rep. 155, citing the text; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125; *McMillan v. Solomon*, 42 Ala. 356; *Graves v. Berdan*, 26 N. Y. 498; *Austin v. Field*, 7 Abb. Pr. (N. S.) 29; *Ainsworth v. Ritt*, 38 Cal. 89; *Kerr v. Merchants'*

landing was destroyed by the ravages of a river.¹ The lease is not terminated, nor the right to rent extinguished, where, by the operation of the lease, the tenant has, after destruction [128] of the building, an interest in the soil and is authorized to rebuild, so that thereby or otherwise he may still have some beneficial enjoyment of the premises.² Neither is the lease terminated by a clause in it to the effect that the tenant need not restore the building from the effects of a fire.³ The rule is not affected by the fact that the landlord had insurance on

Exchange Co., 3 Edw. 315; *Winton v. Cornish*, 5 Ohio, 477; *Womack v. McQuarry*, 28 Ind. 103, 93 Am. Dec. 306. See *Izon v. Gorton*, 5 Bing. N. C. 501.

The destruction of a partition and of windows in a loft is not a total destruction of the premises within the meaning of a lease, although they may be rendered untenable thereby until repaired. *Einstein v. Levi*, 25 App. Div. 565, 49 N. Y. Supp. 674.

The term "fire or other unavoidable casualties" comprehends only damage or destruction arising from supervening and uncontrollable force or accident; it signifies events or accidents which human prudence, foresight and sagacity cannot prevent. *Willis v. Castles*, 3 Gray, 325; *Tays v. Ecker*, 6 Tex. Civ. App. 188, 24 S. W. Rep. 954.

¹ *Waite v. O'Neill*, 76 Fed. Rep. 408, 22 C. C. A. 248, 34 L. R. A. 550.

² *Lieberthal v. Montgomery*, 121 Mich. 369, 80 N. W. Rep. 115; *Fleming v. King*, 100 Ga. 449, 28 S. E. Rep. 239; *Smith v. McLean*, 123 Ill. 210, 14 N. E. Rep. 50; *Helburn v. Mofford*, 7 Bush, 169; *Gibson v. Perry*, 29 Mo. 245; *Bussman v. Ganster*, 72 Pa. 285; *Phillips v. Epp*, 6 Kulp, 405; *Warren v. Wagner*, 75 Ala. 188, 202, 51 Am. Rep. 446; *Graves v. Berdan*, 26 N. Y. 493. See *Union Water Power Co. v. Pingree*, 91 Me. 440, 40 Atl. Rep. 333.

In South Carolina it has been held that where a tenant has been dispossessed by an enemy he ought to be

thereafter relieved from paying rent; that his liability is suspended when his enjoyment is interrupted by the casualties of war. *Bayly v. Lawrence*, 1 Bay, 499. So where a hurricane rendered the rented house untenable, *Ripley v. Wightman*, 4 McCord, 477, 17 Am. Dec. 758.

In the later case of *Coagan v. Parker*, 2 Rich. 255, it appeared that the tenant, although his beneficial enjoyment was impaired by the casualties of war, had not surrendered or offered to surrender the lease, or otherwise to rescind the contract, and it was held that his defense should not be allowed. The authorities in that state and elsewhere are reviewed, and the true doctrine held to be, that where there is a substantial destruction of the subject-matter out of which the rent is reserved, in a lease for years, by an act of God or the public enemy, the tenant may elect to rescind, and on surrendering all benefit from the lease shall be discharged from the payment of rent. It was also decided that if the tenant be deprived of the beneficial enjoyment of the leased premises according to the intent of the lease, that is a destruction of its subject, of its subject-matter, within the meaning of these terms, whether there be a physical destruction of the premises or not.

³ *O'Neil v. Flanagan*, 64 Mo. App. 87.

the property.¹ Under the New York statute referred to in the preceding section the leased building must be destroyed or so materially injured by physical causes as to be unfit for occupancy before there can be a release of the tenant's liability for rent. The existence of a contagious disease in a hotel does not justify one who has leased apartments therein in abandoning them.²

According to a majority of the court of Washington on the destruction of a building the tenant who has covenanted to pay rent therefor monthly in advance may recover money so paid for that part of the month remaining after its destruction. Such covenant is not an apportionment of the risk between the parties, so that the tenant assumes the risk of losing rent for the time for which he has paid in advance, and the landlord the risk of losing subsequent payments, besides the loss of his building.³ But the Michigan court, one of the Illinois appellate courts and the courts of New York have declined to accept this view. In the Illinois case the rented premises consisted of the third floor and parts of two other floors of a building, and the lease provided that if the premises should be burned the term should cease, and that the rent should be paid in advance. As to such rent, no provision was made, and the court did not feel like making one. As it viewed the case, the risk of the lease being terminated before expiration of the time for which rent was paid was upon the party paying.⁴ It is said in the New York case:⁵ If by the terms of his lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed by fire, and he is liable to pay the rent due in advance even though the destruction takes place on the very day it falls due. This was the rule laid down in the case of Craig

¹ Ward v. Adams' Trustee, 8 Ky. L. Rep. 769 (Ky. Super. Ct.).

² Majestic Hotel Co. v. Eyre, 53 App. Div. 273, 65 N. Y. Supp. 745.

³ Porter v. Tull, 6 Wash. 408, 33 Pac. Rep. 965, 22 L. R. A. 613, 36 Am. St. 172.

⁴ Lieberthal v. Montgomery, 121

Mich. 369, 80 N. W. Rep. 115; Tarkovsky v. George H. Hess Co., 64 Ill. App. 513. See Copeland v. Goldsmith, 100 Wis. 436, 76 N. W. Rep. 358.

⁵ Werner v. Padula, 49 App. Div. 135, 63 N. Y. Supp. 68, affirmed without opinion, 167 N. Y. 611.

v. Butler,¹ which was affirmed in the court of appeals on the opinion of the general term.² The case of Hecht v. Heerwagen,³ to the contrary, must be deemed to be overruled by Craig v. Butler.

§ 853. **When premises taken for public use.** Whenever the estate which a lessor had at the time of making the lease is defeated or in any manner determined, the lease is extinguished with it;⁴ as where a tenant for life makes a lease for a term and dies before it ends.⁵ So where the entire premises demised are taken for any public use the lease is thereby terminated; it becomes void when the proceedings have divested the lessor's title and payment therefor is made him.⁶ But where only a portion of the demised premises is taken, the taking has no effect upon the rights or relations of lessor and lessee; each is entitled to compensation for his property so taken, and the lessee is not entitled to an abatement of the rent he has covenanted to pay unless by force of some provision of the lease or statutory regulation.⁷ This is the rule, although the lessor consents to the entry by a railroad company and conveys to it the right of way.⁸ It is held in Missouri and Mississippi, and in Pennsylvania, in equity, that the claim for rent on the portion of the land appropriated is extinguished.⁹

¹ 83 Hun, 286, 31 N. Y. Supp. 963.

² 156 N. Y. 672.

³ 14 N. Y. Misc. 529, 35 N. Y. Supp. 1090.

⁴ Taylor's Landlord & T., § 519.

⁵ Marshall v. Moseley, 21 N. Y. 280.

⁶ Barclay v. Pickles, 38 Mo. 143; Noyes v. Anderson, 1 Duer, 342; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. Rep. 746, 21 L. R. A. 212; O'Brien v. Ball, 119 Mass. 28; Lodge v. Martin, 31 App. Div. 13, 52 N. Y. Supp. 385; Dyer v. Wightman, 66 Pa. 425; Tays v. Ecker, 6 Tex. Civ. App. 188, 191, 24 S. W. Rep. 954 (*dictum*); Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115, 57 N. E. Rep. 214.

It is held in Foote v. Cincinnati, 11 Ohio, 408, 38 Am. Dec. 737, that the exercise of the right of eminent domain is not a technical incumbrance

on the land, nor is it an eviction; and that the rights of the parties are unaffected thereby. The tenant's liability to pay rent to his landlord continues, and he is to be compensated accordingly. See Corrigan v. Chicago, *supra*, for a discussion of the Ohio case.

⁷ Corrigan v. Chicago, 144 Ill. 537, 544, 33 N. E. Rep. 746, 21 L. R. A. 212; Gluck v. Mayor, etc. of Baltimore, 81 Md. 315, 32 Atl. Rep. 515, 48 Am. St. 550; Workman v. Mifflin, 30 Pa. 362; Parks v. Boston, 15 Pick. 198; Stubbings v. Evanston, 136 Ill. 37, 26 N. E. Rep. 577, 29 Am. St. 300; Chicago v. Garrity, 7 Ill. App. 474. But compare Leiter v. Pike, 127 Ill. 287, 20 N. E. Rep. 23.

⁸ Blythe v. Pratt, 62 Miss. 707.

⁹ Biddle v. Hussman, 23 Mo. 597; Barclay v. Pickles, 38 id. 143; Com-

The general rule rests on the principle that upon such condemnation the amount of compensation or damages is the [129] same whether one person owns the property entirely, or several have distinct estates or interests therein.¹ Where the division of interest is between a lessor holding the reversion and the lessee of an unexpired term, the subsequent liability of the latter for rent without abatement, notwithstanding the curtailment of the demised premises, enhances his share of the damages which are assessed on the taking for public use.² But where, as in Missouri, Mississippi and New York—in the latter state by statute,—the rent is apportioned when a part of the leased property is taken for public use,³ the lessor's share of the damages is enhanced by the subsequent loss of rent on the part so taken. He then gets in hand from the public an equivalent for his rent, and the tenant's future liability is apportioned so as to confine it ratably to the residue.⁴ The right to rent which is due, though it be payable in advance, is not affected by condemnation proceedings, the title of the lessee not being divested until after the rent day.⁵ The lessee of a portion of a building, the whole of which is condemned by

missioners v. Johnson, 66 Miss. 248, 6 So. Rep. 199; Cuthbert v. Kuhn, 3 Whart. 356; Uhler v. Cowen, 192 Pa. 443, 44 Atl. Rep. 42, 199 Pa. 316, 49 Atl. Rep. 77.

¹ Edmonds v. Boston, 108 Mass. 535; Burt v. Merchants' Ins. Co., 115 id. 1; Burt v. Wigglesworth, 117 id. 302; Ross v. Elizabethtown R., 20 N. J. L. 230; Kohl v. United States, 91 U. S. 367.

² Id.

³ Bidde v. Hussman, 23 Mo. 597; Kingsland v. Clark, 24 id. 24; Gillespie v. Thomas, 15 Wend. 464; In re William and Anthony Streets, 19 Wend. 678.

⁴ In re New York Central R. Co., 49 N. Y. 414, a railroad company leased its road and all its land upon or across which the road or any part thereof, or its machine shops, etc., were constructed. It was held that the lease included all lands acquired

for use in operating the road, and without which the use of the road or any part of it would be less convenient and valuable; and also that where the railroad company had prior to the execution of such a lease acquired title to a piece of land for the purpose of use as a street in connection with its road, which use would be highly beneficial to and convenient for its business, the land was included in the lease, although such use had not been actually obtained at the time of the execution of the lease; and that upon the subsequent condemnation of this land by another railroad the lessee was entitled to the use of the money awarded as damages for such taking during the continuance of the lease.

⁵ Gugel v. Isaacs, 21 App. Div. 503, 48 N. Y. Supp. 594, affirmed without opinion, 162 N. Y. 636. See § 852.

public authority, who surrenders his lease pending the condemnation proceedings cannot recover from the owner for damage sustained by removing therefrom.¹

§ 854. **Lessee's liability for interest.** Interest on rent in arrear is, in this country, allowed upon the same principle as [130] upon other debts.² Although it was held in some old cases that it should not be allowed upon rents because it would be making a profit on profit, the more modern and reasonable doctrine seems to be that a certain sum due for rent is similar to any other debt;³ but it is said in the Kentucky case from which the foregoing is quoted, that when due by verbal contract interest shall be allowed or not according to circumstances. In Mississippi it is said interest on rent is in the discretion of the court.⁴ In New York and Pennsylvania it seems to be settled that interest is not only allowed on rent payable in money, but also when payable otherwise, as in wheat, fowls and services, if not paid when due.⁵ In a case in which the point was very

¹ *Steeffel v. Rothschild*, 64 App. Div. 293, 72 N. Y. Supp. 171.

² *Elkin v. Moore*, 6 B. Mon. 462; *Honore v. Murray*, 3 Dana, 31; *Clark v. Barlow*, 4 Johns. 183; *Stockton v. Guthrie*, 5 Harr. 204; *Walker v. Had-duck*, 14 Ill. 399; *Naglee v. Ingersoll*, 7 Pa. 185; *Glover v. Wilson*, 6 id. 290; *McQuesney v. Hiester*, 33 id. 435; *Dorrill v. Stephens*, 4 McCord, 59; *Dennison v. Lee*, 6 Gill & J. 383; *Downing v. Palmateer*, 1 T. B. Mon. 64; *Vance v. Evans*, 11 W. Va. 342; *Stevenson v. Maxwell*, 2 Sandf. Ch. 273; *Crane v. Hardman*, 4 E. D. Smith, 448; *Binsee v. Wood*, 47 Barb. 624; *Van Rensselaer v. Jones*, 2 id. 643; *Same v. Jewett*, 2 N. Y. 135; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. Rep. 431; *Palmer v. Meriden Brit-tania Co.*, 188 Ill. 508, 59 N. E. Rep. 247; *Lane v. Ruhl*, 103 Mich. 38, 61 N. W. Rep. 347; *Schildwachter v. Mayor*, 12 N. Y. Misc. 52, 33 N. Y. Supp. 41; *Dubuque Lumber Co. v. Kimball*, 111 Iowa, 48, 82 N. W. Rep. 458; § 339.

³ *Burnham v. Best*, 10 B. Mon. 227.

⁴ *Howcott v. Collins*, 23 Miss. 398.

⁵ *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643; *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413.

But if the parties have mutual demands which are unliquidated and are not ascertainable by computation, interest is not recoverable on the amount found due to one of them. *Button v. Kinnetz*, 88 Hun, 35, 34 N. Y. Supp. 522; §§ 347, 348; *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

Where rent was payable in royalties and these were frequently accepted by the lessor long after they were due, no demand being made for interest, and he finally gave a receipt in full payment, this not being done under a mistake as to any matter of fact, the representatives of the lessor could not recover interest on royalties which had accrued and were paid prior to the giving of the receipt. *Waller v. Kingston Coal Co.*, 191 Pa. 193, 43 Atl. Rep. 235.

fully considered Bronson, J., referring to the earlier cases, said: "The principle to be extracted from these decisions may be stated as follows: 'Whenever a debtor is in default for not paying money, delivering property or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress he ought, in all cases, to recover interest in addition to the debt by way of damages.' It is true that on an agreement like the one under consideration the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money."¹ It is accordingly allowed also in an action for use and occupation.² Interest which is allowed by way of damages for the neglect to pay promptly is a mere incident of the debt, and falls, when the debt is paid, though that be after suit brought. Hence the acceptance of the rent bars the right to recover interest.³

In Virginia, however, it is not recoverable of course. [131] In an early case⁴ Tucker, J., said: "This question depends partly upon the nature of the thing demanded, which is *rent*, and partly upon the nature of the action which is brought for the recovery of it. Some consideration is also due to the nature of interest and damages according to the principles of the common law." Because a summary remedy by distress was afforded to the landlord for rent it was deemed to be giving him advantage from his own laches to allow him interest un-

¹ Van Rensselaer v. Jewett, 2 N. Y. 135; Bradford Oil Co. v. Blair, 113 Pa. 83, 4 Atl. Rep. 218. See Livingston v. Miller, 11 N. Y. 80.

² Ten Eyck v. Houghtaling, 12 How. Pr. 523.

³ Davis v. Harrington, 160 Mass. 278, 35 N. E. Rep. 771. See § 372.

⁴ Newton v. Wilson, 3 Hen. & Munf. 470.

less the tenant had in some way obstructed that remedy. "Rent service, when it consisted either in personal or manual operations, or in unproductive things, as capons, spars, bows, shafts, roses and other articles enumerated by Sir Edward Coke, was not of a nature to yield any profit growing out of the thing itself in the nature of interest. And if they happened to be uncertain the lord could neither distrain nor recover damages for withholding them. By the common law interest, under the odious name of usury, was altogether prohibited; consequently it could not be recovered in the common-law courts for the mere detention or delay of payment of a debt, however just, or how unreasonably soever the payment might have been delayed. And upon this principle it seems to be that in actions of debt the damages are in general merely nominal; and even in replevin at common law it would seem that the rent is to be regarded as the certain measure of the damages." It seems to be considered in that state that interest is allowable in the discretion of the chancellor or jury in view of particular facts showing a delay in the landlord's remedies for rent without any neglect on his part.¹ It is not allowed where it appears that there were always effects on the premises, liable to distress, sufficient to have satisfied the rents, even though such rents were demanded by the landlord.² A lessee who advances money to his lessor in payment of rent is entitled to interest thereon;³ and where the lease is terminated by agreement and the lessee is entitled to the money deposited as security for the rent he is also entitled to interest on so much of it as he recovers from the date the lease was terminated.⁴

§ 855. Covenants for repairs. The implied covenant on the part of a lessee is that he will treat the demised premises so that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee. Such covenant does not extend to the loss

¹ *Id.*; *Cooke v. Wise*, 3 Hen. & Grundy, 8 Ill. 626; *Mulliday v. Munf.* 463; *Mickie v. Lawrence*, 5 Machir, 4 Gratt. 1.
Rand. 571.

² *Dow v. Adams*, 5 Munf. 21. See *ardson*, 57 Neb. 617, 78 N. W. Rep. 273.
Payne v. Graves, 5 Leigh, 561; *Roper*

v. Wren, 6 *id.* 38; *Buckmaster v.* ⁴ *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. Rep. 1080.

of buildings by fire, flood or tempest, or enemies, which it was not in the power of the lessee to prevent, nor does it require that he shall restore buildings destroyed by accident without his fault.¹ It has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury to the demised premises [132] which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger.² The covenant embraces not only the buildings on the premises at the date of the demise, but any new buildings erected during the term unless the contract expresses a different intention, as where it stipulates to keep in repair the demised buildings.³ Such a covenant, however, does not bind the tenant to insure against natural wear and decay,⁴ nor to give the landlord at

¹ *Earle v. Abrogast*, 180 Pa. 409, 36 Atl. Rep. 923; *United States v. Bostwick*, 94 U. S. 53.

² *Leavitt v. Fletcher*, 10 Allen, 119; *Polack v. Pioche*, 35 Cal. 416; *Nave v. Berry*, 22 Ala. 382; *Phillips v. Stevens*, 16 Mass. 238; *Paradine v. Jane*, Aleyn, 26, 1 Dyer, 33a; *Earl of Chesterfield v. Duke of Bolton*, 2 Comyn, 627; *Walton v. Waterhouse*, 3 Saund. 422a; *Bullock v. Dommitt*, 6 T. R. 650; *Compton v. Allen*, Style, 162; *Green v. Eales*, 2 Q. B. 225; *Bigelow v. Collamore*, 5 Cush. 226; *Allen v. Culver*, 3 Denio, 294; *Bohannons v. Lewis*, 3 T. B. Mon. 376; 2 Platt on Leases, 186; *Parrott v. Barney*, 1 Sawyer, 423; *Cohn v. Hill*, 9 N. Y. Misc. 326, 30 N. Y. Supp. 209; *Beach v. Crain*, 2 N. Y. 87; *Ely v. Ely*, 80 Ill. 532; *David v. Ryan*, 47 Iowa, 642; *Davis v. George*, 67 N. H. 393, 39 Atl. Rep. 979; *Armstrong v. Maybee*, 17 Wash. 24, 48 Pac. Rep. 737, 61 Am. St. 898; *Ross v. Overton*, 3 Call, 309, 2 Am. Dec. 552; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659.

The force of this rule, which is regarded as a rule of construction, is denied in a recent case in Nebraska. *Wattles v. South Omaha Ice & Coal*

Co., 50 Neb. 251, 69 N. W. Rep. 785, 36 L. R. A. 424.

³ *Worcester School Trustees v. Rowlands*, 9 C. & P. 734; *Cornish v. Cleife*, 3 H. & C. 446.

A covenant to surrender the premises at the end of the term in the same state of repair or condition they were in at the date of the lease, natural wear and tear excepted, does not bind the lessee to rebuild if they are accidentally destroyed by fire, without the negligence of the lessee, or make him responsible for the loss. *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814; *Nave v. Berry*, 22 Ala. 391; *Maggort v. Hansbarger*, 8 Leigh, 536; *Wainscott v. Silvers*, 13 Ind. 500; *Warner v. Hitchins*, 5 Barb. 666; *McIntosh v. McLawn*, 49 id. 554; *Levey v. Dyess*, 51 Miss. 501; *SeEVERS v. Gabel*, 94 Iowa, 75, 27 L. R. A. 733, 58 Am. St. 381, 62 N. W. Rep. 669; *Gilchrist v. Weil*, 10 Ohio Dec. 687, affirmed without opinion, 52 Ohio St. 677.

⁴ *Harris v. Goslin*, 3 Harr. 383; *Ball v. Wyette*, 8 Allen, 275; *Gutteridge v. Munyard*, 7 C. & P. 129; *Harris v. Jones*, 1 M. & R. 173; *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. Rep. 957.

the end of the term new buildings in the place of old ones.¹ Where a very old building is demised it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted; it is to be repaired as an old house; but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care.² The term "good repair" is to be construed with reference to the subject-matter,³ the age and class of the tenement, and must differ as that may be a palace or a cottage; but to keep in good repair presupposes a putting into such repair, and means that during the whole term the premises shall be in that condition.⁴

¹ *Belcher v. M'Intosh*, 8 C. & P. 720; *Hart v. Windsor*, 12 M. & W. 68; *Mantz v. Goring*, 4 Bing. N. C. 451.

² *Gutteridge v. Munyard*, 7 C. & P. 129; *Payne v. Haine*, 16 M. & W. 541.

If the lease authorizes the lessee to adapt the premises to a use different from that to which they have been put, a condition requiring their surrender in the same state they were in when leased, reasonable use and wear for the purposes for which they were leased excepted, does not make it the duty of the lessee to restore them to a state fitted for their original use. *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. Rep. 420.

The covenant was that the lessee would repair, uphold, sustain, maintain and keep the demised premises. Before the end of the term one of the walls of the house was bulging out, and after the end of the term the house was condemned and pulled down. The foundation of the house was a timber platform, which rested on a boggy or muddy soil. The bulging of the wall was caused by the rotting of the timber. The house was not less than one hundred years old, and the solid gravel was seventeen feet below the surface of the mud. The wall might have been repaired during the term by means

of underpinning. The defendant was not bound to make his covenant good. *Lister v. Lane*, [1893] 2 Q. B. 212.

³ See *Wait v. O'Neil*, 76 Fed. Rep. 408, 22 C. C. A. 248, 253, 34 L. R. A. 550.

⁴ *Payne v. Haine*, 16 M. & W. 541; *Burdett v. Withers*, 7 Ad. & E. 136; *Walker v. Hatton*, 10 M. & W. 249; *Hart v. Windsor*, 12 id. 68. But see *West v. Hart*, 7 J. J. Marsh. 258, in which, referring to *Brashear v. Chandler*, 6 T. B. Mon. 150, *Nicholas, J.*, said: "It is said in that case that a covenant simply to repair may be construed to embrace only the making good what may be damaged *ad interim*, but that the stipulation to deliver in good repair in every respect left no room for limiting it to a covenant merely to repair according to the original condition of the farm. The word 'keep' seems to us to have direct reference to the condition of the premises at the time of the leasing, and that the then state of repair must be taken to be what the parties meant by good repair. There is so broad and palpable a distinction between a promise to put into repair and one to keep in repair that it is almost impossible to believe that the parties meant the former when they used the latter expression.

And it is proper to show what was the age, class and [133] general state of repair of the premises when the tenant took them in order to measure the extent of the repairs to be made.¹ Covenants to maintain the premises in good repair and in a cleanly condition do not extend to a nuisance created by sewage arising from the landlord's adjacent premises and because of his neglect.² The obligation to make repairs does not require the tenant to replace improvements destroyed by a stranger, the tenant not being at fault.³

The covenant to repair or to keep in good repair does not mean merely that the premises are to be kept in as good a state of repair as when the tenant took them; for that may not be good repair.⁴ Such covenants are to be construed according to their particular words.⁵ A covenant to put the premises into habitable repair does not require the tenant to make a new house; but the word "put" implies that it is to be improved; regard being had to the state in which it was at the time of the agreement, and also to the situation and class of persons who are likely to inhabit it; the lessee is to put it into a condition fit for a tenant to inhabit.⁶ A covenant by the lessee of farm lands "to repair the buildings, build all fences, and to generally improve the property," does not include work done by the lessee at the request of the lessor and on a promise to pay him therefor, in the erection of new buildings, whether the material in them is entirely new or partly derived from old structures, nor in the cutting off of parts of the demised dwelling and setting them up as independent structures. The agreement to generally improve the property refers to the mode of cultivating the lands, the proper and sufficient use of manures and other like matters.⁷

Where the general covenant to repair excepts damages by

A covenant to keep in repair is certainly no broader than a covenant to repair, and if the latter obliges only to make good the damages *ad interim*, no greater stress can be laid on the promise to keep in repair." See *Stultz v. Locke*, 47 Md. 562.

¹ *Payne v. Haine*, *Burdett v. Withers*, *supra*; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Mantz v. Goring*, 4 id. 451.

² *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. Rep. 514, 49 Am. St. 659.

³ *Gulf, etc. R. Co. v. Smith*, 3 Tex. Civ. App. 483, 23 S. W. Rep. 89.

⁴ 3 Par. on Cont. 233.

⁵ *Cornish v. Cleife*, 3 H. & C. 466.

⁶ *Belcher v. McIntosh*, 8 C. & P. 720.

⁷ *Naye v. Noezel*, 50 N. J. L. 523, 14 Atl. Rep. 750.

the elements or acts of providence, no damages are within the exception to which human agency has in any way contributed.¹ A tenant holding over is impliedly bound by all the stipulations in the lease which are applicable to his new situation, including that for repairs, where there is nothing in the lease or any extrinsic fact to destroy this implication.² If he has been in possession several consecutive terms the lessor is not bound to show the separate damages he has sustained at the end of each. It is enough for him to prove a breach of the covenant under one or more or all of the leases. The delivery of each new lease was not a waiver nor an estoppel of the right to claim damages previously sustained.³

In a covenant to keep the outside premises in repair, the external parts are construed to be those which form the inclosure of them, and beyond which no part of them extends; and it has been held to be immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let, as a wall dividing the demised house from an adjoining one.⁴ Where a party to the lease of a carriage-house, consisting of a frame covered with matched boards, a shingle roof, and having a plank floor, covenanted to do the necessary repairs on the outside, and the other those on the inside, it was held that the outside included the whole outer shell of the building or external inclosure of roofs and sides; that the necessary repairs on the outside were those which would make the building outwardly complete. It having been crushed without the fault of either party by a heavy fall of snow upon the roof, it was held that he who undertook to make the outside repairs must first rebuild so as to make the building externally complete before the other was bound to make the repairs inside. The fact that rebuilding the outside would so far replace the whole building as to leave but little to be done on the inside, and thus make the performance of the other party's covenant very easy, did

¹ Polack v. Pioche, 35 Cal. 416.

Damages by the elements, in an exception respecting repairs, covers destruction by fire occurring without fault or negligence in the lessee. Van Wormer v. Crane, 51 Mich. 363, 16 N. W. Rep. 686, 47 Am. Rep. 582.

² Digby v. Atkinson, 4 Camp. 275; Riggs v. Bell, 5 T. R. 471; Beavan v. Delahay, 1 H. Bl. 8; Beale v. Sanders, 3 Bing. N. C. 850.

³ McGregor v. Board of Education, 107 N. Y. 511, 14 N. E. Rep. 420.

⁴ Green v. Eales, 2 Q. B. 225.

not in any degree excuse the former from first performing his contract.¹ The wrongful eviction of a tenant by his landlord from a part of the demised premises does not necessarily affect the tenant's obligation to make repairs.²

§ 856. **Measure of liability for not making repairs.** For a continuing breach of a covenant to repair damages may be recovered *toties quoties*.³ But a covenant by a lessee to repair fences on or before a certain day is not a continuing one, and in an action for a breach damages must be recovered once for all.⁴ An action may be brought for breach of a covenant to keep demised premises in repair whenever such breach occurs, even while the lessee is in possession and during the term,⁵ and the recovery will be limited to compensation for the injury to the plaintiff. Where it is brought by the owner [135] of the reversion before the term has expired the measure of damages is the diminution in value of the reversion in consequence of the want of repairs.⁶ This is manifestly a just rule, rather than that of the amount it would cost to put the premises in repair, as was held in some early cases.⁷ The landlord is not bound to expend the moneys recovered as damages in repairs, and whatever he recovers beyond his reversionary interest is in excess of due compensation. Alderson, B., said:⁸ "The damages for non-repair may surely be very different if the reversion would come to the landlord in six months or

¹ Leavitt v. Fletcher, 10 Allen, 119.

² Smith v. McEnany, 170 Mass. 26, 48 N. E. Rep. 781, 64 Am. St. 272.

³ Hill v. Barclay, 16 Ves. 402; Kingdon v. Nottle, 1 M. & S. 365; Tremere v. Morison, 1 Bing. N. C. 89; Beach v. Crain, 2 N. Y. 86; Shaffer v. Lee, 8 Barb. 420; Phelps v. New Haven & N. Co., 43 Conn. 453. See Cooke v. England, 27 Md. 14.

⁴ Cole v. Buckle, 18 Up. Can. C. P. 286.

An action on a covenant to return leased chattels in as good condition as when leased cannot be maintained before the expiration of the lease. Fratt v. Hunt, 108 Cal. 288, 41 Pac. Rep. 12.

⁵ Buck v. Pike, 27 Vt. 529; Lux-

more v. Robson, 1 B. & Ald. 584; Schieffelin v. Carpenter, 15 Wend. 400. See Atkins v. Chilson, 9 Met. 52.

⁶ Worcester School Trustees v. Rowland, 9 C. & P. 734; Smith v. Peat, 9 Ex. 161; Mills v. East London Union, L. R. 8 C. P. 79; Williams v. Williams, L. R. 9 C. P. 659; Atkinson v. Beall, 11 Up. Can. C. P. 245; Fagan v. Whitcomb, 4 Tex. Civ. Cas. 47, 14 S. W. Rep. 1018; Henderson v. Thorn, [1895] 2 Q. B. 164; Ebbetts v. Conquest, [1895] 2 Ch. 377; Conquest v. Ebbetts, [1896] App. Cas. 490; Brown v. Samson, 8 N. Z. L. R. 284.

⁷ Vivian v. Campion, 2 Ld. Raym. 1125, 1 Salk. 141; Nixon v. Denham, 1 Irish L. 100.

⁸ Turner v. Lamb, 14 M. & W. 412.

nine hundred years, and that Lord Holt's doctrine in *Vivian v. Campion* would startle a man to whom the proposition was stated."

Where the reversion is limited to one for life, with remainder to another in tail, with remainder to a third in fee, and there is a breach of covenant which gives the tenant for life a right to sue, he can only recover damages according to the injury done to his life estate, and not those which may be sustained by the reversioner.¹ The injury to the reversion, however, is not universally the basis and measure of recovery; the damage which the plaintiff suffers and for which the tenant is liable may not arise from its depreciation. Thus, a defendant, an under-lessee, who had covenanted with the plaintiff, his lessor, as the latter had with his lessor, to keep, and, at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord ejected both him and the defendant; and it was held that the plaintiff was entitled to recover substantial damages for the non-repair. The lease to the plaintiff was for a term of seventy-two years, only sixteen of which had elapsed. Though the term had been forfeited [136] by the plaintiff's act, and not that of the defendant, it was ended, and by the terms of the covenant the lessor was entitled to have the premises surrendered in repair; hence the damage to the reversion from the non-repair was necessarily what it would cost to put the premises in repair. It was contended for the defendant that, as the plaintiff had no reversion, and had lost it by his own default, he was entitled only to nominal damages; that it was as if the premises had been built on a cliff which fell into the sea. But Pollock, C. B., said: "This case is distinguishable from the supposed case of the demised premises being destroyed by a convulsion of nature, or by falling into the sea, or being swallowed up and lost, because there the original lessor could not maintain an action of covenant against his tenant, and therefore such lessee would have no right of action against his under-lessee. That

¹ *Evelyn v. Raddish*, Holt's N. P. 543.

does not apply here because the superior landlord has a right of action on the covenant to leave and deliver in repair. . . . And as the intermediate landlord is liable to make good the defects in the premises he may indemnify himself by this action beforehand." In respect to the diminution in value of the reversion being the measure of damages, Bramwell, B., said it "was a very good test, but not the only test of the damages to be recovered. Then a case was suggested of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. If in such a case the house should be burnt down when out of repair I should say that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. Here, however, the premises when delivered up to the ground landlord were worth 40% less than they would have been if in proper repair."¹

In the case of a fee-farm grant there is no reversion, and the only right the grantor has is to preserve the security for his rent, and to have the premises kept in such repair as shall not lessen this security or endanger their recovery in fair tenantable condition if he evicts for the non-payment of rent. Hence an assessment of damages on the principle of ascertaining the sum required to restore the premises to good tenantable condition and reducing such sum to its present value as a reversionary interest which will come into possession at the termination of the grant does not apply. The rule which must govern is to ascertain how much the present value of the landlord's right is depreciated by the breach of the covenant — how much less his interest will sell for in the existing condition of the premises than they would have brought if they had been preserved. In cases where the buildings form the main value of the premises the damage will be much greater than in the case of a ground rent or an agricultural holding where the land forms the chief security for the rent.²

§ 857. Same subject. Where the tenant under a lease containing a covenant to repair underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered 10%.

¹ *Davies v. Underwood*, 2 H. & N. 570.

² *Lombard v. Kennedy*, 23 L. R. Ire. 1.

damages and 57*l.* costs, and the lessee therein incurred 48*l.* costs in his defense, it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against [137] the under-tenant for breach of his covenant to repair. The court say: "If he could not recover these damages and costs against this defendant he would be without redress for an injury sustained through the neglect of the defendant, and not in consequence of his own default; for during the term he could not enter and repair the premises without rendering himself liable to be treated as a trespasser."¹ This case as to the allowance of the costs of the former action has been overruled.² In a case in which the plaintiff, after having suffered judgment at the suit of his lessor for non-repair of demised premises, sought to recover from his own lessee for breach of the covenants for repairs contained in the sublease of the same premises, including the costs to which he had been subjected, the court of queen's bench held the covenants in the two leases were materially different, and suggested that this consideration had been overlooked in the decision of the preceding case.³ Parke, B., said the action was not on a contract of indemnity; that the only true measure of damages was what it would cost to put the premises in repair, and if the plaintiff had expended more than was his own fault, for which the defendant was not liable.⁴ In a similar case which came before the same court the following year⁵ these facts appeared: The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to make the repairs, and for instructions as to the course he should pursue with respect to the defense of the action. The defendant denied that any notice to repair had been given; insisted that

¹ Neale v. Wyllie, 3 B. & C. 533.

² Walker v. Hatton, 10 M. & W. 249; Penley v. Watts, 7 id. 601.

³ Neale v. Wyllie, *supra*.

⁴ Penley v. Watts, 7 M. & W. 610. On the argument the cases of Lewis v. Peake, 7 Taunt. 153, and Pennell v. Woodburn, 7 C. & P. 117, were referred to, and Parke, B., said:

"Those cases would be applicable if the [former] action had been defended in the belief that the premises were in repair. The case of a warranty applies to an existing state of things, not to a thing to be done in the future."

⁵ Walker v. Hatton, *supra*.

the premises did not require it, and even refused permission to the plaintiff to enter and execute the repairs himself; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice that, as he had denied that any notice had been served, and insisted that the premises were not [138] out of repair, he should traverse the breaches of covenant assigned and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was that the original lessor recovered 68*l.* damages and 58*l.* 12*s.* costs, and he himself incurred as costs 53*l.* 14*s.* 4*d.* in defending the action. Lord Abinger, C. B., said: "I do not think the covenant entered into by the defendant extended to the payment of the whole of these damages, but only to that portion of them which was necessarily incurred by the plaintiff. Now the real damage he sustained was the sum of 68*l.*, being the amount recovered by the plaintiff in the former action. The costs were certainly incurred by the present plaintiff in his own wrong, for he could have put an end to the present controversy between him and his lessor by the payment of that sum in the first instance, or he might have subsequently paid it into court. If we held that any more damages were recoverable there would be no limit; the only safe rule is to confine the verdict to those which were the necessary result of the act complained of, viz., the want of repairs; and I cannot see how it can be contended that the costs of both the plaintiff and the defendant in the former action were the natural or necessary consequences of that act. I think the case of *Neale v. Wyllie* is not law, and that it was decided on a mistaken principle." While it was said in this case by Parke, B., that the covenants in the two leases were not in substance identical, since one was given two years after the other, and a general covenant to repair must be construed to have reference to the condition of the premises at the time when it begins to operate, still the amount of the damages recovered against the plaintiff in the action on the covenants in the first lease was adopted as the "real damage" for breach of the second, on the motion of the defendant. On the whole, it is probable that the costs were disallowed because unnecessarily

incurred — on the ground of an improvident defense of the former action.¹

[139] § 858. **Same subject.** A landlord cannot recover as part of his damages for the failure of his lessee to repair, losses to which he has contributed by his own acts. Thus, the plaintiff held the demised premises subject to the performance of several covenants, one of which was to repair; he sublet to the defendant on a covenant by the latter to repair, which he failed to perform. The superior landlord ejected the plaintiff for breach of all the covenants, including that broken by the defendant. It was held that the plaintiff could not recover from the defendant for the loss of the term because there were breaches of other than the defendant's covenant, and it did not appear that the ejectment resulted alone from the breach thereof. It was left undecided whether, if the loss of the term had been solely caused by the defendant's failure to perform his covenant, it could have been taken into consideration in the assessment of damages.² Where the plaintiff, to save his lease from forfeiture, has entered during his tenant's term, after default of the latter on his covenant to make repairs, and has executed repairs which both covenants required the reasonable cost of the same is the measure of damages against his tenant; and it is not necessary to prove that his lessee assented to his entry and to the repairs being made by him because, if there was no assent, the plaintiff would be merely liable as a trespasser and it would have no effect on the measure of the tenant's liability for non-repair.³

As has been already incidentally mentioned, if a tenant bound to repair, or under a covenant to leave and deliver up in repair, leaves the premises at the end of his tenancy in a state of dilapidation, he is liable in damages for what it will reasonably cost to put them in the state in which he was bound to leave them,⁴

¹ See *Smith v. Compton*, 3 B. & 16 S. W. Rep. 334. See *Williams v. Ad.* 407; *Short v. Kalloway*, 11 Ad. Williams, L. R. 9 C. P. 659.

& E. 28; *Tindall v. Bell*, 11 M. & W. 228; *Wrightup v. Chamberlain*, 7 Scott, 598; *Smith v. Howell*, 6 Ex. 730; *Blyth v. Smith*, 5 M. & Gr. 405.

² *Clow v. Brogden*, 2 M. & Gr. 39.

³ *Colley v. Streeton*, 2 B. & C. 273; *Martinez v. Thompson*, 80 Tex. 568,

⁴ *Penley v. Watts*, 7 M. & W. 601; *Rawlings v. Morgan*, 18 C. B. (N. S.) 776; *Keyes v. Western Vermont Slate Co.*, 34 Vt. 81; *State v. Ingram*, 5 Ired. 441; *Hays v. Mynihan*, 60 Ill. 409; *Rutland v. Dayton*, id. 58; *Scott v. Haverstraw Clay & Brick Co.*, 135

and also to make compensation for loss of the use while the premises are undergoing repairs.¹ This measure of liability cannot be diminished by proof which shows that the premises have so altered in value by reason of surrounding circumstances that they may be worth as much for certain purposes if some of the repairs the lessee covenanted to make are omitted or made in a less expensive way than his duty required him to make them;² nor by the fact that because of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term, the lessor is at the time of bringing his action no worse off by reason of the defendant's breach.³ Where the lessee breached his contract to sink a third well on the leased premises and to pay a fixed sum or rental therefor if gas was found in paying quantities, the value placed upon success was deemed, *prima facie*, the just measure of compensation.⁴ On the breach of a covenant to put upon the premises a steam engine of sufficient capacity for use in a brickyard, the lessee is liable for the value thereof, notwithstanding he furnished an engine of less capacity, the lessor not having accepted or used it.⁵ If there has been a recovery against the lessee or he has paid money before the expiration of the lease because of the breach of his covenant, the sum paid will be regarded as compensation for injury to the reversion, and the amount recoverable to put the premises in repair will be lessened accordingly.⁶

If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or are blown down by the wind, or burned by an accidental fire, the proper meas-

N. Y. 141, 31 N. E. Rep. 1102; *Darlington v. De Wald*, 194 Pa. 305, 45 Atl. Rep. 57; *Henderson v. Thorn*, [1893] 2 Q. B. 164. See *Myers v. Burns*, 35 N. Y. 269; *Cook v. Soule*, 56 id. 420; *Pennsylvania R. Co. v. Patterson*, 73 Pa. 491; *Phelps v. New Haven & N. Co.*, 43 Conn. 453.

¹ *Woodhouse v. Walker*, 1 Q. B. Div. 408; *Rawlings v. Morgan*, 18 C. B. (N. S.) 776; *Woods v. Pope*, 6 C. & P. 782; *Hexter v. Knox*, 63 N. Y. 561; *Birch v. Clifford*, 8 T. L. Rep. 103. See *Green v. Eales*, 2 Q. B. 225.

² *Morgan v. Hardy*, 17 Q. B. Div. 770; *Scott v. Haverstraw Clay & Brick Co.*, *supra*; *Conquest v. Eb-betts*, [1896] App. Cas. 490.

³ *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185, 44 Atl. Rep. 612.

⁴ *Iddings v. Equitable Gas Co.*, 8 Pa. Super. Ct. 244.

⁵ *Scott v. Haverstraw Clay & Brick Co.*, 135 N. Y. 141, 31 N. E. Rep. 1102.

⁶ *Henderson v. Thorn*, [1893] 2 Q. B. 164.

ure of damages is the amount it will take to rebuild, deducting the difference in value between old and new, as the landlord is not entitled to be put in a better position on account of the destruction, and cannot have the value of a new house when the one he lost was old.¹ If there be covenants to repair and to insure against loss by fire for a specific sum, the liability of the covenantor on the former, in respect to the cost of rebuilding in case the premises are burned down, is not limited to the amount designated to be covered by insurance.² Nor has the tenant any equity to compel his landlord to expend money received upon insurance in rebuilding the demised premises on their being burnt down, or to restrain him from suing for rent until after the premises have been rebuilt.³ It is a common-law duty of a tenant to use the demised premises in such a way that no substantial injury shall be done them. He is not bound to make anything beyond tenantable repairs, such as keeping fences in order, replacing windows and doors broken during the pendency of the lease. For any damage resulting from his use of the premises beyond that incident to such as is reasonable he is responsible.⁴ If fixtures are removed the damages are ascertained by the sum required to restore them, allowing for reasonable use and wear and for the increased value of new materials over old.⁵

If the lessee refuses to make the repairs deemed necessary by a municipal building department and informs the lessor that he will continue to pay rent if the lessor will make the repairs, and the latter notifies the lessee that if he does not make them by a given time they will be made at the expense of the lessee, the lessor is justified in entering to make the repairs, and such entry is not an acceptance of the surrender of the premises.⁶ The tenant's neglect of his obligation to make

¹ Yates v. Dunster, 11 Ex. 15; 1 Add. on Cont., § 767.

² Digby v. Atkinson, 4 Camp. 275.

³ Leeds v. Cheetham, 1 Sim. 146; Ely v. Ely, 80 Ill. 532; Lofft v. Davis, 1 El. & El. 474; Bussman v. Ganster, 72 Pa. 285; Magaw v. Lambert, 3 id. 444. The English cases referred to are cited with approval *arguendo*, in

Sheets v. Selden, 7 Wall. 424. See Kingsbury v. Westfall, 61 N. Y. 359.

⁴ Genau v. District of Columbia, 20 Ct. of Cls. 389.

⁵ Watriss v. First Nat. Bank, 130 Mass. 343.

⁶ Markham v. David Stevenson, Brewing Co., 51 App. Div. 463, 64 N. Y. Supp. 617, affirmed without opinion, 169 N. Y. 593.

repairs, in consequence of which the premises cannot be used for the purposes for which they were leased, does not absolve him from liability for rent, though he vacates them.¹

§ 859. **Liability of assignee of lease for repairs.** An assignment of a lease, subject to the performance of the covenants, does not import a covenant on the part of the assignee; but a covenant to repair runs with the land, and he is liable whilst he continues to hold the premises.² This covenant is divisible in respect to the privity of estate, and may be apportioned when the reversion or the land is severed.³ In an action by an intermediate lessor against his lessee, after the lease had passed through several hands and the premises had been surrendered out of repair to the superior landlord, it appeared that they were in that condition while held by the defendant, and while in the possession of the subsequent assignees, and it was ruled, in the absence of proof to the contrary, that the dilapidations took place in the defendant's term. Pollock, C. B., observed: "It does not appear that the defendant made any complaint about the state of the premises at the time he took them, and if so, the presumption is, [141] either that the premises were in a good state of repair, or that the person from whom he took them paid him a sum of money to put them in repair."⁴ In an action by reversioners to recover for the breach of the covenant to repair brought against an under-lessee, who has notice that there is a superior landlord, and during the under-lessee's term, the measure of damages is not the same as it would be in an action against the direct lessee with a freehold reversion. The latter's liability over to the landlord must be considered, and the cost of putting the property into repair at the end of the term may be regarded for that purpose.⁵

§ 860. **Damages for not making repairs in special cases.** A person desired to erect a building adjoining the brick house

¹Huber v. Baum, 152 Pa. 626, 26 Atl. Rep. 101; Reeves v. McComeskey, 168 Pa. 571, 32 Atl. Rep. 96. Fenwick, 4 Bibb, 538; Congham v. King, Cro. Car. 222; McMurphy v. Minot, 4 N. H. 251.

²Wolveridge v. Steward, 1 Cr. & M. 644; Hintze v. Thomas, 7 Md. 346; Gordon v. George, 12 Ind. 408. ⁴Smith v. Peat, 9 Ex. 161.

³Badeley v. Vigurs, 4 El. & B. 71; Lee v. Payne, 4 Mich. 106; Cox v. ⁵Ebbetts v. Conquest, [1895] 2 Ch. 377; Conquest v. Ebbetts, [1896] App. Cas. 490.

of another, and obtained permission to sink his foundation wall below and partly under the latter, agreeing to pay all damages such house might thereby suffer; in putting in that foundation damage was done to the brick house; the owner repaired it, and in a suit for the expense so incurred called expert witnesses who gave detailed estimates of the cost. Among the items was one for "risk" in doing the work, and there was conflicting testimony in respect to its being a usual charge in such cases. Sheldon, J., delivering the opinion, thus referred to it: "It can hardly be said that there was no evidence tending to show that this charge of risk was not a proper item of the expenses of the repairs of the building; and so long as there was any such evidence, although it might be weak, it was for the jury to consider and weigh it; and we cannot say that the court erred in refusing to entirely exclude it from the consideration of the jury. The court could not have been required to do more than say to the jury that they should not make any allowance on account of that item, unless they believed from the evidence that it was a usual and customary charge in the making of such repairs. The item should not have been allowed as an item of damage under the evidence. But there were four witnesses . . . each one of whose estimate of the damages, exclusive of that item, exceeded the amount of the verdict, so that we cannot say that that charge must have entered into the verdict and formed a part of it."¹

By an act of the legislature, in 1857, for the sale of public works, consisting of a railroad and canal, it was required that the purchaser should, immediately after taking possession, "thereafter keep up, in good repair and operating condition, the line of said railroad and canal," the same to be and remain forever a public highway, and kept open and in repair by the [142] purchaser for all parties desiring to use and enjoy them. By a subsequent act it was declared that by the act of 1857 the commonwealth required the purchasers of the main line to keep the canal "in a condition of repair and fitness for use, which shall, at all times during seasons of navigation, be equal and not inferior to the condition of repair and fitness for use in which they were at the time the commonwealth delivered

¹ Hays v. Moynihan, 60 Ill. 409.

the same into the purchaser's possession." It was held that under these acts the purchasers were bound to keep the canal in good repair and operating condition, although they may not have been in such repair when delivered to them; that the duty was immediate on taking possession as respects its obligation, but not as to the time of its performance; the purchasers were entitled to a reasonable time, commensurate with the magnitude of the work of making the repair; and if they did not commence the repair in a reasonable time, and pursue it with diligence, they were liable for damages to the owners of canal boats for such injuries as were thereby sustained, but not for unavoidable accidents by sudden storms or floods. The following instructions on the measure of damages were approved: "1st. In cases of detention, the loss suffered by the expense of hands, horses, provisions consumed, and loss of the use of the boats during the period of detention would properly be allowed. 2d. In case of damage to the boats and tackle, caused by defective locks, shallow water, or other defect producing unusual wear and tear, the damages thus sustained would be properly allowed. 3d. In cases of injuries caused by difficult and delayed navigation, owing to the negligence of defendant, the loss of ability to carry freight, if offered, and extra length of voyages would be the subject of just compensation. 4th. If by such detentions a trip which could in a proper state of repair be made in a certain time should be prolonged for some days, the expense of the boats, horses, hands and provisions for this extra time would be properly allowed. 5th. If, in consequence of this difficulty of navigation, caused by defendant's negligence, a boat was compelled to forego a full load it had offered to it, or certainly could have had, and had to take so much less, the net amount of freight thus lost would be a proper allowance. 6th. If, for the same reason, the plaintiff was compelled to take two boats to carry a load which otherwise he would have carried in one boat, the expense of [143] the extra boat, horses, hands and provisions would be properly allowed. 7th. If, for the same reason, the plaintiff was compelled to hire extra teams of horses, and hands on his boats, to enable them to make their trips, he is entitled to his actual expenses and losses, and all other losses which he has proved were the legal, natural and immediate consequences of the neglect

of the defendant. 8th. The plaintiff is entitled to interest from the date of each loss which he has sustained up to this date."¹

§ 861. **Covenants not to sublet or assign; liability for breach; proximate cause of loss.** These covenants have not generally raised any question of damage, but one of forfeiture.² Their breach does not avoid the lease except at the option of the lessor, shown by a re-entry.³ But it is ruled in a recent case, the lease in which stipulated that the premises should not be sublet, but was silent as to a forfeiture if the condition should be broken, that the preponderance of authority is to the effect that such a stipulation does not forfeit the lease or give the lessor the right of re-entry.⁴ In a case in England the action was brought on the covenants in a lease which bound the lessees and their assigns to maintain and keep in repair the forge and buildings demised, and all buildings which should be erected during the demise, and all additions and improvements thereto; and to maintain in good working order the fixtures, steam-engines, tools, utensils, and other articles demised; also others that might be brought or set up on the premises, and to replace and make good all such fixtures, engines, tools, utensils and other articles as should be broken or worn out; and it was also covenanted that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor. It was held, first, that so much of the covenant for repairs as related to buildings, machinery, tools and utensils which were tenant's fixtures ran with the land; second, that so much as related to tools and utensils which were not fixtures did not run with the land; third, that the assignee was not liable for breaches of the covenant after an assignment by him without the consent of the lessor; fourth, that the covenant not to assign ran with the land, and bound an assignee to whom the premises had been assigned with the consent of the lessor;

¹ *Pennsylvania R. Co. v. Patterson*, 73 Pa. 491.

² *Taylor's Landlord & T.*, ch. 9.

³ *Holman v. De Lin*, 30 Ore. 428, 47 Pac. Rep. 708; *Shattuck v. Lovejoy*, 8 Gray, 204.

⁴ *In re Pennewell*, 119 Fed. Rep. 139,

55 C. C. A. 571; *Hague v. Aherns*, 53 Fed. Rep. 58, 3 C. C. A. 426; *Hanaw v. Bailey*, 83 Mich. 24, 46 N. W. Rep. 1039, 9 L. R. A. 801; *Hilsendegen v. Scheich*, 55 Mich. 468, 21 N. W. Rep. 894.

fifth, that the lessor could recover damages indirectly in respect of those breaches which had already occurred, and [144] future breaches; that the measure was such sum as would, so far as money could, put him in the same position as if he had retained the liability of the defendant, instead of having an inferior remedy against a person less able to perform the covenants or to compensate for the breach of them.¹

In a Canadian case the rule of the English case cited was modified by making an allowance for the vicissitudes of business and the uncertainty of the defendant's life and health. These elements of uncertainty would have been borne by the lessor if the lease had not been assigned, and it was considered that he should not be wholly relieved of them because of the assignment.² In another case in the same court the doctrine of the English case was followed and the lessor was allowed to recover from the lessee the rent which became due a few days after the assignment was made, which was payable in advance without any deduction for rents realized during the period covered by such rent under new leases given by the lessor, who, finding the premises unoccupied, took possession of them.³

In a later case in England the covenant against assigning or subletting without consent was qualified by a condition that such consent should not be unreasonably or capriciously withheld to a responsible assignee or sub-tenant. Without applying for consent, the lessor sublet the premises to a person who intended, as he knew, to use them, and who did, in fact, use them as a turpentine distillery. In consequence of such use they were burned, fire having arisen therefrom. Such burning was the natural result of the breach of the covenant, and the damages caused by it were recoverable from the lessee. The case so holding was tried before Hawkins, J. He said: For the bare breach of a covenant not to assign or sublet without consent, a lessor, if he thinks fit so to do, may recover nominal damages, even though the person to whom the assignment or sublease is made be one to whom no lessor could reasonably object. In applying the principles which must determine whether substantial damages are recoverable in a case

¹ Williams v. Earle, 9 B. & S. 741,
L. R. 3 Q. B. 739.

² Munro v. Waller, 28 Ont. 574.

³ Patching v. Smith, 28 Ont. 201.

like the present, let us for a moment consider what must be deemed to be in the contemplation of any reasonable lessor and lessee in entering into such a covenant as that before us. Surely the lessor must be taken to intend, and the lessee to know that he so intends, to protect himself as far as possible from an objectionable assignee or sub-tenant, or an objectionable use being made of his property, whether such objection be on account of the inability of the proposed assignee or sublessee to pay the rent and fulfill the other covenants contained in the lease, or on account of the probability that he will so use the demised premises as to expose them to extraordinary peril and danger. Assuming such to be the case, and that the lessee deliberately, in defiance of his covenant, sublets them without his lessor's consent to a person in order that upon them such person may carry on a business of a highly dangerous character, and afterwards, in the course of, and as one of the risks thereof, an explosion or fire occurs, destructive to the premises, could it be seriously doubted that such damage was within the contemplation of the parties when the covenant was made? I proceed now to consider whether the damage sought to be recovered can fairly and reasonably be treated as arising naturally, that is, according to the usual course of things, from the breach of the defendant's covenant. I think it may. It is not, in my opinion, essential to prove that the damage *must inevitably follow such breach*; it is sufficient to show that it was a probable and not unlikely result. I do not wish to be understood as saying that any and every damage occasioned to premises by an assignee or sub-tenant let into possession in defiance of a covenant not to assign or sublet could be saddled upon the person guilty of such breach. Take, for instance, the case of a sublease, without consent, of a house to a highly respectable and responsible tenant for *bona fide* occupation as a dwelling-house; if through some carelessness on the part of such tenant or his servant the house were accidentally set on fire and destroyed, it could hardly be contended that the breach of the covenant was the proximate cause of the fire; for, according to the usual course of things, such misfortunes are not in the contemplation of anybody, and do not happen as the result of the ordinary occupation of a dwelling-house; and it would have been a capricious and unreasonable thing for a

landlord to refuse his consent to a sublease upon the mere ground that the sub-tenant or some one of his servants possibly might, in the future, accidentally set fire to the house. I will not say that the person guilty of the breach might not be responsible if, when he committed it, he knew that the sub-tenant so about to be let in was a recklessly negligent person, who had previously by his recklessness caused damage, by fire or otherwise, to houses in his occupation. Again, if a house let to an unobjectionable sub-tenant for the purposes of a mere dwelling-house were afterwards damaged by fire caused by the sub-tenant using it for a dangerous purpose, I should hesitate to cast liability for substantial damages upon the person who so sublet without asking his lessor's consent; for in such cases, inasmuch as a refusal of consent to the sublessee would, at the time it was made, have been unreasonable and capricious, the lessee would have been entitled to sublet as though no such covenant existed. The present case, however, is very different; the premises are sublet to L. for the express and avowed purpose of enabling him to carry on upon them a business highly dangerous, and in knowingly so subletting them the defendant must have known that he was seriously imperiling the safety of the premises, and exposing his lessor to risk of injury. . . . Under all the circumstances, I look upon the fire and the consequent damages as the natural result of the subletting for the hazardous purposes I have mentioned, and such subletting as the proximate cause of the fire.¹

Where there was a breach of the covenant against subletting or assigning, and of the covenants giving the lessor the right to enter the premises for the purpose of selling or leasing them and the right to put up the usual notice "to let," it was held that the latter covenants were made to aid the lessor in releasing with the least possible delay, and that the parties contemplated an amount of rent which might be lost by the refusal to perform as a proper measure of damages.²

§ 862. **Covenants to insure.** The bare covenant to insure is personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and

¹ *Leppla v. Rogers*, [1893] 1 Q. B. 31.

² *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 38 N. E. Rep. 266.

in general gives the landlord no right to receive the insurance money from the insurers; but when it contains a clause for reinstating the premises with such money he may not only require it to be so applied, but it becomes also a covenant running with the land, enabling the assignee of the reversion to maintain an action for its breach.¹ In case of the breach of such a covenant the lessor is entitled to recover the value of the premises lost to the plaintiff by the defendant's neglect to insure, not exceeding the sum to which he was by his covenant to have insured.² And it will make no difference that on failure of the lessee to insure the lessor was allowed by the lease to do so and charge the premiums as rent.³ This measure of damages has been approved by the supreme court of the United States as the obvious measure of liability. "It is argued," said Justice Shiras, "that the defendant received no consideration for agreeing to insure the property; that it contracted to pay the cost of insurance as part of the rental, and the cost of the premium of insurance was the proper measure of recovery. The obligation of the lessors to rebuild and repair in case of fire, and the suspension of the rent so long as the premises remained uninhabitable, formed the consideration of the defendant's agreement to insure; and we cannot accept the proposition that the plaintiff's damages arising out of the breach of the contract are to be measured by what it would have cost the defendant to secure the stipulated insurance."⁴

A contrary view is maintained in New York. The contract provided that the lessee of a building, who was given the right to purchase, should keep in force insurance thereon for the benefit of the lessor in the sum of \$10,000. No policy was issued, and the building was burned. The lessor's damages were measured by the cost of procuring such a policy as the contract provided for. The opinion contains the following: The question of the measure of damages has not often been brought to the attention of the courts. Indeed, the investiga-

¹ Taylor's Landlord & T., § 400; American Organ Co. v. Abbott, 1 Pa. Douglass v. Murphy, 16 Up. Can. Q. Dist. Rep. 174.

B. 113; Northern Trust Co. v. Snyder, ³ Douglass v. Murphy, *supra*.

76 Fed. Rep. 34, 22 C. C. A. 47, 77 Fed. ⁴ Jacksonville, etc. R. & N. Co. v. Hooper, 160 U. S. 514, 529, 16 Sup. Ct.

Rep. 818, 23 C. C. A. 480. 379 (1896).

² Douglass v. Murphy, *supra*; Smith

tions of counsel, and such as we have been able to make, have produced one case only in which the question as to the measure of damages has been discussed. That case differs somewhat from the one under consideration, but the reasoning employed is entirely applicable. In *Dodd v. Jones*¹ a contract for the sale of a house and lot contained a promise that the grantor would assign a policy of insurance then in full force and effect. The property was conveyed to the grantee, but the policy was not assigned, although its assignment was requested. The purchaser did not procure any insurance and the house was injured by fire. The purchaser then attempted to recover from his grantor such a sum as he would have been entitled to recover upon the policy had it been assigned, alleging that by reason of the grantor's failure to perform his contract in such respect the policy became void. The Massachusetts court said: The agreement was not a contract of insurance, but of sale, and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance, and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff would procure another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that. Applying this reasoning to the case in hand, the New York court said that the agreement does not contemplate that the lessee should become insurer, but rather that for the use of the premises he should pay the taxes, the insurance premiums to keep in force a \$10,000 policy, and the fixed sum agreed upon.²

Where the plaintiff has paid the insurance premium and the covenant to insure has been broken, he may recover it, no

¹ 137 Mass. 322.

80 Hun, 584, 30 N. Y. Supp. 508 (1894),

² *National Mahaiwe Bank v. Hand*, 89 Hun, 329, 35 N. Y. Supp. 449 (1895).

special loss having occurred.¹ The plaintiff being himself a lessee and under like obligation, such payment of the premium was not voluntary, but necessary for his own safety. And doubtless if an ordinary lessor had, on his tenant's default, insured for his own protection he would be entitled to recover of his lessee the amount so paid.² Mr. Mayne says: "If, however, he has not paid the premiums, then the question is, how much is the reversion the worse by reason of the lapse or non-existence of such a policy, no loss having as yet occurred? The answer to this would seem to be that the loss to the reversion is measured by the amount which it would cost the [145] plaintiff to put himself into the same position as he would now be in had the defendant kept his contract. If no insurance has been effected this amount would be the cost of entering into one; that is, all the charges which a party has to incur at starting before his next premium falls due. If a policy has been effected, then the arrears of premiums (if the office will accept them), or the cost of a new policy, whichever is cheaper. It seems plain that this is all to which the plaintiff is entitled; he can claim nothing in respect of the past risk, for this is over; nor in respect of past payments, for he has made none. The cost of commencing an insurance will at any moment secure him against risk till default made in paying the premiums; and when this takes place he may pay them himself and recover their amount as damages."³

Where the covenant does not fix the amount of insurance to be effected, but is general to insure against loss by fire, it will be intended that there should be full indemnity, and the value of the property lost by the failure to insure may be recovered.⁴

¹ *Hey v. Wyche*, 12 L. J. (Q. B.) 83.

² *Mayne on Dam.*, Wood's ed., 374.

³ See *Charles v. Altin*, 15 C. B. 46.

⁴ *Ex parte Bateman*, 2 Jur. (N. S.) 265; *Betteley v. Stainsby*, 12 C. B. (N. S.) 477; *Douglas v. Murphy*, 16 Up. Can. Q. B. 113; *Beardsley v. Davis*, 52 Barb. 159. See § 814.

In *Charles v. Altin*, 15 C. B. 46, by a charter-party it was agreed between the master and the charterers that one-third of the stipulated freight should be paid before the sail-

ing of the vessel,—the same to be returned if the cargo was not delivered at the port of destination,—the charterers to insure the amount at the owner's expense, and deduct the cost of doing so from the first payment of freight. The charterers paid one-third of the freight, deducting the premium of insurance. In an action brought by them to recover the freight so paid the owner pleaded that the loss of the freight to be returned was such a loss as was by the

Where a defendant agreed with the plaintiff to have the [146] building of the latter insured in some good company and had made arrangements for that purpose, but before the insurance was effected the building was burned, and it appeared that the company so selected, in consequence of the great Chicago fire, had become insolvent, but was good when the arrangement was made, it was held that the sum at which the insurance was agreed to be made was not the proper measure of damages for breach of the agreement, but only such dividend as the company would be able to pay in case the insurance had been perfected before the loss.¹ On the breach of a covenant to insure for a stipulated sum, although no injury has occurred, and if the breach continues to the end of the term the utmost extent of the damage to the lessor would be the difference between such sum and the amount of insurance taken, he is entitled to be placed beyond the reach of damage. If the lessee finds it impossible to obtain the full amount of the insurance, the deficiency must be paid to the lessor; failing to

charter-party to be insured against by the charterers at the owner's expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that, although the plaintiff might, with the use of reasonable care and diligence, have effected an insurance whereby the defendant and the owners of the ship would have been fully indemnified against the loss of the one-third of the freight so to be returned, the plaintiffs effected the insurance so negligently and out of the usual course of business that the same became of no use or value, and the defendant, by reason of such improper conduct, had sustained damages to the amount of said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under this charter-party; and any sum paid or returned by the defend-

ant to the plaintiffs in respect of the freight would be the damages sustained by the defendant, by reason of such improper conduct and deviation, and the defendant would be damnified to that extent. The plea was held bad on demurrer, inasmuch as the conclusion was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the insurance was a liability to *damages*, which were not *necessarily* identical in amount with the claim set up by the plaintiffs in the action.

On the breach of a covenant to keep the property insured in such amounts as the vendee deems proper, there is no basis upon which damages can be assessed. *Keith v. Crump*, 22 Ind. App. 364, 53 N. E. Rep. 889. See *Guetzkow Brothers Co. v. Breese*, 96 Wis. 591, 72 N. W. Rep. 45, 65 Am. St. 83.

¹ *Chicago Building Society v. Crowell*, 65 Ill. 453.

do either, the lessor will be entitled to the possession of the premises.¹

There can be no question under the authorities that the collection of insurance money by the lessor upon the destruction of the demised property, where he has paid the premiums, does not affect the lessee's liability for rent in case the lease is silent as to that contingency. But where the insurance is procured by the lessee pursuant to his contract for the lessor's benefit, the rule may well be otherwise, as has been held in a well-considered case in which Judge Brewer wrote the opinion. The provision requiring the lessee to insure was held to qualify the promise to pay rent, and when the former became operative the latter ceased to have force. Whether the amount of insurance was equal to the value of the leased property or not was considered immaterial, as was the question whether the policy covered all or only a portion of it. In the case in question² real and personal property was leased in one instru-

¹ Lawson v. Douglas, 7 N. Z. L. R. 55.

² Whitaker v. Hawley, 25 Kan. 674.

The writer of the opinion says: "The obligation to pay rent after the destruction by fire was always rested upon the part of the contract therefor. It was never doubted but that by contract this obligation might be limited or removed. The parties might stipulate for rebuilding by either, for the absolute termination of the lease or any other change in their respective obligations and rights. Here the contingency of fire was foreseen and provision made therefor. And whether that provision was ample or not is no more a matter of present inquiry than whether the rental stipulated for was excessive or insufficient. The contract was that the tenant should keep the personal property insured at its insurable value in some responsible company for the benefit of the landlord. Thus in case of fire the landlord would receive pay for his property destroyed. Rent is compensation for the use, and implies the

continued existence of the property to be used. Here this compensation was named in the fore part of the lease as '\$275 per month as rent for the use of the premises and property above described.' Beyond this compensation was the stipulation for insurance. By the lease, then, as a whole, the tenant was to pay rent for the use of the property, and in addition purchase a guaranty to the landlord that in case such use should fail by reason of fire, he should receive the value of the property destroyed. When the latter comes into force, is it not plain that the former ceases? Was not the one intended as a substitute for the other? Suppose, instead of contracting to procure insurance, the tenant had contracted himself to insure the property so that in case of destruction by fire he was bound to pay the value; would it for a moment be doubted that the rent ceased when the obligation to pay the value arose? Apply such a contract to the case at bar; could it be held that a party who contracted

ment for a gross sum. The latter was insured. It was held that on its destruction the lessee was relieved from liability for rent, although he had covenanted to keep the premises in repair.

SECTION 2.

TENANT AGAINST LANDLORD.

§ 863. Lessor's covenant for quiet enjoyment. In every lease there is an express or implied engagement by the lessor that he has such title to the premises as enables him to give the lease, and that the lessee shall not be disturbed in his possession during the term by the lessor, nor by a paramount title.¹ If the lease contains an express stipulation on this sub-

that in case of destruction by fire the day after he had taken possession, he would pay to the landlord the value of the property leased and also pay \$275 a month rent for its use for the ensuing two years? Before a contract could be so interpreted it must appear, not merely that the language will justify such an interpretation, but also that it necessarily excludes every other construction. Paying value is equivalent to purchase, and who would think if the right to purchase at a stipulated sum was inserted in the lease, that rent could be enforced after such purchase? If the contract to pay value to insure is so manifestly inconsistent with the obligation to pay rent that the latter gives way when the former becomes operative, the same principle applies when the contract is to furnish insurance. While the contrast is not so glaring, it is still obvious that the insurance is to take the place of the rent. The insurance is a provision to compensate the landlord when the rent fails and not a provision to double the rent. . . . But it is said that the insurance contracted for was simply on the personalty; that such insurance, even if it abates the rent,

abates it only on the personalty, and that if the defendants wish any abatement they must show the relative rental values of the real and personal property. This is a misconception. The rent was in gross for the real and the personal property. The contract concerning insurance was a single provision; it shows that the parties contemplated the possibility of fire, and made their stipulations accordingly; and whether that provision was for insurance in a definite amount on all the property or the full value of either the real or the personal is immaterial; it is the contract provision for the possibility of fire.²

¹Smith's Landlord & T., 206; Taylor's Landlord & T., § 304; Mayor v. Mabie, 13 N. Y. 151, 64 Am. Dec. 606; Tone v. Brace, 8 Paige, 597; Vernam v. Smith, 15 N. Y. 327, 69 Am. Dec. 606; Graves v. Berdan, 26 N. Y. 498; Granger v. Collins, 6 M. & W. 458; Maule v. Ashmead, 20 Pa. 482; Bandy v. Cartwright, 8 Ex. 913; Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 404; Ross v. Dysart, 33 Pa. 452; Baugher v. Wilkins, 16 Md. 35, 77 Am. Dec. 279; Boyer v. Commercial Building Investment Co., 110 Iowa, 491, 81 N. W. Rep. 720; Budd-Scott v. Daniell,

ject, although a restricted one, none will be implied.¹ The landlord will, however, be liable for a substantial interference with the convenient occupation of the premises, such interference [147] amounting to a nuisance.² A disturbance of possession by a stranger having no title will not be a breach of the covenant for quiet enjoyment;³ but any interference with the possession of the lessee, more than a mere trespass by the lessor himself, will be a breach of his engagement.⁴ Hence, if a party accepts a lease and engages absolutely to pay rent for premises which the lessor owns and has power to lease for the term he undertakes to grant, the lessee will be bound to pay though kept out of possession by a former tenant whose term has expired.⁵ But an entry by the lessor himself, tortiously and without right or title, will amount to a breach.⁶ A recovery in trespass by a prior lessee is an eviction, although the action was not brought until the termination

[1902] 2 K. B. 351 (though the word "demise" be not used); *Hanley v. Banks*, 6 Okl. 79, 51 Pac. Rep. 664; *Riley v. Hale*, 158 Mass. 240, 33 N. E. Rep. 491; *Coulter v. Norton*, 100 Mich. 389, 59 N. W. Rep. 163, 43 Am. St. 458.

¹ *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637; *Howell v. Richards*, 11 East, 642; *Burr v. Stenton*, 43 N. Y. 462; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 578, 5 id. 183.

² *Grosvenor v. Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

³ *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. Rep. 588.

⁴ *Mayor v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Baughner v. Wilkins*, 16 Md. 25, 77 Am. Dec. 279; *Taylor's Landlord & T.*, § 305; *York v. Steward*, 21 Mont. 515, 43 L. R. A. 125, 55 Pac. Rep. 29; *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. Rep. 514, 49 Am. St. 659; *Wyse v. Russell*, 16 N. Y. Misc. 53, 37 N. Y. Supp. 683; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244; *Grove v. Youell*, 110 Mich. 285, 68 N. W. Rep. 132, 33 L. R. A. 297.

By purposely rendering a building unsafe and uninhabitable, and pro-

curing its destruction under cover of condemnation proceedings, the landlord is liable for an eviction. *Silber v. Larkin*, 94 Wis. 9, 68 N. W. Rep. 406.

A landlord who has given leases of different floors of the same building to various persons may, as owner of one floor, repair, alter and improve it, but in so doing he is bound by his implied agreement not to dispossess or render uninhabitable the portion of the building demised to others; if he does so, he is liable to them irrespective of the question of negligence. *McDowell v. Hyman*, 117 Cal. 67, 48 Pac. Rep. 984.

⁵ *Gardner v. Keteltas*, 3 Hill. 330, 38 Am. Dec. 637. See *Coe v. Clay*, 5 Bing. 440; *Trull v. Granger*, 8 N. Y. 115; *Underwood v. Birchard*, 47 Vt. 305.

⁶ *Sedgwick v. Hollenback*, 7 Johns. 317; *Levitski v. Canning*, 33 Cal. 298; *Bennet v. Bittle*, 4 Rawle, 339; *Bartlett v. Farrington*, 120 Mass. 284; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. Rep. 14; *Huline v. Brown*, 3 Heisk. 679.

of the first lease.¹ An actual forcible eviction is not necessary; it is enough to show a demand for possession by one claiming under a paramount title, and a yielding and surrender of possession in obedience to such demand and in recognition of the dominant character of the title under which the demand was made.² Every grant of any right, interest or benefit carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial; and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.³ It is not a defense to a landlord who removes the property of his tenant and turns him out without authority that the business carried on by the latter was illegal or that he was in default in payment of rent.⁴ In Virginia a tenant who has been wrongfully enjoined from enjoying the rented premises may, in addition to the remedy on the injunction bond, recover damages by an action on the case.⁵

If one takes possession of land under a void parol agreement, with the consent of the owner, and with his consent expends time, labor and materials thereon for the purpose of placing it in condition for use under the contemplated lease, the contract is so far taken out of the statute that there may be a recovery for what has been done, and also a fair compensation for what the contemplated lessee has lost.⁶

§ 864. **The general rule of damages.** When the lessee is prevented from taking possession, or is afterwards evicted by the lessor or any other person claiming under a paramount title, the general rule of damages in this country is the same as upon executory contracts for the sale of real estate and the covenants for title in conveyances. In those states where the doctrine of *Flureau v. Thornhill*⁷ prevails the purchaser recovers the consideration money and interest, and not the value of the property; he recovers nothing for the loss of the bargain where the sale is made in good faith, and fails by the

¹ *McAlester v. Landers*, 70 Cal. 79, 11 Pac. Rep. 505.

² *Tyson v. Chestnut*, 118 Ala. 387, 405, 24 So. Rep. 73.

³ *Dexter v. Manley*, 4 Cush. 24.

⁴ *Boniel v. Block*, 44 La. Ann. 514, 10 So. Rep. 869.

⁵ *Hubble v. Cole*, 88 Va. 236, 13 S. E. Rep. 441, 29 Am. St. 716.

⁶ *Deisher v. Stein*, 34 Kan. 39, 7 Pac. Rep. 608.

⁷ 2 W. Bl. 1078.

vendor's inability, without his fault, to give a good title.¹ Following that analogy, the rent reserved in a lease, where no other consideration is paid, is regarded as a just compensation for the use of the premises.² In case of eviction the rent ceases and the lessee is relieved from a burden which is treated as equal to the benefit which he would derive from the enjoyment of the property. Having lost nothing, he can recover no damages. He is, however, entitled to the costs he has been put to in defending against the paramount title; and, as he is answerable to the true owner for the *mesne* profits for a limited period, he may recover the rent he has paid for the same time with interest thereon.³ Upon refusal to perform an executory contract to give a lease the rule of damages is the same, if the inability or refusal is without fault or fraud on the part of the party promising to execute the lease.⁴

¹ § 578; *Bertram v. Herring*, 18 Pa. Super. Ct. 395.

² *Id.*; *Kelly v. Dutch Church*, 2 Hill, 105; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *In re Strasburger*, 56 Hun, 164, 9 N. Y. Supp. 204, 132 N. Y. 128, 30 N. E. Rep. 379; *Smart v. Allegart*, 14 Phila. 179; *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; *Engstrom v. Merriam*, 25 Wash. 73, 64 Pac. Rep. 914. See *Union Water Power Co. v. Pingree*, 91 Me. 440, 448, 40 Atl. Rep. 333.

If the lessee's term is brought to an end by the foreclosure of a mortgage it will be presumed that the rent agreed upon is the fair value of the use of the property, and he will not be allowed anything out of the surplus proceeds of the sale as against the owner of the equity of redemption. *Larkin v. Misland*, 100 N. Y. 212, 3 N. E. Rep. 79.

In *Cumberland Telephone & Tel. Co. v. Hendon*, 71 S. W. Rep. 435, — Ky. —, a physician's telephone was, by mistake, disconnected for the non-payment of rent for several hours. It was not shown that he suffered any pecuniary injury. The recovery of

punitive damages was denied, the measure of recovery being the sum paid for the service during the time of the disconnection.

³ *Id.*; *Kinney v. Watts*, 14 Wend. 38. In this case the court also say, in respect to improvements he may have made upon the premises, and money expended upon them, he stands precisely upon the same footing with a purchaser who recovers nothing for improvements or expenditures, nor can a lessee, upon an ordinary covenant for quiet enjoyment. *McAlpin v. Woodruff*, 11 Ohio St. 120; *Mack v. Patchin*, 43 N. Y. 167, 1 Am. Rep. 506; *Green v. Williams*, 45 Ill. 206; *McClowry v. Cloghan*, 1 Grant's Cas. 307; *Van Brocklin v. Brantford*, 20 Up. Can. Q. B. 347; *Chatterton v. Fox*, 5 Duer, 64; *Ricketts v. Lastetter*, 19 Ind. 125.

⁴ *Noyes v. Anderson*, 1 Duer, 342.

If the custom, usage and by-laws of a church recognize the right of a member of it to the continuance of his lease of a pew on compliance with the prescribed terms, he may recover reasonable, but not vindictive, damages for a refusal to recog-

In a comparatively late case in New York¹ one of the two judges delivering opinions treated the rules adopted upon the analogy of those governing between vendor and purchaser as settled in that state; but because the lessor was an actor in evicting the tenant he was held liable for compensatory damages, measured, not by the rent, but by the value of the lease. The judgment appealed from was based upon that view, and was affirmed. Smith, J., in an opinion in favor of affirmance, says the mild rule which has been stated has not been very satisfactory to the courts in this country, and it has been modified more or less to meet the injustice done by it to lessees in particular cases. He refers to two English cases² as repudiating that rule, and mentions a New York case³ as based on the same doctrine. The English cases do repudiate the rule except as between vendor and purchaser. Erle, C. J.,⁴ said: "If there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, . . . the lessee is entitled to recover all he has lost, that is, the value of the term." Byles, J., in the same case, said that the rule firmly established between vendor and purchaser is that the purchaser is not to be placed in the [149] position he would have been in if the vendor had performed his contract, but in the position he — the purchaser — would have been in if the contract had never been made; that is, he is entitled to a return of his deposit with interest, and to any expenses he may legitimately have been put to in investigating the title, and to nominal damages, and no more. "That," he adds, "is an anomalous rule, confined, for the sake of general convenience, to the case of vendor and purchaser. In all other cases of breach of contract the measure of damages is the loss

nize such right. *Johnson v. St. Andrew's Church*, 1 Can. Sup. Ct. 235 (\$300 were allowed as damages).

¹ *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506.

Where the assignor of a lease warranted its validity and the assignee's quiet enjoyment of the premises demised, on its breach the damages were not less than the consideration paid, with interest, and these were

recoverable as soon as there was a failure to give possession, and without a reassignment or tender of the lease. *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. Rep. 1004.

² *Williams v. Burrell*, 1 C. B. 402; *Lock v. Furze*, 19 C. B. (N. S.) 96, affirmed, L. R. 1 C. P. 441.

³ *Trull v. Granger*, 8 N. Y. 115.

⁴ *Lock v. Furze*, *supra*.

the plaintiff has proximately sustained by reason of the breach of the defendant's contract."¹ A city which fails to put its lessee in possession of the granted right to collect wharfage is not liable for the value of the use of the wharf for the purpose of the lessee's private business, but for the difference between the rent reserved and the value of the use of the wharf at the rate of wharfage fixed by law.² Even in England if other losses than the value of the term have been sustained as a natural consequence of the lessor's wrongful act, there may be a recovery, as the expense of removing the tenant's business to other premises.³

In several states of the Union the doctrine of *Flureau v. Thornhill* has never been adopted between vendor and purchaser, and has no influence upon the adjudications between lessor and lessee.⁴ Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which he assumes to grant; where he refuses, in violation of his agreement, to give a lease, or possession pursuant thereto, having the ability to fulfill, as well as where he evicts his tenant, he is chargeable with full damages for compensation, and the doctrine of that case has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages.⁵ This is ordinarily meas-

¹ See *Rolph v. Crouch*, L. R. 3 Ex. 44.

² *Eastman v. Mayor*, 152 N. Y. 468, 46 N. E. Rep. 841. See *Deluise v. Long Island R. Co.*, 65 App. Div. 487, 72 N. Y. Supp. 988.

³ *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

⁴ *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Dexter v. Manley*, 4 Cush. 14; *Horsford v. Wright*, Kirby, 3; *Sterling v. Peet*, 14 Conn. 245; *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 32 id. 104; *Doherty v. Dolan*, 65 id. 87, 20 Am. Rep. 677; *Caswell v. Wendell*, 4 Mass. 108; *Sumner v. Williams*, 8 id. 222; *White v. Whit-*

ney, 3 Met. 81; *Hertzog v. Hertzog*, 34 Pa. 418; *McNair v. Compton*, 35 id. 23. See § 579 *et seq.*

⁵ *Green v. Williams*, 45 Ill. 206; *Dobbins v. Duquid*, 65 Ill. 464; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506, 29 How. Pr. 20; *Trull v. Granger*, 8 N. Y. 115; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283; *Tracy v. Albany Exp. Co.*, 7 N. Y. 472, 57 Am. Dec. 538; *Chatterton v. Fox*, 5 Duer, 64; *Dean v. Roesler*, 1 Hilt. 420; *Myers v. Burns*, 35 N. Y. 272; *Porter v. Bradley*, 7 R. L. 538; *De La Zerda v. Korn*, 25 Tex. Supp. 188; *Dexter v. Manley*, 4 Cush. 14; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501;

ured by the amount the lessee would be compelled to pay for other premises equally well adapted to his business.¹ If the premises are in the possession of another under a valid lease and an advance payment of rent has been made the lessor is liable for it and also for interest.² The subsequent lessee is not bound to consider his lease as an assignment of the rent accruing under the prior lease, though he may do so at the risk of waiving any claim he may have against his [150] lessor.³ Where the lessee is deprived of possession under the circumstances indicated the lessor is either guilty of intentional wrong, or has made the lease and assumed the obligation to assure the lessee's quiet enjoyment with a culpable ignorance of defects in his title, or on the chance of afterwards acquiring one. In neither case has he any claim to favorable

Giles v. O'Toole, 4 Barb. 261; *Yeager v. Weaver*, 64 Pa. 425; *Wolf v. Studebaker*, 65 Pa. 459; *Cilley v. Hawkins*, 48 Ill. 308; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127; *Chambers v. Brown*, 69 Iowa, 213, 28 N. W. Rep. 561; *Woods v. Kernan*, 57 Hun, 215, 10 N. Y. Supp. 654; *Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. Rep. 714; *Snodgrass v. Reynolds*, 79 Ala. 452; *Rose v. Wynn*, 42 Ark. 257; *Cohn v. Norton*, 57 Conn. 480, 5 L. R. A. 572, 18 Atl. Rep. 595; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. Rep. 58; *Jewett v. Brooks*, 134 Mass. 505; *Dodds v. Hakes*, 114 N. Y. 260, 21 N. E. Rep. 398; *Pumpelly v. Phelps*, 40 N. Y. 60; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. Rep. 827; *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. Rep. 35; *Marrin v. Graver*, 8 Ont. 39; *Hughes v. Hood*, 50 Mo. 350; *Cull v. San Francisco & Fresno Land Co.*, 124 Cal. 591, 57 Pac. Rep. 456; *Tyson v. Chestnut*, 118 Ala. 387, 406, 24 So. Rep. 73; *Chestnut v. Tyson*, 105 Ala. 149, 16 So. Rep. 723; *Hodges v. Fries*, 34 Fla. 62, 15 So. Rep. 682; *Shuman v. Smith*, 100 Ga. 415, 28 S. E. Rep. 448; *Cleveland*, etc. R. Co. v. *Mitchell*, 84 Ill. App. 206; *Sheets v. Joyner*, 11 Ind. App. 205, 38

N. E. Rep. 830, citing the text; *Bartram v. Hering*, 18 Pa. Super. Ct. 395; *Riley v. Hale*, 158 Mass. 240, 33 N. E. Rep. 491; *Coulter v. Norton*, 100 Mich. 389, 59 N. W. Rep. 163, 43 Am. St. 458; *Friedland v. Myers*, 139 N. Y. 432, 34 N. E. Rep. 1055; *Salzgeber v. Mickel*, 37 Ore. 216, 60 Pac. Rep. 1009, quoting the text; *Irwin v. Nolde*, 176 Pa. 594, 35 Atl. Rep. 217; *Jonas v. Noel*, 98 Tenn. 440, 36 L. R. A. 862, 39 S. W. Rep. 724, quoting the text; *Utah Optical Co. v. Keith*, 18 Utah, 464, 56 Pac. Rep. 155; *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. Rep. 263; *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. Rep. 991; *Smith v. Phillips*, 16 Ky. L. Rep. 615, 29 S. W. Rep. 358.

"Value of the use" and "rental value" mean substantially the same thing. *Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. Rep. 714.

¹ *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. Rep. 35, 60 Am. Rep. 858; *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. Rep. 724, 36 L. R. A. 862, quoting the text.

² *Riley v. Hale*, 158 Mass. 240, 33 N. E. Rep. 491; *Poposkey v. Munkwitz*, *supra*.

³ *Poposkey v. Munkwitz*, *supra*; *Hughes v. Hood*, 50 Mo. 350.

consideration, and he is not excused on the doctrine of *Flureau v. Thornhill* from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term.¹ Nor would a vendor, who had contracted for the sale and conveyance of land and, being able to fulfill, refused, or was unable to perform by reason of a known absence or defect of title, be held liable to the purchaser for less damages than the value of his bargain.² A lessee who is thus denied possession or evicted may recover the difference between the agreed rent and the actual rental value as general damages. It is not necessary to state them as special damages in the declaration.³

If the premises from which the tenant is excluded are of a peculiar character in the vicinity in which they are situated, the damages must be estimated on the basis of the difference between the rental stipulated to be paid and the value of the leasehold interest. It is error in such a case to apply the standard of market value.⁴ The lessee may show the profits actually realized by him during the time he has occupied the premises under the lease as tending to prove their value to him, and to measure his recovery beyond the difference between the rental value in the market and the rent reserved;⁵ and if the business conducted on the premises from which he was evicted was established, he may show also the value of the good-will.⁶

The right of action accrues at the time the covenant is broken, and all damages that have been or will be sustained

¹ The text is quoted with approval in *Poposkey v. Munkwitz*, *supra*.

Where the plaintiff, being in possession as tenant of the lessee for his unexpired term, entered into an agreement with the lessor for a new term, the latter covenanting for quiet enjoyment, but failing to put the lessee in possession, and it appeared that the rent paid by the plaintiff to the lessee was excessive, and that the sum payable under the new lease was much less, though equal to the value of the property, the action was not regarded as of a meritorious character because both

parties had been speculating as to the probability of the lessee losing the property, and thus perfecting a lease of mutual advantage. But little more than nominal damages were awarded. *Davidson v. Des Barres*, Newf. Rep. 1884-1896, 672.

² § 580.

³ *Green v. Williams*, 45 Ill. 206.

⁴ *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. Rep. 724, 36 L. R. A. 862.

⁵ *Taylor v. Cooper*, 104 Mich. 72, 62 N. W. Rep. 157; *Chew v. Lucas*, 15 Ind. App. 595, 43 N. E. Rep. 235.

⁶ *Bass v. West*, 110 Ga. 698, 36 S. E. Rep. 244.

may be immediately recovered.¹ A life tenant who has been evicted may recover the rental value from the date of eviction up to the commencement of the action, and the present worth of such value from that time forward during his expectancy of life.² A tenant at will, evicted by his landlord without notice, may recover damages until the time when the tenancy might have been terminated by the landlord — even in an action brought before the expiration of that time.³

Where the ouster is from part of a farm the damages are to be measured by the injury to the whole, not by the rental value of the part taken. "The loss of a single field by disarranging the operations of a farm as a whole may cause an injury much greater than the rental value of the acres taken. The real loss is the value of the use of the part taken in connection with that which remains, and it is measured by the difference in rental value. This measure is reasonably free from uncertainty, it is easy of ascertainment and of general application."⁴ On the eviction of a farm tenant who was to pay rent by turning over a portion of the crops raised, he is entitled to recover the fair market value of his share of the crops upon the farm at the time he was evicted, and the landlord is not entitled to diminish such recovery by the cost of harvesting his portion of them. By preventing the tenant from doing what he ought to have done, and what it is presumed he would have done, he bars the right to claim any advantage from the non-performance.⁵ Where the tenant sued the landlord for entering upon a part of the demised premises and wrongfully placing therein property of his own which the tenant was obliged to remove, the latter, not seeking to recover the rental value of the premises, might recover the necessary cost of removing such property. But there could not be a re-

¹ *Jewett v. Brooks*, 134 Mass. 505; *Taylor v. Bradley*, 39 N. Y. 129, 100 Conn. v. McGraw, 66 Mich. 194, 33 Am. Dec. 415.

N. W. Rep. 388; *Carter v. Lacy*, 3 Ind. App. 54, 29 N. E. Rep. 168; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. Rep. 123; *Grove v. Youell*, 110 Mich. 285, 68 N. W. Rep. 132, 33 L. R. A. 297; *Salzgeber v. Mickel*, 37 Ore. 216, 60 Pac. Rep. 1009;

² *Grove v. Youell*, *supra*.

³ *Ashley v. Warner*, 11 Gray, 43.

⁴ *Irwin v. Nolde*, 176 Pa. 594, 35 Atl. Rep. 217; *Gallagher v. Burke*, 13 Pa. Super. Ct. 244.

⁵ *Foley v. Southwestern Land Co.*, 94 Wis. 329, 68 N. W. Rep. 994; *Jefcoat v. Gunter*, 73 Miss. 539, 19 So. Rep. 94.

covery, in the absence of such removal, for the tenant's services in procuring men to put property in such part of the premises and then, after the trespass, notifying them that they need not come, nor for the difference between what it would have cost him to put his property in the premises when he was evicted and such cost at the time of the trial of the action.¹

§ 865. **Special and consequential damages.** If the lessee has been put to costs in defending a suit against the paramount title he may recover them, and his right to do so is governed by the same principles that apply when the action is brought upon other forms of warranty. There is included an implied indemnity against all such costs as have been properly and necessarily incurred.² These include not only the costs recovered by the claimant of the superior title, but also those incurred in the unsuccessful defense, where the lessee is justified [151] in making it.³ Such costs must be specially claimed in the declaration; they are items of special damage.⁴ If other damages have resulted as the direct and necessary or natural consequence of the defendant's breach, these are also recoverable. For example, if the plaintiff in good faith, and relying on the contract, has made preparations to take possession, and these have been rendered useless by the defendant's refusal to perform, there may be a recovery for the loss thus sustained.⁵

¹ *Buhrmaster v. Ainsworth*, 90 Hun, 563, 36 N. Y. Supp. 68.

² *Wynn v. Brooke*, 5 Rawle, 106; §§ 84, 617. See *Child v. Stenning*, 11 Ch. Div. 82.

³ *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Williams v. Burrell*, 1 C. B. 402; *Howes v. Martin*, 1 Esp. 162; *Wrightup v. Chamberlain*, 7 Scott, 598; *Lewis v. Peake*, 7 Taunt. 153; *Mainwaring v. Brandon*, 8 id. 202; *Pennell v. Woodburn*, 7 C. & P. 117; *Blyth v. Smith*, 5 M. & Gr. 405; *Leffingwell v. Elliott*, 10 Pick. 204; *Reggio v. Braggiotti*, 7 Cush. 166; *Ottumwa v. Parks*, 43 Iowa, 119; *New Haven, etc. Co. v. Hayden*, 117 Mass. 433; *Rolph v. Crouch*, L. R. 3 Ex. 44; *McAlpin v. Woodruff*, 11 Ohio St. 120; *Harding v. Larkin*, 41 Ill.

413; *Levitsky v. Canning*, 33 Cal. 299; *Adamson v. Rose*, 30 Ind. 380; *Phipps v. Tarpley*, 31 Miss. 433; *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Blake v. Burnham*, 29 Vt. 437; *Baxter v. Ryerss*, 13 Barb. 267; *Sterling v. Peet*, 14 Conn. 245; *Welsh v. Kibler*, 5 S. C. 405; *Hardy v. Nelson*, 27 Me. 525; *Keeler v. Wood*, 30 Vt. 242; *Ryerson v. Chapman*, 66 Me. 557; *McAlester v. Landers*, 70 Cal. 79; *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. Rep. 939; *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. Rep. 35; *Rose v. Wynn*, 42 Ark. 257, quoting the text with approval.

⁴ *Green v. Williams*, 45 Ill. 206.

⁵ Id.; *Adair v. Bogle*, 20 Iowa, 238; *Friedland v. Myers*, 139 N. Y. 432, 34

Thus, where a party agrees to demise certain premises to another, who breaks up his establishment and proceeds with his family and furniture to the place where they are situate, and the landlord refuses to give possession, the tenant may recover the damages sustained by his removal.¹ So where a defend-

N. E. Rep. 1055; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. Rep. 1059.

In *Pratt v. Paine*, 119 Mass. 439, a lease of a dwelling-house for five years provided that the lessor might terminate it by notice, and that if this was done during the first three years of the term the lessee should be paid such sum as a compensation for the loss as he might "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises and expense incurred in removing." In an action by the lessee to recover for expenses incurred in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that at the time it was made the building was in thorough repair, but the lessee made changes in it, and furnished it; held, that the term "fitting up the premises" included not only the fitting up the building and premises for the uses of the lessee, but also the fitting up of the furniture to the building; and that the measure of damages was the loss sustained by reason of his having incurred such expenditures, the full benefit of which he had lost by the abridgment of his term, and not the entire cost of the fitting up.

In *Cohn v. Norton*, 57 Conn. 480, 18 Atl. Rep. 585, 5 L. R. A. 572, the lessor failed to give possession of a building which he knew was leased for use as a clothing store. The lessee incurred expense in engaging clerks and purchasing goods. It does not clearly appear whether he did so before or after he knew that

there was a prior outstanding lease. On the assumption that he acted in good faith, the court ruled that he could not recover. *Carpenter, J.*, said: "The lessor did not request the plaintiff to hire clerks and purchase goods, nor was he advised that the plaintiff would do so. While he may have supposed that the plaintiff would make suitable preparations to occupy the store, yet he could not know what preparations were necessary. He may have needed no clerks, or they may have been previously engaged, and the necessary goods may have been then in his possession. As a matter of law it cannot be said that the defendant contemplated that the plaintiff would hire clerks and purchase goods under such circumstances as to incur heavy liabilities in case of failure for any cause. In no proper sense, therefore, was the defendant a party to those arrangements, had no interest in them and had no right to interfere, consequently he cannot be held responsible."

Where a lessor, on finding it impossible to give possession of premises, permitted the lessee to temporarily occupy adjoining premises, the latter could not recover in an action for the breach of the covenant for expenditures made in fitting up the premises so occupied; they were not the direct and necessary result of the lessor's act. *Engelsdorff v. Sire*, 64 Hun, 209, 18 N. Y. Supp. 907.

¹ *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283; *Giles v. O'Toole*, 4 Barb. 261.

ant had leased a farm to plaintiffs and permitted them to enter and break ground before the lease commenced, and afterwards, when it commenced, refused to let them have possession, they [152] recovered not only the market value of the lease, but also the worth of the labor they had bestowed upon the premises, together with such other losses as they had sustained by incurring expenses in preparing to carry out their agreement under the lease.¹ The view that there may be a recovery for services is not everywhere accepted. In a New York case the lease of a farm was to the effect that the plaintiff was to do all the work upon the farm, the defendant to furnish certain things required for its cultivation, and each to receive one-half the proceeds. The defendant was excluded from the farm soon after he had entered on the performance of his contract. He sought to recover one-half the crop produced under the management of the defendant and at his expense, less the earnings of the plaintiff after he was prevented from performing. It was considered that the contract was not one for work, labor and services, and that the amount earned by the plaintiff in other employments could not be allowed in mitigation of the damages. These were measured by the value of the privilege of working the farm under the contract.² This is substantially the view held in California and in South Dakota.³ A defendant in New Hampshire proposed by letter to the plaintiff, residing in Wisconsin, that if the latter would come to the writer he would give him and his wife a year's board, and allow him to carry on his farm. The defendant having refused, on the plaintiff complying with his proposition, to fulfill his agreement, it was held that the expenses incurred by the plaintiff in so removing his family, and compensation for his necessary loss of time, as well as the loss of other advantages offered him in the contract, might be recovered; but not his sacrifice in

¹ *Cilley v. Hawkins*, 48 Ill. 308. See *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. Rep. 827.

Recovery of reasonable compensation for labor done has been sustained in the Kentucky superior court where a tenant who was to clear and fence land within a year for the use of it during that time

was forced to abandon the premises. *Mills v. Harding*, 11 Ky. L. Rep. 308.

² *Ecker v. Cottrell*, 24 App. Div. 496, 48 N. Y. Supp. 1031, following *Taylor v. Bradley*, 39 N. Y. 129.

³ *Cull v. San Francisco & F. Land Co.*, 124 Cal. 591, 57 Pac. Rep. 456; *Bowers v. Graves*, 8 S. D. 385, 66 N. W. Rep. 931.

selling his property with a view to such removal.¹ The recovery of expenses incurred in shipping household goods to the place in which the leased house was, which the lessee did not occupy because of the lessor's wrong, has been denied where the latter did not know that their removal was contemplated.² Where premises were leased for occupation as a store and the lessee, with the knowledge of the lessor, caused fixtures to be made for use therein, and, on being unable to take possession, sold them at public auction, the lessor was liable for the loss; but he was not liable for the loss of perishable goods bought to put in the store, they being bought in the city in which the premises were and in advance of the time it was necessary to buy them.³ If injury to crops, goods, machinery and the like and expenditure of time and money necessarily result from the eviction they may be recovered for.⁴

Where there was a refusal to execute a lease of a hotel the persons entitled thereto recovered the contract price for the services of a clerk employed by them, with the knowledge of the other party, in anticipation of the lease, money paid as rent and interest thereon, the reasonable value of their own services while waiting for the building, their personal expenses incurred in leaving their homes, and the reasonable value of the services of one of them up to the time the hotel was tendered, if a tender was made, and if not the value of his time, less such sum as he had or might have by reasonable diligence earned up to the time of trial.⁵ If the lessee of a farm who pays a share of the produce as rent is dispossessed before his crop is harvested he may recover the value of his share when it is harvested, and if the lessor negligently cares for it, in consequence of which there is a depreciation in its value, the lessee may recover the damage he sustains; the lessor is, however, entitled to a deduction equal to the value of his labor in

¹ Woodbury v. Jones, 44 N. H. 206; Adair v. Bogle, 20 Iowa, 238; Yeager v. Weaver, 64 Pa. 425. *Contra*, Hughes v. Hood, 50 Mo. 350; Williams v. Oliphant, 3 Ind. 271.

² Serfling v. Andrews, 106 Wis. 78, 81 N. W. Rep. 991.

³ Friedland v. Myers, 139 N. Y. 432, 34 N. E. Rep. 1055.

It seems that it would be otherwise as to the fixtures if they were bought without the lessor's knowledge. Price v. Eisen, 31 N. Y. Misc. 457, 64 N. Y. Supp. 405.

⁴ Cleveland, etc. R. Co. v. Mitchell, 84 Ill. App. 206.

⁵ Hall v. Horton, 79 Iowa, 352, 44 N. W. Rep. 569.

producing and harvesting the crop.¹ The cost of removing from the demised premises is an element of damage,² and so, it seems, is the loss of time;³ and injury done to a stock of goods by removing it.⁴ An early New York case held a more conservative view as to the cost of removal, to the effect that if the eviction takes place at a season when the expense of removing from the demised premises is greater than it would have been at the close of the term, the lessor is liable for the extra cost.⁵ Where the landlord wrongfully entered and ejected his tenant, the latter, on regaining possession, was entitled to compensation for the actual injury sustained by his goods and other property, the inconvenience and expense of being deprived of their use and of returning them to their places on the demised premises, and also "for any bodily or mental anguish or suffering, for injury to his pride and social position, and for the sense of shame and humiliation at having his wife and family turned out of their home into the public street."⁶ The case which lays down this doctrine has been cited approvingly in Minnesota, where it has been determined that injury resulting to property from its wrongful removal by the landlord may be recovered for, as also compensation for mental anguish and injury to the tenant's feelings and sense of shame in being turned into the street; but discomforts of the tenant and his family because of the unfit and unsuitable condition for occupancy of the building he subsequently moved into, and damages sustained by the exposure of his goods to the elements are special, and, not being pleaded, cannot be recovered for, even if not too remote.⁷ Where the landlord destroyed the furnace and refused to replace it, testimony was admissible to show the ill health of the tenant's child at the time of, and immediately after, such destruction, and also to show the inconvenience to which he was subjected in taking care of the child in consequence of being deprived of the use of the furnace.

¹ McClure v. Thorpe, 68 Mich. 33, 35 N. W. Rep. 829.

² Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836; Jennings v. Bond, 14 Ind. App. 282, 295, 42 N. E. Rep. 597.

³ Jennings v. Bond, *supra*.

⁴ Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. Rep. 1059.

⁵ Chatterton v. Fox, 5 Duer, 64.

⁶ Moyer v. Gordon, 113 Ind. 282, 288, 14 N. E. Rep. 476.

⁷ Rauma v. Bailey, 80 Minn. 336, 83 N. W. Rep. 191.

The tenant might recover for such time after the furnace was destroyed as he was bound to pay rent.¹

§ 866. **Same subject ; exemplary damages.** If the tenant has expended money in improvements these will not add to the damages he is entitled to recover for eviction, except as such expenditures enhance the rental value or the value of the premises for the particular use they may have been rented for, unless the tenant has some property in the improvements and is entitled to be paid therefor or to remove them;² in which latter case to the extent to which the defendant's act of disturbing the lessee's possession injures his rights in the new erections, or entitles him to claim as for their destruction or conversion, his damages for eviction will be increased.³ In an action for a tortious and illegal eviction brought by a tenant against his landlord, where the former with his family and goods have been ejected from the premises demised to him, he may recover in addition to other damages for injury to his feelings,⁴ but not for injury to his health from exposure in going two days afterwards from the premises to another place, or from attending his family when ill from the effects of the eviction, or from grief at their illness.⁵ On the failure of an evicted tenant to take his goods as they are removed from the leased premises by an officer, the latter may put them in a storage warehouse; that being done, with due care, and the receipt therefor delivered to the tenant, his acceptance of it restores his dominion over the goods, and any loss or depreciation in value thereafter occurring cannot be recovered for from the landlord.⁶

Where premises are let for a particular purpose, if the lessor withholds them or any part, he will be liable for their [153] rental value for that purpose or the diminution of value from the loss of the part withheld.⁷ And if an established business

¹ *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. Rep. 1.

² *Schlemmer v. North*, 32 Mo. 206; *Flagg v. Dow*, 99 Mass. 18; *Conlon v. McGraw*, 66 Mich. 194, 33 N. W. Rep. 388; *Walters v. Transue*, 6 Northampton County Rep. 406. See *Lanigan v. Kille*, 97 Pa. 120, 39 Am. Rep. 797; § 999.

³ *Ricketts v. Lastetter*, 19 Ind. 125.

⁴ *Fillebrown v. Hoar*, 124 Mass. 580; *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. Rep. 476; § 865.

⁵ *Fillebrown v. Hoar*, *supra*.

⁶ *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. Rep. 388.

⁷ *Hexter v. Knox*, 63 N. Y. 561; *Townsend v. Nickerson Wharf Co.*,

is suspended by eviction, or, probably, by the refusal to renew a lease pursuant to agreement, the injury suffered in breaking it up may be taken into consideration in the assessment of damages. A lease for years was made of real estate comprising a factory, water-power, tools, machinery and apparatus for carrying on the manufacture of pails. In an action on the implied covenant for quiet enjoyment the plaintiff was permitted to introduce evidence on the question of damages for the interruption of his business and on the value of his lease; to show the condition and capacity of his works, the number of pails that could be made, the cost of making them, and their price at the shop and in the market. He also called a witness who had been engaged in making similar pails at a place twenty-five miles distant from the plaintiff's works, who was permitted to testify to the particular items of the cost of manufacturing, to the price of pails at the shop and in the market, and to the profits of the business. The appellate court held there was no error in admitting such evidence, for it enabled the jury to approximate to the actual damage.¹ The lessee of a pasture who is wrongfully evicted therefrom may recover the expenses and losses sustained in holding his cattle on the commons pending a diligent effort to secure another pasture.² Where the landlord contracted with the lessee to saw his logs at a fixed price and refused, while the lease was in force, to do so, the damages included the value of the remainder of the term, as well as the loss the lessee sustained by having the logs left on his hands and being obliged to dispose of them otherwise than he would have done if they had been sawed.³

If a forcible entry is unlawful, its purpose being to wrong the tenant by taking that from him by force which he was entitled to hold until deprived of its possession by due process of law, there may be a recovery of punitive damages.⁴ Such damages are recoverable if the trespass by the landlord

117 Mass. 501; *Dobbins v. Duquid*, 65 Ill. 464; *Dexter v. Manley*, 4 Cush. 14. *thorne v. Siegel*, 88 Cal. 159, 25 Pac. Rep. 1114, 22 Am. St. 291.

² *Buck v. Morrow*, 2 Tex. Civ. App. 361, 21 S. W. Rep. 398.

³ *Amsden v. Atwood*, 69 Vt. 527, 38 Atl. Rep. 263.

⁴ *Wamsganz v. Wolfe*, 86 Mo. App. 205.

was wanton and malicious;¹ but he is not responsible for the wanton and malicious acts of an officer in executing a writ of restitution whereby the tenant's goods were damaged unless such acts were authorized or ratified.² A wilful and malicious negligence resulting in damage to the tenant's property entitles him to exemplary damages in the discretion of the jury.³

§ 867. Recovery for damage to business. How far the lessee is entitled to have his damages increased by including compensation for any loss he may suffer in having a business, contemplated or being done on the demised premises, thwarted or broken up is not quite settled. The cases agree that where possession is withheld or interrupted by the landlord the tenant is entitled to damages on the basis of the rental value at the time of the breach. That is an element of damages or measure of redress to which he is manifestly entitled, because such value is the natural and direct product of the contract. This value, however, according to some authorities, may not be the special value the premises have for the lessee's use, but is the market value,—the value for general use, or which might be realized by subletting, or by assignment of the lease. It is not enhanced or affected by consideration of any profits which the lessee has by his plans in prospect, or is actually [154] realizing in a business projected or being conducted on the demised premises, and for which they are essential to him for the time being.⁴ The suspension of a profitable business, even if it can be re-established elsewhere, involves a loss of the gains which would be made in the interval, the expense of the change, and if a good will has been created that will be in some measure, if not wholly, lost by the removal to a different place. The objection usually made to the allowance of damages for the loss of profits, when they are disallowed, is that such damages are remote and uncertain or speculative, or were not within the contemplation of the parties when the lease was made.⁵ They are not remote when the premises were leased for the particular business, and the action is against the lessor

¹ *Gallagher v. Burke*, 13 Pa. Super. Ct. 244; *Vogel v. McAuliffe*, 18 R. I. 791, 31 Atl. Rep. 1; *Gildersleeve v. Overstolz*, 90 Mo. App. 518, 532.

² *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. Rep. 388. See §§ 408-411.

³ *Hysore v. Quigley*, 9 Houst. 348, 32 Atl. Rep. 960.

⁴ See § 864.

⁵ See *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. Rep. 991.

or his successor in interest by the lessee or his assignee, whether it is on the covenant for quiet enjoyment or in tort; nor are they remote to a wrong-doer who destroys or impairs a business open to his observation.¹

In a Minnesota case the lessee took a lease of water for the purpose of engaging in the manufacture of flour and the lease was made with knowledge of that fact. Both parties, said the court, knew that if the power were not furnished the business would be suspended or interrupted, and the lessee would consequently be deprived of such profits as might have been made but for the suspension or interruption. And the loss of such profits must have been in contemplation of both as a probable result of a breach of the covenant to furnish the power. To bring the case within the rule that lost profits might be recovered, it was not necessary the parties should have had in mind the amount of the profits or the extent of the loss from the breach. It was enough that they must have contemplated loss of profits as the result of a breach.²

¹Townsend v. Nickerson Wharf Co., 117 Mass. 501; Hexter v. Knox, 63 N. Y. 561; Chapman v. Kirby, 49 Ill. 211; Smith v. Wunderlich, 70 id. 426; Dobbins v. Duquid, 65 id. 464; New York Academy of Music v. Hackett, 2 Hilt. 217; Allison v. Chandler, 11 Mich. 542; Seyfert v. Bean, 83 Pa. 450; Park v. C. & S. W. R. Co., 43 Iowa, 636; Lacour v. Mayor, etc., 3 Duer, 406; St. John v. Mayor, etc., 13 How. Pr. 527; Schneider v. Patterson, 38 Neb. 680, 57 N. W. Rep. 398; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. Rep. 1059; Cleveland, etc. R. Co. v. Wood, 189 Ill. 352, 357, 59 N. E. Rep. 619, quoting the text; Goebel v. Hough, 26 Minn. 252, 2 N. W. Rep. 847; Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4; Consolidated Coal Co. v. Schneider, 63 Ill. App. 88, affirmed on other questions, 163 Ill. 393, 45 N. E. Rep. 126; Gildersleeve v. Overstolz, 90 Mo. App. 518, 525, quoting the text; Murphy v. Century Building Co., id. 621.

In Eten v. Luyster, 60 N. Y. 252,

the purchaser of the reversion evicted the tenant and the latter brought an action for damages. The defendant had torn down and destroyed a building erected by plaintiff on the premises: the latter gave evidence tending to show that he also had a sum of money in a box in that building which was lost in the removal. It was held that the plaintiff was not bound to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendant placed them, and to look to him for their value; that the plaintiff was entitled to recover for all losses occasioned by the trespass, including the destruction of the building, the loss of the money, and the value of the unexpired term; that although the money was kept in an unusual place, and the defendant may not have suspected its presence, yet he was liable for its loss, it being the direct result of his acts.

²Carghill v. Thompson, 57 Minn. 534, 59 N. W. Rep. 638. See p. 2598.

The objection that the damages are uncertain and speculative is insuperable when they are incapable of estimation and proof with that degree of certainty requisite to establish facts for the consideration of a jury. There should be no distinction as to the degree of certainty required in proof between this fact and any other upon which either the right to dam- [155] ages or their amount depends. A conservatism, however, pervades generally the law of damages; and it being the common experience that there is a wide difference between theoretical or speculative profits estimated in advance, without any actual *data*, and the result usually achieved when the scheme is put in practice, it is necessary that the law should discard what is merely fanciful or possible and only permit those profits to be considered which have some basis of actual facts to support them.¹ In Georgia the rule is declared to be that a person wrongfully deprived of the use and occupancy of premises in which an established business is carried on may recover damages for the injury done his business. He cannot, however, even in such a case, recover the loss of profits and the value of the good-will of his business, but evidence as to these may be

¹ Grubb v. Burford, 98 Va. 553, 37 S. E. Rep. 4; Karbach v. Fogel, 63 Neb. 601, 88 N. W. Rep. 659; Kenny v. Collier, 79 Ga. 743, 8 S. E. Rep. 58.

As to the mode of proving loss of hotel profits, see Stewart v. Lanier House Co., 75 Ga. 582.

Evidence of profits made by the successor of an evicted lessee who continued the latter's business is not admissible for the purpose of proving the disseizee's damages. Smith v. Eubanks, 72 Ga. 280.

In Montgomery, etc. Society v. Harwood, 126 Ind. 440, 26 N. E. Rep. 182, 10 L. R. A. 532, there was a breach of an agreement not to rent land adjoining the piece leased plaintiff for the purpose of a stand during the continuance of a fair for uses similar to that which he was to put his. It was held that profits lost in consequence of competition within the prescribed limits could not be recovered as damages. The compen-

sation due plaintiff was measurable by the difference between the rental value of the ground unoccupied by the competing stands and such value as it had as it was occupied. See Kelly v. Miles, 58 N. Y. Super. Ct. 495, 12 N. Y. Supp. 915.

The same rule has been applied to the violation of a lease giving the sole right to sink and operate oil wells on described lands. Duffield v. Rosenzweig, 144 Pa. 520, 539, 23 Atl. Rep. 4, 150 Pa. 543, 24 Atl. Rep. 705.

The profits which might have been realized from a crop expected to be grown cannot be recovered because too conjectural. Smith v. Phillips, 16 Ky. L. Rep. 615, 29 S. W. Rep. 358; Taylor v. Cooper, 104 Mich. 72, 62 N. W. Rep. 157. See §§ 61, 870. And so of profits from a school or from keeping boarders. Throop v. Broadus, 15 Ky. L. Rep. 812 (Ky. Super. Ct.).

introduced to throw light on the value of his leasehold estate. Where the amount of the profits lost and the value of the good-will of the business can be ascertained with a reasonable degree of certainty, they should be allowed in estimating the value of the lease for the purpose for which it was being used, but not where these elements are merely speculative and conjectural.¹ The rule is otherwise as to the recovery of profits where the action is for breach of contracts of lease.² If the defendant's conduct is lawless and malicious that will be cause, it has been said, for holding him responsible for damages more indefinite than in ordinary instances where such elements are not present.³

§ 868. **Same subject.** In a New York case which went to the court of appeals a tenant, evicted by his landlord by void summary proceedings before a justice, which were annulled on *certiorari*, brought an action for the damages resulting. On the trial the plaintiff was the only witness as to the amount of his loss. He estimated the damage to his property in items amounting to \$4,645, and also testified, without objection, that he lost a large amount — \$4,000 — which he supposed or estimated he would have made if he had not been molested. This supposed loss, so stated, it was held he was not entitled to recover. No facts were given which a jury could weigh; the profits claimed to have been lost were, so far as appeared, wholly conjectural.⁴ In an earlier case⁵ suit was brought against a municipal corporation for causing a nuisance in the street by which the plaintiff, as proprietor of a restaurant and lodging-house, lost custom and the consequent profits. He showed the actual receipts of his hotel the year previous to the obstruction complained of, the actual daily receipts during its continuance, and such receipts for some months after the obstruction was removed; also, that the expenses were in the same, or in about the same, ratio to the receipts during the

¹ Bass v. West, 110 Ga. 698, 36 S. E. Rep. 244. See Karbach v. Fogel, 63 Neb. 601, 88 N. W. Rep. 659.

² Id.; Smith v. Eubanks, Stewart v. Lanier House Co., *supra*.

³ Gildersleeve v. Overstolz, 90 Mo. App. 518, 530.

⁴ Hayden v. Florence Sewing Machine Co., 54 N. Y. 221. See Brockway v. Thomas, 36 Ark. 518; Wolff v. Hvass, 11 N. Y. Misc. 561, 32 N. Y. Supp. 798.

⁵ St. John v. Mayor, 13 How. Pr. 527.

whole period. On this state of facts Woodruff, J., thus discussed the right to damages and the proof of them: "When it is borne in mind that the plaintiff kept a refectory and boarding-house for the resort of daily visitors for their various meals, and of transient persons for their lodgings, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business than this. To say that he must prove what persons were prevented from visiting his house, [156] and what meals they would have taken and paid for, is to suggest a mode of proof obviously impracticable; and if it was done, it would still leave the same inquiry, what would have been the profits upon the meals they took and paid for, which is now objected to. The loss of custom, and the consequent loss of profits, is the very matter to be recompensed in this action, and the cases to which we are referred are not analogous. In *De Winte v. Wiltse*¹ the plaintiff recovered for the loss of the rent he had been accustomed to receive for a house he had elected to let as an inn, or tavern, although, in general, in actions for the breach of contract, loss of profits are not recoverable;² and purely contingent or speculative profits, it is sometimes said, are not the subject of recovery. This is a somewhat loose statement of the proposition, which does not exclude all reference to probable profits. It is undoubtedly true [that profits are recoverable], under certain circumstances, in every sense; for example: A. agrees to let a tavern-house to B., and afterwards refuses to give a lease. The actual value of the house, contrasted with the sum paid, or to be paid, therefor is the damage sustained; and yet the elements of value consist in location, good-will, if any, the long habit of travelers to resort to a well-known stand, and like circumstances; and the experience of the past must necessarily enter into the estimation of either the witnesses or the jurors. On the other hand, if a house be hired for a dwelling, the cost of another having equal advantages is the only guide in determining the damages."³ The doctrine that the breaking up of an established business conducted by a lessee makes the lessor liable

¹ 19 Wend. 325.

² See *Blanchard v. Ely*, 21 Wend. 350; *Dorwin v. Potter*, 5 Denio, 306; *Giles v. O'Toole*, 4 Barb. 261.

³ *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Lacour v. Mayor*, 2 Duer, 406; *Marquart v. La Farge*, 5 Duer, 559.

for the loss of his prospective profits has recently been affirmed in New York.¹

Where a railroad company leased land on which the lessee erected a hotel and agreed to furnish rooms to the lessor for station purposes, and to maintain a first-class hotel, and the lessor covenanted to stop all passenger trains passing at seasonable hours for meals, the last clause was regarded as not going to the whole consideration of the contract so as to entitle the lessee to recover as for its total breach, there having been a failure for eleven months to observe it. The damages recoverable were limited to the diminution in the earnings of the hotel caused by such breach.² In another case the lessee of a railroad hotel sued the lessor for breach of its covenant to stop its trains at the hotel for meals. It was proper to prove by the opinions of witnesses the rental value of the hotel with and without trains stopping in compliance with the terms of the lease and the value of the leasehold interest with and without such compliance. It is strongly intimated that if the hotel had been operated with trains stopping there as the contract contemplated, the damages would have been measured by the loss of profits resulting from the breach.³

There is no reason for applying a more favorable rule to a party injuring another's business by an act which is both a tort and a breach of contract, as is the case when a landlord disturbs the possession of his tenant, than to one who so disturbs a possession and impairs a business merely as a tort-feasor; though in many cases of tort the jury is permitted to award compensation upon less certain proof than that ordinarily required in actions upon contracts. Hence, when the action for [157] disturbance of possession is based upon the tort, as it must be when brought against one standing in no privity to the plaintiff, and as it may be even against the landlord, its form may have some influence on the required certainty of proof. But where there is a legal standard of damages, and this equally measures the compensation due to the injured party, whether

¹ *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. Rep. 1059; *Schile v. Brokhahus*, 80 N. Y. 614. Compare *Karbach v. Fogel*, 63 Neb. 601, 88 N. W. Rep. 659.

² *Union Pacific R. Co. v. Travelers' Ins. Co.*, 83 Fed. Rep. 676, 28 C. C. A. 1.

³ *Cleveland, etc. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. Rep. 619, 90 Ill. App. 551.

the act complained of is a tort or a breach of contract, any evidence which would suffice in the one form of action to prove that act and its consequences ought to be accepted as sufficient in the other for the same purposes. If there be any such rule as that loss of profit constitutes no ground or element of damages, it is not a universal nor a general rule. There are numerous cases, even for breach of contract, in which profits have been properly held to constitute, not only an element, but the measure of damages.¹ When it is advisedly said that profits are uncertain and speculative and cannot be recovered when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because they are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore, it is more a general truth than a general principle that a loss of profits is not ground on which damages can be given.² In an early case³ the defendant agreed to let the plaintiff have the use of certain mills for six months for 10%, which was shown to be the full rental value; but damages for being deprived of the use to the amount of 500% were given with the sanction of the court by reason of the stock laid in by the plaintiff.⁴

¹ Allison v. Chandler, 11 Mich. 558. See §§ 53-74.

² The text is quoted with approval in Brigham v. Carlisle, 78 Ala. 243, 249, 56 Am. Rep. 28; in Cleveland, etc. R. Co. v. Wood, 189 Ill. 352, 357, 59 N. E. Rep. 619, and in Hirschhorn v. Bradley, — Iowa, —, 90 N. W. Rep. 592.

³ Nurse v. Barns, T. Raym. 77.

⁴ In Green v. Williams, 45 Ill. 206, the defendant had rented a store to the plaintiff for a year, in which the latter intended to carry on business as a milliner. Before the term commenced the defendant leased and gave possession to another. The court said the plaintiff is entitled to recover all expenses necessarily incurred by her in consequence of the

defendant's refusal to give possession, so far as said expenses are declared for; but she is not entitled to recover profits that she might have made by conducting her business upon the demised premises. Such damages are remote, speculative and incapable of ascertainment. Besides, it does not appear that the plaintiff was not able to find another store equally favorable to her business. Olmsted v. Burke, 25 Ill. 86; Giles v. O'Toole, 4 Barb. 261; Hodges v. Fries, 34 Fla. 63, 72, 15 So. Rep. 683. "If, however, it had appeared that her business was unavoidably suspended in consequence of the defendant's breach of his contract, we are of opinion she should receive, not speculative profits, but interest during

§ 869. **Same subject.** A case decided in Wisconsin involved the question of the lessor's liability for the loss of the lessee's profits. The lease was made with knowledge of the existence of an outstanding demise. The lessee had been and was then carrying on business in the vicinity of the leased premises. After considering and applying the general rules of damages which have been stated, the court, by Lyon, J., said that if the plaintiff hired the store for the purpose of continuing his former business therein, and the defendant knew that fact and executed the lease with knowledge that he could not give possession of the store at the stipulated time, he took the risk of the plaintiff being able to procure another suitable store for his business. The inability of the lessee to do so would render the lessor liable for the damages resulting to the former's business. This is plainly within the rule of *Hadley v. Baxendale* because, under such circumstances, the parties may fairly be considered to have contemplated that the breach of the covenant would necessarily destroy or greatly impair the value of plaintiff's business. If he recovered therefor he cannot also recover the value of his lease, because such value is necessarily a factor in estimating the damages to the business.¹ In such a case he may, however, recover money paid as rent and the expense incurred in removing goods to the leased store, they having been taken there with the lessor's consent, and removing them there-

such suspension on the amount of capital invested in her business, and for the time being lying idle. *Freeman v. Clute*, 3 Barb. 424." See *De La Zerda v. Korn*, 25 Tex. Sup. 188; *Rhodes v. Baird*, 16 Ohio St. 573.

In *Dobbins v. Duquid*, 65 Ill. 464, the lessor of premises used by the lessees in carrying on the business of dealing in wood and coal, after the destruction of the buildings thereon by the great Chicago fire in 1871, and before the expiration of the term, leased the premises to other parties, and put them in possession. This was supposed to be done by some forgetfulness or mistake. The court held that the lessor was liable to the prior lessees, in any event, for

the difference between the rent to be paid and the actual rental value of the property, and also for any loss to their business which could not reasonably have been avoided. The plaintiff was prevented from recovering anything under this last ruling by having refused the defendant's offer of other premises near to those which had been demised, the court holding that it was the plaintiffs' duty to make ordinary and reasonable effort to prevent any loss to their business. By declining the defendant's offer they failed in that duty.

¹ *Smith v. Wunderlich*, 70 Ill. 426, 433.

from. . . "We agree with Mr. Justice Paine¹ that to ascertain the value of a business an inquiry as to the profits thereof is necessary. Probably *value* and *net profits* are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts based on prospective profits when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover damages to his business, the character, extent and value of his established business when the lease was executed and before will furnish a guide to the jury in assessing the prospective and probable value thereof had the plaintiff been permitted to transfer it to the store" in question. "Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued. It was said in argument that no case can be found which gives damages for the loss of anticipated profits because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of *Ward v. Smith*² seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which, with his good-will, could have been transferred to the store in question, there would have been no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession and carried on the business therein. In such case profits would probably be too conjectural and uncertain to be the basis of a recovery."³

A comparatively recent English case appears to proceed upon a view differing from that suggested in the closing sentences of the extract quoted. The lessor delayed giving the

¹In *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679. ity now. *Marrin v. Graver*, 8 Ont. 39, 45.

²11 Price, 19. This case was ruled before *Hadley v. Baxendale*, and is said by *Armour J.*, not to be author-
³*Poposkey v. Munkwitz*, 68 Wis. 322, 333, 32 N. W. Rep. 35, 60 Am. Rep. 858; *Gildersleeve v. Overstolz*, 90 Mo. App. 518, 531.

lessee possession of the premises, which he knew were desired for the purpose of establishing the business of oil refining. Counsel contended that the rule of *Hadley v. Baxendale* did not apply; and that damages could not be given for loss of prospective profits, though the rule of the Scotch law is otherwise.¹ In answer, Fry, J., observed that the defendant must have known that the plaintiff's business could not be carried on without possession of the premises, and awarded damages at £250.² In Ontario this case is not recognized as authority for the recovery of profits, and the liability of a lessor therefor is denied by a majority of the court of queen's bench.³ The rule of the *Wisconsin* case quoted from has been approved in that state, and it has been ruled there that evidence of previous annual profits made in carrying on a theater and saloon in a leased building is admissible to show the profits which the lessee might reasonably anticipate from a continuation of such business during the balance of the term, as a basis for estimating the damages recoverable for a wrongful eviction; it was also held that profits made on Sundays, as a result of the violation of the Sunday laws, can form no legal basis for the estimate of such damages.⁴

Profits may be recovered in New Hampshire if an established business is interrupted. Where water was diverted from a lessee so that he had to discontinue the business for which he had obtained the lease, it was ruled that the making of profits was the presumable object of the business, and their

¹ *Dunlop v. Higgins*, 1 H. of L. Cas. 381.

² *Jaques v. Millar*, 6 Ch. Div. 153, overruled on another question in *Marshall v. Berridge*, 19 id. 233. Fry, J., said in the principal case: "Damages are claimed in addition to the specific performance of the agreement in respect of the delay which was caused by the defendant's willful refusal to perform his contract, and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between the 5th of September,

1876, and the time when he actually gained possession of other premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract."

³ *Marrin v. Graver*, 8 Ont. 39.

⁴ *Raynor v. Valentin Blatz Brewing Co.*, 100 Wis. 414, 76 N. W. Rep. 343.

loss could be reasonably anticipated by both parties as the result of the lessor's act.¹ A landlord ousted a tenant during [158] his term, and the latter brought trespass. Not having re-entered it was held he could recover damages for the ouster and all the necessary or natural consequences thereof, including those resulting from breaking up his business, but not for the value of the unexpired term or the *mesne* profits.²

Damages on the basis of the excess of the rental value above the stipulated rent is wholly independent of the consideration of any special use of the premises, the rental value being merely the actual or market value. Hence, if the lessee is prevented by the lessor from taking possession, and has incurred any expenses for that purpose, they are an additional item of damages; and for the same reason, if, after taking possession, the lessee establishes a profitable business, which is broken up by eviction, or impaired by enforced suspension or transfer to another place, any damages resulting therefrom which can be established with the requisite certainty may be recovered, in addition to that computed on the basis of the rental value. The recovery of the value of the lease [159] has sometimes been supposed to include any damage done to the lessee's business.³ This is obviously a mistake where [160]

¹ *Crawford v. Parsons*, 63 N. H. 438.

In a case in the New York court of common pleas the lease was of a market, and the right to recover for injury to business was denied. The action was in trespass, though the acts complained of amounted in law merely to an eviction. The court applied the doctrine that the profit to be made by the lessee was not the subject of the contract between him and the lessor, but a specific article, and not the right to make a profit. *Denison v. Ford*, 10 Daly, 412; *Engelsdorf v. Sire*, 18 N. Y. Supp. 907. Referring to *Shaw v. Hoffman*, 25 Mich. 163, where a tenant was evicted from a sale and boarding stable on July 11th, and brought suit in January following, claiming as items of damage the loss of profits he would have made by boarding the horses of

third persons, and also his loss by boarding his own horses at another stable where he was obliged to pay more than he could have boarded them for himself, and where it was held that these were proper elements of damage, the judge who wrote the opinion in the New York case first cited said that it has not been and never will be followed.

The recovery of profits against a lessor is also refused in Iowa. *Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. Rep. 714.

² *Smith v. Wunderlich*, 70 Ill. 426.

³ In the case last cited *McAllister, J.*, thus discusses this question: "There is no evidence tending to show that after the ouster was consummated they (the plaintiffs) made any lawful re-entry, or brought any action for forcible entry and detainer

to recover possession, but, on the contrary, they brought this action to recover for the ouster, before the term expired, and, by the instructions now in question, the jury were directed, in assessing damages, to first allow plaintiffs the rental value of the premises above the rent they were paying, for the residue of the term, and then *any* loss sustained in their business as a necessary consequence of the ouster, after the time it occurred. The words *any loss* would, of course, include the loss of profits which they would have realized, if they had not been ousted, by the use of the premises in carrying on their business. The jury could not understand it otherwise, because the basis was laid for estimating prospective profits, by showing what had been the net profits of the business for the month next previous to the ouster, which included not only their own time and labor, but the use of the premises in producing them. It is obvious that the plaintiffs could not realize the advanced rental value over and above what they had to pay for rent, as an income independent of the profits derived from using the premises in conducting their business, without renting or otherwise disposing of them to another party; and common experience teaches us that they could not do that, and still retain them, to be used for carrying on their business.

"There may be cases where, from the peculiar circumstances of the disseizee's business, and the actual rental value of the premises, the difference between the actual rental value and what it was paying as rent would not be full compensation for the loss in having his business broken up by the disseizin. Where such is the case the plaintiff has been permitted to make his election, and instead of recovering the rental value

demand compensation for the loss of profits in his business occasioned by the ouster. *Chapman v. Kirby*, 49 Ill. 211, though an action on the case, and not trespass, was decided upon that principle; but it seems to us that to allow as a measure of damages both the advanced rental value, and prospective profits, which could be realized only by the use of the premises by the plaintiffs themselves, would be to establish mere arbitrary rules of damage, devoid of sense or justice either in their basis or application. But aside from improperly uniting the two grounds of damage, is the rule as to the rental value, under the circumstances of this case, a correct one? It is laid down by the instruction under consideration, without qualification, and is in effect, that where a tenant for years is ousted by strangers — we say strangers, because there is no allegation in the declaration about the tenancy, or one of the defendants being lessor, — the disseizee, without a subsequent re-entry, may bring trespass for the disseizin immediately after it is effected, and recover as one species of damage the value of the unexpired term. Suppose the term has five, ten or twenty years to run. Surely there can be no such rule as that, because, if there were, applicable to terms for years, why not upon the same principle extend it to any greater estate? Suppose, again, that the plaintiffs' unexpired term had five years to run, and, without any re-entry, they had waited four years before bringing this suit, and then another year had elapsed before trial, the statute of limitations would not have been transcended; but could they recover *mesne* profits, or the rental value for that entire period? If for five months, why not for five years? The answer to these queries is to be found in the established rules of the common law. . . .

the rental, rather than the special, value to the lessee is estimated.¹

"In the case at bar the plaintiffs' term had not expired, and did not expire until several months after this suit was brought. There was ample time for them to have brought an action of forcible entry and detainer, and thus have regained possession. That done, the law, by a kind of *jus postliminii*, or right of reprisal, would regard the possession as having been all along in them (3 Black. Com. 210); and then after the expiration of their term they would be entitled to recover, as *mesne* profits, the value of their lease or term; for, as a general rule, the annual value of land is the measure of *mesne* profits. Adams on Eject. 391; Sedg. on Dam. 124. The theory on which such recovery could be had would be, that the trespass was continued to the end of the term." See *Ashley v. Warner*, 11 Gray, 43.

¹ *Dobbins v. Duquid*, 65 Ill. 464.

In *Rhodes v. Baird*, 16 Ohio St. 473, the action was brought upon a contract made January 1, 1858, by which the defendant agreed to furnish twenty-seven acres of land to the plaintiff on which to plant a peach orchard; also a dwelling-house, certain pasturage, fuel, and about thirty acres of tillable land. In consideration of this agreement the plaintiff agreed to set out two thousand peach trees on the tract of twenty-seven acres, and to assist in the cultivation of a peach orchard thereon, and in the business of raising and selling fruit therefrom. It was further agreed that the expenses were to be borne by the parties in equal portions, and that the number of trees should be increased until the entire twenty-seven acres should be planted. The agreement was to last ten years or longer if the orchard should continue to bear fruit and prove profit-

able. A lease was to be made to the plaintiff embodying those terms. After he had been in possession and planted two thousand peach trees, defendant refused to execute the lease, and plaintiff was evicted from a part of the premises when the peach trees were about two years old. On the trial a witness who had the special knowledge to qualify him to testify as an expert was asked the following questions: First. What is the average life of a peach orchard in this county? Second. Taking the average of crops for the last ten or fifteen years in this county, how many crops may be reasonably expected from a peach orchard during its life? Third. Taking the average of prices for the last ten or fifteen years, what would be the future profits of a peach orchard [161] of budded trees in this county upon an average crop? Fourth. Taking the probabilities of crops in the future, and the average price of peaches for the last ten or fifteen years, what would be the value per tree of such a peach orchard, two years old, with the privilege of having them stand on the land for the life of the orchard? The witness testified, under objection, in answer to these questions, "that the average life of peach orchards in this county, in ordinary good locations, is about twelve to fifteen years, and that taking the average of peach crops for the last ten or fifteen years in this county he was of opinion that a peach crop might reasonably be expected, from an orchard in this county, about once in three or four years, after it began bearing and during its life. And that taking the average of prices for the last ten or fifteen years in this county, the future profits of a peach orchard of budded

[164] § 870. Same subject. An injury to business must consist mainly of a loss of profits, though it often involves other incidental losses. In an Iowa case¹ where a lessee was refused possession of a farm to be worked on shares for a year

trees in this county, upon an average crop, would be probably, at a low estimate, about one dollar and fifty cents per tree in the orchard for each crop; that he knew no market value for peach trees about two years old in such an orchard; that he never knew or heard of one selling at that age, and that judging from what a peach orchard would probably produce, and the probable price of peaches, he would be of the opinion that such an orchard would be worth about one dollar and fifty cents per tree."

There was testimony tending to show that the plaintiff was to have a certain house to live in and pasturage for five or six head of horses and cattle, and about thirty acres of other land of the defendant to till during the continuance of said contract, and that he had been prevented from the use thereof by the defendant. The plaintiff as a witness, being a farmer, gave evidence tending to show the yearly value of the rent of the house, the profits he might probably have realized from said thirty acres of land during the ten years which he said the contract was to continue, and the value of the pasturage to him for the same time. A judgment having been recovered of \$1,000 by the plaintiff, it was reversed on error by reason of the admission of the foregoing testimony. White, J., delivering the unanimous opinion of the court, said: "The testimony excepted to by the plaintiff in error related to the probable future profits of a peach orchard not yet grown, to the profits

the plaintiff would probably have made from the thirty acres, and to the value of the pasturage to him during the time. The testimony was offered in chief by the plaintiff, as furnishing the basis on which his damages were to be assessed by the jury. It was uncertain and speculative in its nature and must have been, in a great degree, conjectural. The general rules as to the measure of damages are well understood. The difficulty lies in making a proper application of them to particular cases. It is a well established rule that the damages to be recovered for a breach of a contract must be shown with certainty, and not left to speculation or conjecture. In the practical application of this general rule, others have been adopted as guides in ascertaining the required certainty, as (1) that the damage must flow naturally and directly from the breach of the contract; that is, must be such as might be presumed to flow from its violation; and (2) must be not [162] the remote but the proximate consequence of such breach. In cases where the damages may be estimated in a variety of ways, that mode should be adopted which is most definite and certain. In the present case, as respects the property, the immediate and proximate consequence of the breach of the contract by the eviction was the loss of the use of the premises for the term. To the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff

¹ *Adair v. Bogle*, 20 Iowa, 238.

the court said: "By the contract the plaintiff not only secured a place in which to live, but also employment for himself during a year's time. If the defendant, without cause, refused to let the plaintiff into possession, what is the direct consequence?

iff, furnished the standard for assessing the damages. If it had no general market value, it should have been ascertained from witnesses whose skill and experience enable them to testify directly to such value, in view of the hazards and chances of the business to which the land was to be devoted. *Griffin v. Colver*, 16 N. Y. 489; *Giles v. O'Toole*, 4 Barb. 261; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127. This would only be applying the same principle for ascertaining the value of property which, by reason of its limited use, had no general market value, which is adopted with reference to proving the present worth of the future use of property, which, by reason of its being in greater demand, has such market value. In the case of property of the former description the range for obtaining testimony as to the value is, of course, more circumscribed than it is in the case of property of the latter description. But in either case the proving the value of the property by witnesses having competent knowledge of the subject is more certain and direct than to undertake to do so by submitting to the jury, as the grounds on which to make up their verdict, the supposed future profits.

"The profits testified to in the present case were remote and contingent, depending on the character of the future seasons and markets, and a variety of other causes of no certain or uniform operation. Neither did the amount of the plaintiff's expenditures, made in obtaining or performing the contract, furnish the measure of his damages, or constitute the fact to which his evidence

in chief, on the question of damages, ought to have been directed. For this would be to allow the plaintiff, in case he had made a bad bargain, to charge his losses resulting therefrom upon his adversary; and, on the other hand, if his contract had been a profitable one, to deprive him of its benefits. In regard to the question objected to, and kindred inquiries, it may also be remarked that we do not doubt it would be the right of a party, on cross-examination, to propound such questions to the witnesses who might have testified to the value of the property in question. This could be done in order to ascertain the grounds of their judgment and as tending to test its correctness." See § 62.

This opinion seems to sanction the admission of the opinions of expert witnesses to prove the value of property having no market value; and yet that the statement in chief of the material facts on which the opinions are based is error; that such facts are only to be elicited on cross-examination. If the damages for the loss of the use of the property are its value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff in error, as the opinion asserts, [163] the meaning must be the value enhanced by considering the benefits which would have accrued from the performance of the contract by the party who has in fact abandoned it. How shall the value of those benefits be ascertained? Undoubtedly by consideration of all the facts *pro* and *con* which show what are the probabilities or certainties as well as hazards and chances of the business. It

It is that he may be deprived of employment, as well as a home in which to reside. Therefore, a reasonable allowance might, in proper cases, be made to the lessee of a farm for necessary loss of time in looking for another place, or seeking

is believed to be the province of the jury to consider these, and that opinions derive their chief value, when sound, from them.

In *Allison v. Chandler*, 11 Mich. 542, trespass was brought against the landlord to recover damages for ousting his tenant from the demised premises. In the opinion of Christianity, J., is an interesting discussion of the elements of damage as well as of the proper modes of proof. He says: "The law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury. . . . The justice of

the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and as proprietor he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such a sum, or the difference between the rent he was paying and the fair rental value of the premises, if the premises were of much greater and peculiar value to him on account of the business he had established in the store, and the resort of customers to that particular place, or the good-will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate

other employment, where such lessee sustains such loss as the direct result of the lessor's wrongful act, and uses due diligence and reasonable exertions to prevent the loss or to [165] reduce the amount.¹ The last proposition, as to loss of time, is quite near the line (often difficult to trace, if not mysterious) which divides direct and proximate from remote and consequential damages; but, qualified as above stated, we deem it correct. Damages claimed to result from failure to get another farm would, in ordinary cases, if not, indeed, in all cases, be beyond the boundary line which separates recoverable damages from those which are not recoverable."² A less extended liability is imposed on the lessor in California. In an action there by the lessee of farming land for a breach of the covenant of possession the recovery was held to properly include all that could have been netted on the farm, during the year he was to occupy it, by an average farmer; if the plaint-

consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of \$1,000 per year; and he is ousted from the premises and this business entirely broken up for the balance of the time: can he be allowed to recover nothing but six cents for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages, this rule must be taken as a conclusive presumption

of law. . . . The plaintiff in this case did hire another store, the best he could obtain, but not nearly so good for his business; his customers did not come to the new store, and there was not so much of a thoroughfare by it, not one-quarter of the travel, and he relied much upon chance custom, especially in the watch repairing and other mechanical business. This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. . . . Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business, before the injury as well as after, not only might but should be shown as an indispensable means of showing the amount of loss from the injury." *Shafer v. Wilson*, 44 Md. 268. See *Glass v. Garber*, 55 Ind. 336.

¹ See *Attix v. Pelan*, 5 Iowa, 336, *arguendo*, and cases there cited.

² *Williams v. Oliphant*, 3 Ind. 271. See *Yeager v. Weaver*, 64 Pa. 425.

iff owned the stock and utensils with which to carry on farming operations that fact might be considered; but damages were not recoverable because of the loss of his labor or the loss of the use of his teams.¹ In Texas the lessee of farming land who was to cultivate it on shares may recover the reasonable market value of his share of the crops he might reasonably be expected to have raised during his term, less the amount he earned, or by reasonable diligence could have earned, after the contract was broken. The intermediate courts of that state have been in conflict on the question as to whether such damages were too speculative.² The supreme court said that parties entering into such contracts have the right to the benefits to be derived therefrom. The owner of the land expects the share reserved to himself as a return for the cultivation of his land and his other outlay. The benefits expected by the other party are employment and the stipulated return for his labor, and sometimes a home for the time. To deprive him of these benefits is to deprive him of that which in the very contract both parties to it contemplate he shall receive. It would seem to follow, necessarily, that his damages should be compensation for what he thus lost. In such a contract the parties enter into a joint business enterprise, and stipulate what shall be the advantages to each. When one wrongfully deprives the other of those advantages, he should be required to compensate him for that which the contract stipulated he should have. The objects of the contract have a close analogy to those of a partnership.³

§ 871. Mitigation of damages by lessee. The general rule which bars a plaintiff from recovering damages which would not have been sustained had he exercised due diligence to mitigate them has some application to actions to recover for wrongful eviction, though its scope is more restricted in actions between landlord and tenant than in many other classes of actions. The tenant may not recover for damages which result to his personal property through his own negli-

¹ *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. Rep. 501, 5 Am. St. 479. ages, and *Loyd v. Capps*, 29 S. W. Rep. 505, is opposed.

² *Brincefield v. Allen*, 60 S. W. Rep. 1010, favors that measure of dam- ³ *Rogers v. McGuffey*, 74 S. W. Rep. 753.

gence.¹ A tenant who occupies premises so situated that they may be heated without interfering with the rights of other persons, on the failure of the landlord to heat them, should cause the heating to be done, and he may recover the expense necessarily incurred in so doing. If it be practicable to so heat the premises the tenant cannot recover damages on account of the landlord's default unless he avails himself of the facilities within his reach.² This appears to be an extreme application of the doctrine, and to come within language employed by the Minnesota court: Where a party to a contract is exposed to injury by neglect of the other party to perform the covenants on his part, the injured party has no right to aggravate the damages, either by affirmative acts, or by the neglect of ordinary care and reasonable precaution to avert or lessen the injury. We have found no case, however, which holds — and the proposition is unreasonable — that the duty of ordinary prudence to lessen the injury extends so far as to require him to perform the covenants of the other party.³ The tenant is not bound to forego any of his rights under the contract for the advantage of the landlord.⁴

Where the defendant leased her farm to the plaintiff on shares for a year and refused him possession, in an action for the breach it was proved that the plaintiff earned \$1,000 during the year in a different business, and the trial court allowed this fact to go to the jury in mitigation of damages. This was held to be erroneous. Thompson, C. J., said: "The logic seemed to be that because he was an industrious man he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers and domestic servants for a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity of a different business from that which his contract, if complied with,

¹ Gaertner v. Bues, 109 Wis. 165, 85 N. W. Rep. 388; Hysore v. Quigley, 9 Houst. 348, 32 Atl. Rep. 960; Benteau v. Stubler, 79 Minn. 259, 82 N. W. Rep. 583.

² Wayne v. Styles, 94 Ill. App. 615.

³ Cargill v. Thompson, 57 Minn. 534, 547, 59 N. W. Rep. 638.

⁴ Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1.

would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor." After alluding to the rule which confines the plaintiff's recovery to damages which are the proximate consequence of the defendant's wrongful act, the judge added interrogatively: "Is it not, therefore, equally just and logical that whatever shall have the effect to mitigate damages shall have some proximate relation to the [166] contract?"¹ It has been held to be the duty of a plaintiff who sues for compensation for injury to his business by eviction to make reasonable efforts to moderate or prevent such loss by obtaining other premises on which to carry on the business.² But he is not bound to go away from the vicinity in which he was doing business when he made his contract with the defendant, nor to take premises not reasonably well adapted to his needs.³ And it has also been held that whether he is obliged to exert himself for that purpose or not, if he does in fact obtain other premises, and thus prevent an entire loss of the business, the damages will be mitigated accordingly.⁴ But where the lessee of a part of the premises suffers a constructive eviction and to protect his interests takes a lease of the whole at an increased rent and for a longer term, which he sold at a profit, it has been ruled that such lease was an independent transaction by which the lessor incurred no responsibility, and from which he should not be allowed to claim a benefit.⁵

§ 872. **Lessor's covenant to repair, etc.** The obligation of the landlord to repair rests solely upon express contract⁶ or

¹ *Wolf v. Studebaker*, 65 Pa. 459. See § 713.

Where there are several lessees the defendant cannot show that one or more of them has or have obtained other leases or employment from which they have reaped better results than they might have obtained under his lease. *Baumier v. Antiau*, 79 Mich. 509, 44 N. W. Rep. 939.

² *Dobbins v. Duquid*, 65 Ill. 464; *Green v. Williams*, 45 Ill. 206; *Poposkey v. Munkwitz*, 68 Wis. 322, 331, 33 N. W. Rep. 35; *Hodges v. Fries*,

34 Fla. 63, 75, 15 So. Rep. 682. See *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 276, 56 N. W. Rep. 784, distinguishing *Poposkey v. Munkwitz*, *supra*.

³ *Poposkey v. Munkwitz*, *supra*.

⁴ *Chandler v. Allison*, 10 Mich. 460.

⁵ *Fitzgibbons v. Freisem*, 12 Daly, 419.

⁶ *Powell v. Beckley*, 28 Neb. 157, 56 N. W. Rep. 974; *Turner v. Townsend*, 42 Neb. 376, 60 N. W. Rep. 587; *Huber v. Baum*, 152 Pa. 626, 26 Atl. Rep. 101.

statute;¹ an undertaking to repair will not be implied from custom,² nor enlarged by construction.³ It is the same in respect to rebuilding after destruction by any casualty, and as to improvements or additions.⁴ The lessor's exemption from liability for repairs and the consequences of non-repair rests on the principle that the lease is a conveyance; that the lessee has full possession and control of the demised property; the lessor has no right of entry except so far as it has been re-

¹ In Georgia the landlord, in the absence of a stipulation to the contrary, is bound to make repairs. It is presumed that the premises leased are in suitable condition for the purposes for which they were rented; if such is not the case and damage results therefrom to the tenant the landlord is liable, provided he had notice of the defective condition of the premises and failed after a reasonable time to make the necessary repairs, and provided, also, that the tenant's contributory negligence has not affected his right to recover. On failure to inspect the premises, after request, the landlord is chargeable with notice of all the defects that a proper inspection would have disclosed. *Stack v. Harris*, 111 Ga. 149, 36 S. E. Rep. 615.

In Louisiana the lessor is bound to indemnify the lessee for all damages sustained in consequence of the vices and defects of the thing leased, even if he knew not of their existence at the time the lease was made, and though they have arisen since. *Perret v. Dupre*, 2 Rob. 54; *Caspar v. Stone*, 2 McGloin, 149.

The civil law regards a lease for years as a mere transfer of the use and enjoyment of the property, and holds the landlord bound, without any expressed covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident; and if he

does not do so the tenant may have the lease annulled or the rent abated. *Vitebro v. Friedlander*, 120 U. S. 707, 713, 7 Sup. Ct. Rep. 962.

² *Wehrman v. Priest*, 12 Mo. App. 577.

A trust estate is liable for the damages resulting from the breach of the trustee's contract to repair a building which he leased in his representative capacity. *Miller v. Smythe*, 92 Ga. 154, 18 S. E. Rep. 46.

³ *Hopkins v. Ratliff*, 115 Ind. 213, 17 N. E. Rep. 288; *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. Rep. 652, 7 Am. St. 267; *Bowe v. Hunking*, 135 Mass. 380; *Lynch v. Speed*, 15 Daly, 207; *Witty v. Matthews*, 53 N. Y. 412; *Doupe v. Genin*, 45 id. 119, 6 Am. Rep. 47; *Post v. Vetter*, 2 E. D. Smith, 248; *Clark v. Babcock*, 23 Mich. 164; *Sherwood v. Seaman*, 2 Bosw. 127; *Brown v. Barrington*, 36 Vt. 40; *Brewster v. De Fremery*, 33 Cal. 341; *Estep v. Estep*, 23 Ind. 114; *Kahn v. Love*, 3 Ore. 206.

An oral agreement to make repairs is collateral to the written lease and may be proved by parol. *Chapin v. Dobson*, 78 N. Y. 75; *Mann v. Nunn*, 43 L. J. (C. P.) 241; *Clenighan v. McFarland*, 11 N. Y. Supp. 719.

On the failure of a lessor to keep his covenant to repair fences so as to protect crops against stock the tenant may recover for damage done the crops by his own stock. *Rowe v. Baber*, 93 Ala. 422, 8 So. Rep. 865.

⁴ *Id.*; *Vanderpool v. Smith*, 2 Daly, 135; *Loader v. Kemp*, 2 C. & P. 375.

served; the lessee stands in the place of the owner. In other words, the obligation to repair follows the right of possession. When the reason for the rule does not exist the rule does not apply. Hence when an appurtenant attached to and made for the accommodation of several different tenements, leased to divers tenants, remains in the possession of the landlord, though it is used by the lessees, he is bound to keep it in a reasonably safe condition for use.¹ And so if the appurtenant is for the benefit of the landlord only.² The landlord, being the occupant of the upper story of a building, does not owe the tenant of the lower story the duty of cutting off the water so as to prevent it from freezing in the pipes, they not being defective, and the tenant having the same opportunity to cut it off as the landlord.³ The covenant to pay rent is independent of the lessor's covenant to repair, and the tenant's default does not affect the landlord's covenant.⁴ If there is an undertaking by

¹*Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. Rep. 124, 10 Am. St. 260, 3 L. R. A. 458; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, id. 33; *Bold v. O'Brien*, 12 Daly, 160; *Donohue v. Kendall*, 50 N. Y. Super. Ct. 386.

"In the absence of any secret defect, deceit, warranty, or agreement on the part of the landlord to repair, he cannot be held liable to the tenant or any one rightfully occupying under him for an injury caused by the leased premises getting out of repair during the term, unless it be by reason of his own wrongful act, or failure to perform a known duty. And this is so although the premises are let to several tenants, and the injury is caused by want of repair in a passageway used by them in common." *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. Rep. 279; *Dowling v. Nuebling*, 97 Wis. 350, 72 N. W. Rep. 871.

"The lessor of an hotel is not lia-

ble for an injury to a guest caused by the fall of an awning known to be unsafe, unless he was bound by the lease to keep the awning in repair." *Fellows v. Gillhuber*, 82 Wis. 639, 52 N. W. Rep. 307, 17 L. R. A. 577.

"Where there are concealed defects attended with danger to the occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs." *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. Rep. 117, 11 Am. St. 469; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. Rep. 891, 70 Am. St. 930.

²*Payne v. Irvin*, 144 Ill. 482, 33 N. E. Rep. 756, and cases cited; *York v. Steward*, 21 Mont. 515, 55 Pac. Rep. 29.

³*Buckley v. Cunningham*, 103 Ala. 449, 15 So. Rep. 826, 49 Am. St. 42.

⁴*Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360.

the lessor to erect and complete a building for the use and occupation of a tenant, the liability of the former in respect to damages for a breach is not distinguishable from that which arises from a contract to give possession of one already erected. An omission to repair, however, is not an eviction.¹ If the lease is for a monthly rental, no definite term being agreed upon, the liability of the lessor for the breach of his covenant to repair does not extend beyond the month (the statute declaring that to be the term of the lease) unless the tenant shows a renewal of the original agreement for the subsequent months of his occupancy, or some of them.²

On the breach of the landlord's covenant to repair the tenant may abandon the premises if, by reason of want of repair, they have become untenable;³ he may make the repairs and deduct the cost from the rent,⁴ though in some of the cases cited the qualification is added that the cost of the repairs must not be large;⁵ he may occupy the premises without repair, and recoup his damages in an action for the rent,⁶ or he may sue for damages for breach of such covenant.⁷ In the latter action the lessor will be chargeable with the difference between the rent to be paid and the rental value,⁸ and if the contract be

¹ *Speckels v. Sax*, 1 E. D. Smith, 253; *Lewis v. Chisholm*, 68 Ga. 40; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. Rep. 466.

² *Frederick v. Daniels*, 74 Conn. 710, 53 Atl. Rep. 414.

³ *Sheary v. Adams*, 18 Hun, 181; *Lawrence v. Burrell*, 17 Abb. N. C. 312; *Prescott v. Otterstatter*, 85 Pa. 34; *Bissell v. Lloyd*, 100 Ill. 214; *Lewis v. Chisholm*, 68 Ga. 40.

⁴ *Sparks v. Bassett*, 49 N. Y. Super. Ct. 270; *Myers v. Burns*, 35 N. Y. 269; *Wright v. Lattin*, 38 Ill. 293; *Cook v. Soule*, 56 N. Y. 423; *Woodward v. Jones*, 15 N. Y. Misc. 1, 36 N. Y. Supp. 775; *Kimball v. Doggett*, 62 Ill. App. 528 (applying the principle to the finishing of a building); *Brown v. Toronto General Hospital*, 23 Ont. 599.

⁵ *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 56 N. W. Rep. 784, and cases cited. See § 873.

⁶ *Westlake v. De Graw*, 25 Wend. 669; *Wright v. Lattin*, 38 Ill. 293.

⁷ *Lewis v. Chisholm*, 68 Ga. 40; *Block v. Ebner*, 54 Ind. 544; *Buck v. Rodgers*, 39 Ind. 222; *Hexter v. Knox*, 39 N. Y. Super. Ct. 109; *McCardell v. Williams*, 19 R. I. 701, 36 Atl. Rep. 719.

⁸ *Lightfoot v. West*, 98 Ga. 546, 25 S. E. Rep. 587; *Taylor v. Lehman*, 17 Ind. App. 585, 46 N. E. Rep. 84; *Allendorph v. Banks*, 8 Kan. App. 219, 55 Pac. Rep. 488; *Long v. Gieriet*, 57 Minn. 278, 59 N. W. Rep. 194; *Rose v. Butler*, 69 Hun, 140, 23 N. Y. Supp. 375; *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360; *Reiner v. Jones*, 38 App. Div. 440, 56 N. Y. Supp. 423; *Jackson v. Farrell*, 6 Pa. Super. Ct. 31; *Fairman v. Fluck*, 5 Watts, 516; *Wayne v. Lapp*, 180 Pa. 278, 36 Atl. Rep. 723; *Kohne v. White*, 12 Wash. 199, 40 Pac. Rep. 794; *Pewaukee Mill-*

made for a particular use by the lessee the rental value for that use will be the standard.¹ This consideration will have a controlling influence in fixing the standard of repair.² If the lessor has bound himself to pay the value of repairs made by the lessee, his liability is measurable by their value in place; not what the material, if taken out, would sell for.³

In a late case in New York the defendant let to the plaintiff a hotel and certain adjoining premises, covenanting to tear down the old building and erect a new one on such premises, to be used in connection with the hotel, the new building to be completed and the plaintiff put in possession by a specified [167] time. The plaintiff was then occupying the hotel and a building upon a portion of the adjoining premises under a former lease; he removed the furniture from the rooms in that building and stored it while the new one was being erected. The defendant failed to complete the new building within the specified time. In an action for breach of the covenant the court say: "The rent of the whole premises embraced in the lease was to commence with the term, although the plaintiff would necessarily be required to await the erection and completion of the new structure before he could have the beneficial enjoyment of that part of the demised premises. The lease was made with reference to these circumstances, and an allowance to the plaintiff of the rental value of the rooms in the new building during the time he was deprived of them by the defendant's default, based upon the consideration of the use to which they were to be applied, and which was contemplated by both parties when the lease was executed, affords to the plaintiff only a just indemnity, and subjects the defendant to

ing Co. v. Howitt, 86 Wis. 270, 56 N. W. Rep. 784, citing the text; *Bien v. Hess*, 102 Fed. Rep. 436, 42 C. C. A. 421; *Huber v. Ryan*, 57 App. Div. 34; *Ross v. Stockwell*, 49 N. E. Rep. 50; *Leick v. Fritz*, 94 Iowa, 322, 62 N. W. Rep. 855; *Brown v. Toronto General Hospital*, 23 Ont. 599; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. Rep. 466; *Myers v. Burns*, 35 N. Y. 269.

¹ *Myers v. Burns*, 35 N. Y. 269; *Berrian v. Olmstead*, 4 E. D. Smith,

279; *McEwen v. Dillon*, 12 Ont. 411; *McCoy v. Oldham*, 1 Ind. App. 372, 50 Am. St. 208, 27 N. E. Rep. 647; *Bien v. Hess*, 102 Fed. Rep. 436, 42 C. C. A. 421.

² *Myers v. Burns*, *supra*; *Ward v. Kelsey*, 38 N. Y. 80, 97 Am. Dec. 773; *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. Rep. 49.

³ *Ladd v. Hawkes*, 41 Ore. 247, 68 Pac. Rep. 422.

no greater liability than it may fairly be supposed he intended to assume when the covenant was made."¹

In a case in which the plaintiff sought to recover the rental value of the upper stories, which he could not use because of the unsafe condition of the building, he gave evidence to show that the several floors could have been rented at a certain sum per square foot, which would aggregate more than the entire rent reserved in the lease, the court was "inclined to the opinion that when a building erected for business purposes is rented as a whole and without any specific reference to a use by way of subletting, or where that is not the primary purpose contemplated by the parties, the damages for the breach of a covenant to repair is the difference in the rental value of the premises as they are and as they were to be regarding the premises as a whole, and that they are not to be measured by supposed loss by reason of the tenant being unable to parcel out separate portions and let them to under-tenants. Such a rule of damages would lead to great uncertainty and subject the lessor to liability based on contracts with third persons, of which ordinarily he could know nothing. Loss of profits upon the very contract sued upon, if definite and certain, may be recovered, or where a contract is made in view of an already existing contract with a third person, and the contract sued upon is made with special reference to such contract and to enable the other party to carry it out, then the loss sustained, or the profits which might have been realized on such contract with a third person, may be a proper subject for consideration. But in the ordinary case of a lease of a building to be used for any purpose at the discretion of the lessee, and there has been a breach by the lessor of a covenant to repair, the rule which measures the damages by the difference in general rental value is usually compensatory, and, in most cases, best satisfies the demand of justice. If in all cases it does not afford full compensation, it eliminates an element of speculation and uncertainty which, if permitted to be considered, would often tend to great injustice. The cases of *Myers v. Burns*² and *Hexter v. Knox*³ were cases of leases for hotel purposes, and for a breach by the landlord

¹ *Hexter v. Knox*, 63 N. Y. 561.

² 35 N. Y. 269.

Compare *Prescott v. Otterstatter*,

³ 63 N. Y. 561.

79 Pa. 462.

of a covenant to repair the tenant was allowed to recover the value of the use of certain rooms in the hotel for hotel purposes during the time they were rendered untenable because of the failure to perform the covenant. These cases fall within a well defined class, which permits a recovery on a breach of contract of damages which it may be found were contemplated by the parties when the contract was made as a consequence of the breach of the covenant. The claim [of the defendant] that the cost of repairing the walls is the measure of damages cannot be sustained. If the tenant had elected to repair the walls it is possible that he could have charged the necessary expense to the landlord, or recouped the amount in an action brought for the rent. But a tenant is not bound to make permanent and important repairs, which the landlord was to make, but may seek his remedy by action to recover the damages or by counter-claim."¹

If the failure to make repairs as covenanted does not prevent a manufacturing establishment from producing the usual quantity of product, the decrease in rental value may be measured by the increased expense incurred to obtain that result, the rental value of the premises in the conditions in which they should have been kept being taken to be the sum named in the lease.² Where a part of the leased premises is burned before the lessee goes into possession and the lessor is bound to rebuild it, if the lessee goes into possession in reliance on his promise to rebuild, which he does not do, there is a failure of consideration to the extent that the rental value of the premises is reduced.³ If the lessee is deprived of the use of the premises while the repairs are being made he may recover a proportion of the rent, and if he incurred expense for the use of other property during that time he may recover it.⁴ The tenant may recover for the loss of the use of rooms rendered untenable for want of repair.⁵ The damages for the loss of the rental value of furnished rooms is their rental value after

¹ Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. Rep. 7.

² Bien v. Hess, 102 Fed. Rep. 436, 42 C. C. A. 421.

³ Lightfoot v. West, 98 Ga. 546, 25 S. E. Rep. 547.

⁴ Biggs v. McCurley, 76 Md. 409, 416, 25 Atl. Rep. 466.

⁵ Myers v. Burns, 35 N. Y. 269; Ward v. Kelsey, 38 N. Y. 80, 97 Am. Dec. 773; Parker v. Meadows, 86 Tenn. 181, 16 S. W. Rep. 49.

deducting the expenses necessarily incident to carrying on the business of a lodging house.¹

In a Connecticut case, in which claims sounding in tort were joined with claims founded in contract, but which lacks the force of an adjudication because of the failure of the plaintiff's evidence, the question of damages resulting from a defect in the heating apparatus which was to furnish heat for the tenant's rooms was considered. It was the tenant's design to rent the rooms, which was not done because they were insufficiently heated. The cause of the damage was a continuing one. The lease was worth less up to the time of the trial than it would have been had the heating apparatus been adequate, and the difference between what the lease was worth for the tenant's purposes, with cold rooms, and what it would have been worth, with rooms properly heated, represented his loss. The loss of the use of the rooms could be shown otherwise than by evidence of applications actually made and withdrawn on account of the lack of heat. If the rooms were untenable in cold weather the tenant was not bound to seek for lodgers then, or to show that applicants for lodgings had examined and declined to take them.² But it has been ruled that on the breach of a contract to heat leased premises the damages cannot exceed the reasonable cost of supplying sufficient heat to make up the difference between the amount furnished and that stipulated for.³

The lessor cannot mitigate the damages resulting from his neglect to repair by showing that his lessee had sublet the premises and received the same amount for rent as he was liable to him for.⁴ If repairs made are not such as the tenant is entitled to, but are of advantage to him, the lessor's liability will be diminished to the extent that they are beneficial.⁵ If they are negligently made the lessor will be liable for resulting damages,⁶ notwithstanding the work was done by an

¹ *Kohne v. White*, 12 Wash. 199, 40 Pac. Rep. 794.

² *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. Rep. 852.

³ *McCormick v. Stowell*, 138 Mass. 431. See *Russell v. Giblin*, 16 Daly, 258, 10 N. Y. Supp. 315; *Manhattan*

Stamping Works v. Koehler, 45 Hun, 150.

⁴ *Watson v. Hooton*, 4 Ill. App. 294.

⁵ *McEwen v. Dillon*, 12 Ont. 411.

⁶ *Butler v. Cushing*, 46 Hun, 521; *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710.

independent contractor.¹ But if made with due care, and in pursuance of the lessor's right as stipulated in the lease, the lessee has no claim for compensation for any injury suffered in consequence. The right to make alterations carries with it the incidental right to cast upon the lessee the necessary and reasonable consequences of exercising it, so far as these might affect his leasehold.²

On the breach of an agreement made during the tenancy to repair the premises in consideration of an increased rent, the tenant continuing in occupation after expiration of the term and voluntarily paying the increased rent, the damages cannot be extended beyond the term in which such payment was made in reliance on the promise. The recovery was measured by the amount of additional rent so paid.³ On the breach of the landlord's contract to go security for cows to be bought by his tenant and to furnish him hogs, the milk furnished by the cows to be applied to the payment of their purchase price, the damages are not measured by the proceeds of the stock, but by its value over and above the cost price at the time when they would have been paid for as contracted.⁴

§ 873. **Lessee's duty concerning repairs.** The lessee must give the landlord notice to make repairs when needed, unless the lease shows an intention that the latter shall take notice from his own observation. This intention will not be implied [168] where the lease does not give him the right to enter and view the premises.⁵ The rule is that notice to perform is necessary whenever the fact on the occurrence of which the right to claim performance depends lies more peculiarly within the knowledge of the party claiming such right.⁶ If the landlord refuses to repair on receiving notice, the tenant is entitled to do so at the former's expense, and that is held to be his duty

¹ *Wertheimer v. Saunders*, 95 Wis. 573, 70 N. W. Rep. 824, 37 L. R. A. 146; *Wilber v. Follansbee*, 97 Wis. 577, 72 N. W. Rep. 741.

² *Reineman v. Blair*, 96 Pa. 155; *Clark v. Lindsay*, 7 Pa. Super. Ct. 43.

³ *Deuster v. Mittag*, 105 Wis. 459, 81 N. W. Rep. 643.

⁴ *Chesmore v. Barker*, 101 Iowa, 576, 70 N. W. Rep. 701.

⁵ *Gerzebek v. Lord*, 33 N. J. L. 240; *Wolcott v. Sullivan*, 6 Paige, 117; *Norfleet v. Cromwell*, 64 N. C. 1.

⁶ *Id.*; *Chitty on Cont.* 732; *Hayden v. Bradley*, 6 Gray, 425, 66 Am. Dec. 421; *Brown v. Toronto General Hospital*, 23 Ont. 599; *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. Rep. 127.

where it may be done at trifling expense; he cannot neglect it and recover greater damages, suffered in consequence of the premises remaining out of repair, than the repairs would cost.¹ This rule only applies when the repairs can be made with a reasonable expenditure of time and money, the court determining in each case what is reasonable, regard being had to the relative cost, extent of the injury and value of the contract.² Where there was a covenant to reconstruct and enlarge the capacity of a mill by building over or substituting a new motive power, involving the skill and knowledge of experts in hydraulics and mill building, in respect to which the lessee had no special experience or skill, there was no duty on him to attempt to do what the lessor was bound to do. "Failure on the part of the lessor plaintiff to perform its covenant in this respect could not have the effect to impose upon the lessee the risk of success or failure in putting in or setting a new wheel, a risk which might involve the lessee in uncertainty of result and damage to the mill or power, and consequent risk and loss. The burden is one which the lessor had expressly taken upon itself, and which it was in every respect proper it should bear. . . . The defendant had a right to continue

¹ *Wisdom v. Newberry*, 30 Mo. App. 241; *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. Rep. 49; *Dorwin v. Potter*, 5 Denio, 306; *Hendry v. Squier*, 126 Ind. 19, 25 N. E. Rep. 830, 9 L. R. A. 798; *Hopkins v. Ratliff*, 115 Ind. 213, 17 N. E. Rep. 288; *Cook v. Soule*, 56 N. Y. 420; *Indiana Central R. Co. v. Moore*, 23 Ind. 14; *Andrews v. Jones*, 36 Tex. 169; *Nicholson v. Munigle*, 6 Allen, 215; *Miller v. Mariners' Church*, 7 Me. 51, 20 Am. Dec. 341; *Fort v. Orndoff*, 7 Heisk. 167; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Ross v. Stockwell*, 19 Ind. App. 86, 49 N. E. Rep. 50; *Wood v. Sharpless*, 174 Pa. 588, 34 Atl. Rep. 319; *Brown v. Toronto General Hospital*, 23 Ont. 599; *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. Rep. 48, 52 Am. St. 485. See *Terry v. Mayor*, 8 Bosw. 504; *Cole v. Buckle*, 18 Up. Can. C. P. 286.

² *Parker v. Meadows*, 86 Tenn. 181, 6 S. W. Rep. 49; *Hexter v. Knox*, 63 N. Y. 561; *Martin v. Hill*, 42 Ala. 275; *Hinckley v. Beckwith*, 13 Wis. 31; *McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. Rep. 647, 50 Am. St. 208; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776. See *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. Rep. 787.

Where the lessor had agreed to paint a dwelling-house inside and out, repair fences and make all other necessary repairs, the court said it may not have been convenient for the lessee to advance the money necessary to meet such expenses; but whether convenient or not, he was under no obligation to do that which the lessor himself had agreed to do. *Biggs v. McCurley*, 76 Md. 409, 415, 25 Atl. Rep. 466.

in possession and pay the rent and hold the plaintiff responsible for the damages suffered in consequence of its failure to perform its covenant, if he did nothing to acquiesce in "an insufficient wheel "as a satisfaction of the covenant, and mere payment of rent would not be such acquiescence."¹

In Alabama and Michigan the tenant is not bound to cause repairs to be made and thereby limit his recovery to the cost of making them. He may rely upon the lessor's promise and hold him for such damages as are the natural and proximate result of its breach.² When this duty rests upon the lessee the lessor's liability is to be determined as of the time he became in default, notwithstanding the former may have been obliged to pay a third person damages for injuries subsequently sustained.³ If the landlord prevents the tenant from making repairs by repeated promises to make them himself; that is, if the tenant in good faith delays for that reason, he is not prejudiced in his claim to such damages as he may suffer from the continuance of a want of repair.⁴

¹ *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 275, 56 N. W. Rep. 784.

² *Vandegrift v. Abbott*, 75 Ala. 487; *Culver v. Hill*, 68 id. 66, 44 Am. Rep. 134; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. Rep. 246 (if the use of the property is dependent upon the repairs being made).

³ *Sparks v. Bassett*, 49 N. Y. Super. Ct. 270; *Oettinger v. Levy*, 4 E. D. Smith, 288.

⁴ In *Keyes v. Western Vermont Slate Co.*, 34 Vt. 81, Poland, C' J., said: "If, when the plaintiff requested the defendants to repair the drain, they had refused to do so, it would have been the duty of the plaintiff himself to have done it, and all he could have recovered would have been the costs of the repair. He could not in such case lie by and incur loss for want of the repairs, far beyond the cost of fixing it, and make the defendants liable. If the defendants wrongfully refused to repair, still it was the duty of the plaintiff to conduct like a reasonable

and prudent man, and take the course that would be least detrimental to himself and to the defendants. But if the defendants, on having notice to repair the drain, admitted their liability to repair it and promised to do so, and thus kept the plaintiff from making the repairs himself, and thus prolonged the period of loss to the plaintiff so that it exceeded the cost of the repairs, that loss should justly fall on the defendants. It was rather a question whether the plaintiff acted in good faith, and with fair and reasonable prudence, in the course he took in waiting for the defendants to repair, under their assurance, instead of proceeding to make them himself. The defendants when called on should immediately have proceeded to make the repairs themselves, or else have refused, so that the plaintiff could have made them himself. If they omitted to make them on being called on, and kept the plaintiff from doing it by false

In an action by a tenant against a landlord who has [169] covenanted to keep the premises in repair for damages for its breach, the defendant cannot excuse his non-performance by proof of the plaintiff's negligence. His contributory negligence does not go to the cause of action upon contract; there is a right of action when the defendant is guilty of a breach by his negligence; but upon the question of reduction of damages the conduct of the plaintiff in failing to exercise due care to prevent injury to himself by the defendant's failure to perform his contract is proper for the consideration of the jury.¹ In New York where the landlord agrees to repair and fails to do so the tenant is held to have two different remedies, at his election. Hunt, J., said: "He could have made the repairs himself and have called upon the plaintiff to refund the expense; . . . or he could have called upon . . . (the lessor) . . . to take the ordinary responsibility of a party failing to perform his contract, to wit, to pay the damages caused by such failure. . . . In the first case the rule confines the damages to the actual expense, if no special damage is shown, but in the other the cost of repair is not an element in the case. It is as if there was no such right to repair on the part of the lessee, but the claim rested solely in damages."² This right of election to repair or to claim damages was declared in a case where the repairs actually made and damages recovered from the landlord for not making others were but a trifle in excess of the rent due. This decision was subsequently affirmed in a case³ in which the trial court had refused a request to charge that the plaintiff could not recover for the use of rooms except for the time it would necessarily take to repair them; and that if the plaintiff knew of the defect which caused damage he was bound to have it repaired as soon as could reasonably have been done; and that if he did not do so and damage subsequently accrued, he could not recover therefor. On this refusal the court of appeals remarked: [170] "It is conceded that it was the duty of the defendant to repair

and delusive promises, they cannot complain of being made liable for the loss occasioned by the delay." *Buck v. Rodgers*, 39 Ind. 222; *Parker v. Meadows*, 86 Tenn. 181, 6 S. W.

Rep. 49; *Rauth v. Davenport*, 60 Hun, 70, 14 N. Y. Supp. 69.

¹ *Flynn v. Nash*, 11 Allen, 550.

² *Myers v. Burns*, 35 N. Y. 269.

³ *Hexter v. Knox*, 63 N. Y. 561.

the ceilings. Upon his failure to perform it, it was the right of the tenant to make the repairs and charge the expense to the landlord. But he was not bound to make the repairs. He (the lessor) had no right to cast upon the plaintiff the responsibility and the burden of the repairs which he was bound to make. The plaintiff removed his furniture from these rooms; and so far as he could, short of making the repairs himself, limited the injurious consequences of the defendant's neglect."¹ The tenant in making repairs after default of the landlord to make them in pursuance of his contract is not bound to do so in such manner as to literally restore the premises by the same materials and workmanship to their former state; he may exercise a prudent judgment to render the repairs more permanent and useful by substituting better material or workmanship.²

§ 874. Liability for special and consequential damages. Such damages may be recovered against a lessor for breach of his contract to repair if they are not remote and are shown with sufficient certainty. Loss of custom to a mill kept idle by the lessor's failure to repair the dam was held to be uncertain and speculative.³ So of profits anticipated from the future public performance of a vocalist,⁴ and profits which might have been made in a store building if it had been completed at the time fixed.⁵ Damages resulting from illness and loss of business,⁶ and injuries to animals and the increased food required and the decrease of produce,⁷ have been held to be too remote. Where a landlord negligently suffered a

¹ *Martin v. Hill*, 42 Ala. 275; *Hinckley v. Beckwith*, 13 Wis. 31.

² *Myers v. Burns*, 35 N. Y. 269.

³ *Middlekauff v. Smith*, 1 Md. 329; *Fort v. Orndoff*, 7 Heisk. 167. See *Manhattan Stamping Works v. Koehler*, 45 Hun, 150.

The general rule of damages is the value of the use of the premises while they are untenable by reason of the lessor's default. *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 id. 561.

The lessee cannot recover the amount paid for rooms and meals elsewhere during the time the repairs

were being made. *Clenighan v. McFarland*, 16 Daly, 402, 11 N. Y. Supp. 719.

⁴ *New York Academy of Music v. Hackett*, 2 Hilt. 217. See *McHenry v. Marr*, 39 Md. 510.

⁵ *Rathkowski v. Masolowski*, 57 Ill. App. 525.

⁶ *Chadwick v. Woodward*, 12 Daly, 399; *Eschbach v. Hughes*, 7 N. Y. Misc. 172, 27 N. Y. Supp. 320; *Collins v. Karatopsky*, 36 Ark. 316, 324; *Jackson v. Farrell*, 6 Pa. Super. Ct. 31; *Bien v. Hess*, 102 Fed. Rep. 436, 42 C. C. A. 421.

⁷ *Dorwin v. Potter*, 5 Denio, 306.

chimney upon the demised premises to remain in a ruinous condition and its fall caused injury to his tenant's property, he was held liable for the resulting damage;¹ and also for a lessee's goods in a store, injured in consequence of gutters being obstructed.² In such a case wool belonging to the tenant was alleged to have suffered injury from water escaping from a waste-pipe by negligence of the landlord. The trial court in an action therefor gave these instructions, to which exceptions were overruled: that the evidence must be such that the jury may be able to decide thereon as to the amount of damages; that guesses of witnesses were not sufficient [171] to found a verdict upon; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of the wool injured and as to the extent of the injury is competent; that exact accuracy in testimony is not required, but that the jury could not give damages exceeding what they are satisfied of on the evidence; that when the damage was occasioned by different causes, from each of which there was more or less damage to plaintiff's wool, if a portion was from causes for which the defendants were not liable, as from the tide water, the burden of proof was upon the plaintiff to show the damage to the wool from causes for which the defendants were liable, as distinguished from other causes, and for this damage only could the plaintiff recover.³ Where insufficient support was furnished a roof which broke through and let snow and water fall upon the tenant's goods, in consequence of which he had to remove them, he recovered for the injury they sustained and for the injury to his business, he being compelled to surrender possession of the store and rent another at a less profitable position where he was able to do but little business. It was competent for him to show what the profits

¹ *Eagle v. Swayze*, 2 Daly, 140.

² *Center v. Davis*, 39 Ga. 210; *Blumenthal v. Prescott*, 70 App. Div. 560, 75 N. Y. Supp. 710; *Rauth v. Davenport*, 60 Hun, 70, 14 N. Y. Supp. 69; *Kohne v. White*, 12 Wash. 199, 40 Pac. Rep. 794.

³ *Priest v. Nichols*, 116 Mass. 401.

"A tenant whose landlord has agreed to put the premises in repair

but has failed to do so, knowing that his property will be exposed to injuries from storms, or otherwise endangered, if left upon the premises, has no right to take the hazard, and if he does, and his property is injured, he cannot recover of the landlord therefor." *Cook v. Soule*, 56 N. Y. 420, 423; *Reiner v. Jones*, 38 App. Div. 441, 46 N. Y. Supp. 423.

of his business had been,¹ and the extent to which it had been injured.² The damage to injured goods is the amount of depreciation in value caused by the injury, and this is the difference between their market value immediately before the injury and such value immediately thereafter. The price at which they were sold in open market after the injury is not conclusive as to their value.³ In contracting for the lease of a farm and stipulating that the lessor was to have certain ditches thereon cleaned out, the parties contemplate that such cleaning was essential to the making of a full crop. The lessee might have put the ditches in order, but was not bound to do so, and collect the cost from the lessor. The liability of the latter was for the decrease in the net yield of the crop because of the breach of contract.⁴ By knowingly leaving plastering in a defective condition a landlord who has promised to make repairs is liable for damage done to the lessee's goods by fire caused by a lamp upset by falling plaster.⁵ In some of the Illinois appellate courts the lessor has been held liable for the death of the lessee's wife caused by the breaking of a defective railing on a porch,⁶ and for injuries to his child.⁷ But this measure of liability for breach of the contract to repair has generally been denied, especially if the tenant has had knowledge of the defect or condition which caused either, and has not exercised his right to remedy it at the landlord's expense.⁸ It is said in a Massachusetts case⁹ that the action of

¹ *Shafer v. Wilson*, 44 Md. 278.

² *Evans v. Murphy*, 87 Md. 498, 40 Atl. Rep. 109.

³ *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764, 25 S. E. Rep. 761.

⁴ *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. Rep. 167, 37 Am. St. 611.

⁵ *Mason v. Howes*, 122 Mich. 329, 81 N. W. Rep. 111, citing *Stevens v. Pantlind*, 95 Mich. 145, 54 N. W. Rep. 716; *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Watson v. Hooton*, 4 Ill. App. 294; *Maywood v. Logan*, 78 Mich. 135, 43 N. W. Rep. 1005, 18 Am. St. 431.

⁶ *Sontag v. O'Hare*, 73 Ill. App. 432,

citing *Mendel v. Fink*, 8 id. 378; *Platt v. Farney*, 16 id. 216.

⁷ *Schwandt v. Metzger Linseed Oil Co.*, 93 Ill. App. 365.

In *Moore v. Steljes*, 69 Fed. Rep. 518, the landlord warranted the safety of a ceiling. He was liable for an injury to the tenant's child caused by its fall, on the ground of negligence. *Contra*, *Miller v. Rinaldo*, 21 N. Y. Misc. 470, 47 N. Y. Supp. 636.

⁸ *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. Rep. 48, 52 Am. St. 485; *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 13 N. E. Rep. 465; *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. Rep. 127;

⁹ *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 13 N. E. Rep. 465.

tort has for its foundation the negligence of the defendant, and this means more than a mere breach of promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure. As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract. We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor and had unreasonably delayed in performing his contract. We are not aware of any authority for maintaining such an action.

In an action against the lessors of a saw-mill for breach of their contract to repair, whereby the mill was rendered useless to the lessees during the latter portion of their term, it appeared that the lessees at the time of the stoppage had sufficient logs of their own in the mill yard to stock the mill for one-half of the balance of their term, which they were compelled to haul to another mill to be sawed. It was held that they were entitled to recover as damages the amount paid for hauling their logs to such other mill, and the cost of getting them sawed there, above what it would have cost to saw them at their own mill, and also the profits which they would have made from manufacturing lumber in that portion of their term during which they lost the use of the mill through the fault of the defendants, deducting the time which it would

Flynn v. Hatton, 43 How. Pr. 333; York, etc. R. Co., 98 N. Y. 245, 248-9, 50 Am. Rep. 659; Schwartz v. Apple, 21 Arnold v. Clark, 45 N. Y. Super. Ct. 252; Kabus v. Frost, 50 N. Y. Super. Ct. 74; Spellman v. Bannigan, 36 N. Y. Misc. 513, 48 N. Y. Supp. 253; Folsom v. Parker, 31 N. Y. Misc. 348, 64 N. Y. Supp. 263; Schick v. Fleischhauer, 26 App. Div. 210, 49 N. Y. Supp. 962; Brown v. Toronto General Hospital, 23 Ont. 599.

Hun, 174; Sanders v. Smith, 5 N. Y. Misc. 1, 25 N. Y. Supp. 125 (the contrary rule is favored in White v. Sprague, 9 N. Y. St. Rep. 320. See *obiter* remark in Edwards v. New

have required to saw their own logs so hauled to another mill; and that to these damages interest might be added at the discretion of the jury.¹ The profits here held to be recoverable were the special rental value of the mill to the plaintiffs.²

¹ *Hinckley v. Beckwith*, 13 Wis. 31, 17 Wis. 413.

² *Cole, J.*, said: "In the first place we can see no objection to giving the respondents the fair value of the use of the mill for the unexpired portion of the term, subject to the qualifications hereafter mentioned. The mill was of no sort of use to them except to manufacture lumber. And when the motive power gave out, nothing further could be done with it. One of the respondents testified that it was worth for the residue of the term \$10.50 per day to manufacture lumber. This being so, why ought they not to recover damages at that rate during the continuance of the lease, excepting therefrom the time they would use it to saw their own logs? We know of no sound principle of law or reason which would be violated in permitting them to do so. It is said that this would be allowing damages on the basis of a calculation of profits, which, it is said, is inadmissible. But the case of *Griffin v. Colver*, 16 N. Y. 489, to which we are referred by counsel for the appellants, fully sustains the rule we have laid down." After stating the rule of that case the learned judge continued: "In the present case it was very easy to ascertain the profits which were the direct and immediate results of operating the mill for sixty days. The respondents had logs enough on hand to stock the mill for about one-half of that time, and timber standing near the mill sufficient to supply it for the rest of the time. What, therefore, could be made in running the mill, per day, over and above all expenses of rent,

labor, etc., was susceptible of exact and definite proof. It is not like profits anticipated from being able to perform some dependent and collateral undertaking to the principal business of running the mill, but related to gains or profits arising from the business itself, and constituting a portion of the contract. The respondents, when they rented the mill, considered what it would be worth to them per year or per month. The profits upon the manufacture of lumber were so much per thousand, and it was therefore an easy matter to ascertain the gross earnings of the mill. We therefore suppose the profits or earnings of the mill would constitute a proper item in estimating the damages resulting from the breach of the agreement to repair. *Masterton v. Mayor*, 7 Hill, 61; *Blanchard v. Ely*, 21 Wend. 342."

In *Jolly v. Single*, 16 Wis. 280, the lessor removed part of a saw-mill, and thereby made it impossible to run it. It was held that the damages were not confined to the cost of replacing it, leaving the lessee to pay his men out of employ, and lose the use of the mill during the time it necessarily lay idle by reason of the trespass. See *Boynton v. Chase*, 3 Wis. 456; *Buck v. Rodgers*, 39 Ind. 222; also *Crane v. Hardman*, 4 E. D. Smith, 448; *Chatterton v. Fox*, 5 Duer, 64; *Bostwick v. Losey*, 67 Mich. 554, 35 N. W. Rep. 246.

In *Bank of Victoria v. Synnot*, 11 Vict. L. R. 589 (1885), premises were leased for warehouse purposes, and the lessor agreed to put in repair, before the lessee took possession, machinery thereon necessary to the use of the warehouse as such. The repairs

There cannot be a recovery on account of prospective profits unless the business has been established.¹ Some *obiter* observations made in a New York case are pertinent in this connection, and have weight. They are *obiter* because the complaint was silent on the question of special damages, which the loss of profits was considered to be. Such loss, the court said, if recoverable at all, is so only where the tenant is not only unable to carry on business on the demised premises, but where his eviction prevents him from carrying on business at all. In fact, the claim for loss of business profits seems inconsistent with the allegations which are the necessary foundation of the cause of action. If the premises were rendered untenable, then under the terms of the lease the tenancy ceased, and that was the end of the relation between the parties. If the premises were tenantable, it was the duty of the plaintiff to have carried on business upon them. He might either himself have made the repairs that were necessary and charged the defendant with their cost, or he could recover the diminution in the rental value. He had not the right to abandon the premises unless they were untenable, and if they were untenable then the lease ceased.² A tenant may recover for damage done his crops by trespassing animals in consequence of the landlord's failure to keep fences in repair.³ The theft of goods is a contingency naturally within the contemplation of the parties when a landlord reserves the right to use a part of the demised premises and fails to observe a condition that he will secure the door when doing so.⁴

§ 875. **Removal of fixtures.** If a tenant makes improvements of a permanent character which are so annexed as to become part of the realty he can neither remove them nor recover their cost without a special contract to that effect on the landlord's part;⁵ the removal must be made during the con-

were not made until after the stipulated time, but were made at a season when the lessee most needed the machinery. The recovery of lost profits and the injury sustained by the business of the lessee was approved.

¹ *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270, 56 N. W. Rep. 784.

² *Drago v. Mead*, 30 App. Div. 258, 51 N. Y. Supp. 360.

³ *Buck v. Rodgers*, 39 Ind. 222.

⁴ *Herder v. Bloomer*, 7 N. Y. Misc. 687, 28 N. Y. Supp. 266.

⁵ *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. Rep. 315, 53 Am. Rep. 509; *Chase v. New York Insulated Wire Co.*, 57 Ill. App. 205; *Ashby v. Ashby*,

tinuance of the term.¹ Where authority is given a tenant to remove machinery he has put in it is implied that he may do such damage to the freehold in making the removal as in the exercise of ordinary care was necessary.² If the removal of fixtures is prevented, contrary to the terms of the lease, the tenant may recover their value as they stand in the building; he is not limited to their worth after removal.³ The right to remove trade fixtures is waived by taking a new lease after the expiration of that under which they were added to the premises, such lease being silent as to the fixtures, and binding the tenant to deliver the premises in as good condition as when received.⁴ There are but few judicial dissents from this view, though these are by courts of high standing.⁵ Articles affixed by the tenant to the premises for the purpose of carrying on the business for which the premises were leased are denominated "trade fixtures," and are removable by the tenant, no matter how firmly they may be attached to the land.⁶ "As

59 N. J. Eq. 536, 46 Atl. Rep. 528; *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S. E. Rep. 613.

In Mississippi a tenant who buys a cotton gin and puts it upon a plantation he has leased, intending to remove it, may do so. *McMath v. Levy*, 74 Miss. 450, 21 So. Rep. 9. See *Liebe v. Nicolai*, 30 Ore. 364, 48 Pac. Rep. 172.

¹ *Harper v. Gaynor*, 19 Vict. L. R. 675.

² *Hunt v. Pötter*, 47 Mich. 195, 10 N. W. Rep. 198.

³ *Bruce v. Welch*, 52 Hun, 524, 5 N. Y. Supp. 668; *Neiswanger v. Squier*, 73 Mo. 192.

⁴ *Sanitary District of Chicago v. Cook*, 169 Ill. 184, 48 N. E. Rep. 461, 61 Am. St. 161, citing *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Heap v. Barton*, 74 Eng. C. L. 273; *Sharp v. Milligan*, 23 Beav. 419; *Thresher v. Waterworks Co.*, 2 B. & C. 608; *Merritt v. Judd*, 14 Cal. 59; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Watriss v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Carlin v. Ritter*,

68 Md. 478, 13 Atl. Rep. 370, 16 id. 301, 6 Am. St. 467; *Hedderich v. Smith*, 103 Ind. 203, 2 N. E. Rep. 315, 53 Am. Rep. 509; *Marks v. Ryan*, 63 Cal. 607. To the same effect, *Unz v. Price's Adm'r*, 22 Ky. L. Rep. 791, 58 S. W. Rep. 705; *Gaugel v. Ainley*, 83 Ill. App. 582; *Williams v. Lane*, 62 Mo. App. 66; *Davis v. Moss*, 38 Pa. 346; *Free v. Stuart*, 39 Neb. 220, 57 N. W. Rep. 991; *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. Rep. 499.

⁵ *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. Rep. 514. See *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. Rep. 907, the intimation in which is not followed in *Hertzberg v. Witte*, 22 Tex. Civ. App. 320, 54 S. W. Rep. 921, which holds in accordance with the weight of authority.

⁶ *Lawton v. Lawton*, 3 Atk. 13; *Van Ness v. Pacard*, 2 Pet. 137; *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 143 U. S. 396, 12 Sup. Ct. Rep. 188; *Conrad v. Saginaw Mining Co.*, 54 Mich. 249, 20 N. W. Rep. 39; *An-*

between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession. . . . It is difficult to conceive that any fixture, however solid, permanent and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term."¹ The general rule is that the tenant must exercise his right to remove trade fixtures during his term. This rule is dependent upon the termination of the tenancy by the terms of the lease or the voluntary act of the tenant. If the tenancy is of uncertain duration, or is liable to be determined by the happening of some contingent or uncertain event on which it depends, or by the act of the lessor, the tenant has a reasonable time after the termination of the tenancy for the exercise of his right.² And so where, during the term, a new lease is made for the express purpose of releasing a retiring partner of the lessee firm, the new lease being silent as to the removal of such fixtures.³

§ 876. **Recoupment.** In actions by either party [172] against the other upon the express or implied covenants in a lease the defendant is generally allowed to set up by way of recoupment any cross-claim he may have against the plaintiff arising upon the same contract.⁴ In an action to recover [173]

draws v. Day Button Co., 132 N. Y. 348, 353, 30 N. E. Rep. 831; *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. Rep. 342; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93; *Leigh v. Taylor*, [1902] App. Cas. 157 (tapestries affixed to the walls of a house for the purpose of ornament); *Baker v. McClurg*, 198 Ill. 28, 64 N. E. Rep. 701, 96 Ill. App. 165.

¹ *Wiggins Ferry Co. v. Ohio & M. R. Co.*, *supra*.

² *Updegraff v. Lesem*, *supra*; *Ewell on Fixtures*, 141, 147; *Mickle v. Douglas*, 75 Iowa, 78, 39 N. W. Rep. 198.

³ *Baker v. McClurg*, *supra*.

⁴ *Haven v. Wakefield*, 39 Ill. 509; *Nichols v. Dusenbury*, 2 N. Y. 283; *Mayor v. Mabie*, 13 N. Y. 151, 64

Am. Dec. 538; *Dorwin v. Potter*, 5 Denio, 306; *Thomas v. Wiggers*, 41 Ill. 470; *Shallies v. Wilcox*, 4 Thomp. & C. 591; *Cook v. Soule*, 56 N. Y. 420, 45 How. Pr. 340; *Wade v. Halligan*, 16 Ill. 507; *Halligan v. Wade*, 21 Ill. 479, 74 Am. Dec. 108; *Commonwealth v. Todd*, 9 Bush, 708; *Lindley v. Miller*, 67 Ill. 244; *Fairman v. Fluck*, 5 Watts, 516; *Blair v. Claxton*, 18 N. Y. 529; *Myers v. Burns*, 35 N. Y. 269; *Guthman v. Castleberry*, 49 Ga. 272; *Westlake v. De Graw*, 25 Wend. 669; *Wright v. Lattin*, 38 Ill. 293; *Murray v. Pennington*, 3 Gratt. 91; *Benkard v. Babcock*, 2 Robert. 175; *Lynch v. Baldwin*, 69 Ill. 210; *Brittain v. Griggs*, 88 Ga. 232, 14 S. E. Rep. 609; *Ludlow v. McCarthy*, 5

rent the lessee has a right to set up as a counter-claim damages arising from breach of an agreement in the lease on the part of the lessor to keep the premises in repair.¹ Where the lease is for a year the fact that the lessee has paid the rent except for the last quarter does not deprive him of the right to counter-claim his damages for the entire term.² So if there has been a breach of the covenant for quiet enjoyment, the damages therefor may be recouped or counter-claimed in an action by the landlord for rent.³ If a lease of rooms provides that the

App. Div. 517, 38 N. Y. Supp. 1075; Judd v. Fellows, 9 App. Div. 203, 41 N. Y. Supp. 274; Douglas v. Chesebrough Building Co., 56 App. Div. 403, 67 N. Y. Supp. 755; Gregory v. Tomlinson, 68 Vt. 410, 35 Atl. Rep. 350; McDougald v. Hulet, 132 Cal. 154, 64 Pac. Rep. 278.

¹ Myers v. Burns, 35 N. Y. 269; Lunn v. Gage, 37 Ill. 19; Coleman v. Bunce, 37 Tex. 171; Crane v. Hardman, 4 E. D. Smith, 339; Guthman v. Castleberry, 49 Ga. 272; Morgan v. Smith, 5 Hun, 220; Vandegrift v. Abbott, 75 Ala. 487; Stewart v. Lanier House Co., 75 Ga. 582; Rowe v. Baber, 93 Ala. 422, 8 So. Rep. 865; Pioneer Press Co. v. Hutchinson, 63 Minn. 481, 65 N. W. Rep. 938; Pearson v. Germond, 83 Hun, 88, 31 N. Y. Supp. 358 (but not in summary proceedings to recover possession); O'Gorman v. Harby, 18 N. Y. Misc. 228, 41 N. Y. Supp. 521; Collins v. Morrison, 91 Wis. 324, 64 N. W. Rep. 1000 (in replevin by lessor to obtain lessee's furniture under a clause in the lease); Union Water Power Co. v. Pingree, 91 Me. 440, 40 Atl. Rep. 333.

² Cook v. Soule, 56 N. Y. 420; McAlester v. Landers, 70 Cal. 79, 11 Pac. Rep. 505; Hoyt v. Dengler, 54 Kan. 309, 38 Pac. Rep. 260; Pryor v. Foster, 130 N. Y. 171, 29 N. E. Rep. 123.

³ Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Eldred v. Leahy, 31 Wis. 546; Mayor v. Mabie, 13 N. Y.

151, 64 Am. Dec. 538; Chatterton v. Fox, 5 Duer, 64.

In *Mason v. Moyers*, 2 Rob. (Va.) 606, pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the latter leased it for three years from the 1st of April, unless there should in the meantime be a decree of sale, in which case the tenant was to give possession on the 1st of April after the decree. A rent was reserved of \$300, to be paid at the end of each year of the tenancy; and according to the true construction of the lease the tenant had a right to the crops growing on the land at the end of every year for which rent should be received. In June of the third year the land was sold under a decree in the creditor's suit, and the tenant applied to the purchasers for permission to proceed with the cultivation of the land; but one of them in the presence of the other (who was one of the lessors) refused, declaring that if the tenant should sow the land the purchasers would reap the crop; and in consequence of this refusal the tenant proceeded no farther with his preparations for a fall crop, though he remained in possession the third year. A few days after the expiration of that year the purchasers sued out an attachment against the tenant for \$300 rent to become due the 1st of April, upon the levy of which the tenant gave the sheriff bond and se-

lessee shall be boarded by the lessor and the price of rent and board is fixed at a gross sum, the cost to the lessor of boarding the lessee may be deducted from the contract price, the lessee having died before action was brought.¹ In an action for rent by an underlessor, who was a tenant at will, his lessee may [174] recoup as for breach of covenant for rent paid to the plaintiff's lessor to save himself from eviction.² But in other cases an interference by the owner or chief landlord with the possession of a subtenant is not an eviction for which the intermediate landlord is responsible, and does not, as between him and the subtenant, suspend the rent.³

If there was fraud or misrepresentation by the landlord in making the lease, by which the lessee suffered damage, he may recoup therefor in an action for rent;⁴ but a mere trespass or tort of any character not amounting to an eviction, in whole or in part, cannot be set up in defense to an action for rent.⁵ We

curity for the rent. Judgment having been obtained on this bond, it was enjoined as to \$200, upon a bill filed by the tenant praying an abatement of the rent according to equity. It was held by a majority of the court: 1, that under the circumstances the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of \$300; 2, that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3, the evidence justifying the allowance of \$200 as a fair abatement, the injunction should be made perpetual.

¹ *Oliver v. Moore*, 53 Hun, 472, 6 N. Y. Supp. 413.

² *Holbrook v. Young*, 108 Mass. 83.

³ *Luckey v. Frantzke*, 1 E. D. Smith, 47; *Lansing v. Van Alstyne*, 2 Wend. 563. See *Ogilvie v. Hull*, 5 Hill, 52.

⁴ *Allaire v. Whitney*, 1 Hill, 484; *Cage v. Phillips*, 38 Ala. 382; *Avery v. Brown*, 31 Conn. 398; *Staples v.*

Anderson, 3 Robert. 327; *Moberly v. Alexander*, 19 Iowa, 162; *Wallace v. Lent*, 1 Daly, 481; *Haines v. Downey*, 86 Ill. App. 373; *Hoyt v. Dengler*, 54 Kan. 309, 38 Pac. Rep. 260; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. Rep. 123; *Dennison v. Grove*, 52 N. J. L. 144, 19 Atl. Rep. 186; *Barr v. Kimball*, 43 Neb. 766, 771, 62 N. W. Rep. 196, quoting the text. See *Meeks v. Bowerman*, 1 Daly, 99; *Minor v. Sharon*, 112 Mass. 477.

Under the plea of counter-claim it is not competent to defeat a lease by reason of fraud in its inception. *Kiernan v. Terry*, 26 Ore. 494, 502, 38 Pac. Rep. 671.

⁵ *Walker v. Shoemaker*, 4 Hun, 579; *Drake v. Cockroft*, 4 E. D. Smith, 34; *McKenzie v. Farrell*, 4 Bosw. 202; *Campbell v. Shields*, 11 How. Pr. 565; *Vatel v. Herner*, 1 Hilt. 149; *Bogardus v. Parker*, 7 How. Pr. 305; *Gleason v. Moen*, 2 Duer, 639; *Edgerton v. Page*, 10 Abb. Pr. 119, 20 N. Y. 281; *Bartlett v. Farrington*, 120 Mass. 284; *Huline v. Brown*, 3 Heisk. 679; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. Rep. 14; *Cram v.*

think these cases do not recognize the principle of recoupment as fully in actions for rent as in other actions. They go upon the rule that unless there is such a disturbance of the tenant's possession as amounts to an eviction, and therefore to a full defense, the disturbance, although it may greatly impair the tenant's beneficial enjoyment, is no defense at all — is wholly [175] excluded. The reasons which sustain the defense of eviction as a bar will equally entitle the tenant to an abatement of the rent or recoupment where the landlord, by unjustifiable acts, lessens the value of the demised premises to his tenant, though the interference does not amount to eviction; and whether such acts are confined to a brief period of time or are continuous, and whether they are acts for which an action of tort would lie or not. By the lease the tenant is vested with an estate which entitles him to sue his landlord as well as any stranger interfering with his rightful enjoyment or evicting him. But in case of eviction the tenant is not confined to his remedy by ejectment or other action of tort; he may set it up as a bar to an action by the landlord for rent; it is held to be a violation of the implied covenant for quiet enjoyment. The implied obligation of the lessor, however, is not simply that he will not evict his tenant, and that no other person shall do so under a superior title, but equally that he will do no act to prevent or impair the enjoyment of what he has [177] granted by his lease.¹ This defense is available not only

Dresser, 2 Sandf. 120. See Benkard v. Babcock, 2 Robert. 175; McFadin v. Rippey, 18 Mo. 738.

¹Dexter v. Manley, 4 Cush. 14; Leadbeater v. Roth, 25 Ill. 586; Commonwealth v. Todd, 9 Bush, 708; Eldred v. Leahy, 31 Wis. 546; Sigmund v. Howard Bank, 29 Md. 324; Mack v. Patchin, 29 How. Pr. 20; Hanley v. Banks, 6 Okl. 79, 51 Pac. Rep. 664. See Morgan v. Smith, 5 Hun, 220.

The tenant may recoup damage done his crops by the landlord's animals. Johnson v. Aldridge, 93 Ala. 77, 9 So. Rep. 513.

In Texas both actual and exemplary damages arising from the illegal issuance and levy of a distress war-

rant may be pleaded in reconvention in an action to recover rent under a written lease. Texas & Pacific Coal Co. v. Lawson, 10 Tex. Civ. App. 491, 31 S. W. Rep. 843.

In Mayor v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538, a lease was made of the franchise or privilege of collecting wharfage, and an action was brought for the stipulated rent. The lease conveyed the right to collect such wharfage upon all vessels of over five tons. The answer set up as a defense that the agents of the plaintiff disturbed the defendant in the enjoyment of the right conveyed; that they entered upon the premises and assumed the entire control of

in actions for rent, but also in replevin or proceedings for the recovery of property distrained.¹ In Wisconsin a tenant may counter-claim in an action by the landlord for waste for the value of personalty placed on the premises during the ten-

all vessels coming to the slip and pier, etc., and gave preferences, for compensation paid to plaintiff, by which the defendant suffered great losses. The defendant continued to act under the lease and to collect wharfage during his term. Proof of the matters stated in the answer being excluded, the plaintiff appealed. Denio, J., said: "It is not denied but that the acts imputed to the plaintiffs in the answer would, if established, be an infringement of the rights of Mabie, under the grant from the corporation." The court held that there was an implied covenant for quiet enjoyment, and that the acts complained of in the answer were a violation of that covenant; that it was available by way of recoupment. "The main object," said the court, "of a covenant for quiet enjoyment is to protect the lessee from the lawful claims of third persons having a title paramount to the lessor; but such a covenant, when fully written [176] out, provides also for the protection of the lessee against the unlawful entry of the lessor himself. 2 Platt on Cov. 312. . . . It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made

under an assumption of title." 2 Platt on Cov. 319, 320.

In *Tinsley v. Tinsley*, 15 B. Mon. 458, Marshall, C. J., said: "This action is brought by Samuel Tinsley against Nancy Tinsley and John A. McClure, her surety, to recover damages upon an injunction bond, in the penalty of \$300, executed by them for procuring an injunction against the execution of a judgment for restitution, rendered by the Shelby circuit court in favor of Samuel Tinsley against Nancy Tinsley upon a warrant for forcible entry and detainer. The petition alleges the dismissal of the bill and dissolution of the injunction, and claims damages for the costs incurred in defending the injunction suit, and for being kept out of the possession of the land from April, 1850, to September, 1851, alleging the rent for that period to have been worth \$600. The defendants in their answers, besides certain denials, . . . set up a defense and counter-claim on behalf of the defendant Tinsley, first, on the ground that during the pendency of the injunction the plaintiff had, by his threats, prevented her from renting the land to solvent men for \$150, and thus making the rent for which he sues; and second, upon the ground that since the injunction was obtained the plaintiff had taken and disposed of the crop of corn growing thereon, and raised by said defendant while the injunction was pending, of the value of at least \$250.

¹ *Nichols v. Dusenbury*, 2 N. Y. 283; *Wade v. Halligan*, 16 Ill. 507; *Hatfield v. Fullerton*, 24 id. 278; *Lindley v. Miller*, 67 id. 244; *Fairman v.*

Fluck, 5 Watts, 516; *Westlake v. De Graw*, 25 Wend. 669; *Collins v. Morrison*, 91 Wis. 324, 64 N. W. Rep. 1090. See *Anderson v. Reynolds*, 14 S. & R. 439.

ancy, and which the landlord converted by preventing its removal.¹ But a conversion which takes place after the expiration of the lease and after the eviction does not arise out of a violation of the covenant for quiet enjoyment, and consequently did not arise out of the contract or transaction which is the basis of the suit; neither is it, in a legal sense, connected with the transaction.² Where the tenant was liable for rent

. . . Section 152 of the code authorizes a counter-claim in behalf of one of several defendants to be set up in answer to the action, and the only restriction which it makes as to the nature of such counter-claim is that it shall be a cause of action arising out of the contract or transaction set forth in the petition (as the foundation of the plaintiff's demand), or that it be connected with the subject of the action. It is not required that the counter-claim itself shall be founded in contract, or arise out of the contract set forth in the petition, but it is sufficient that it arises out of the transactions set forth in the petition, or be connected with the subject of the action. As the petition states the occupation of the land by Mrs. Tinsley during the pendency of the injunction, and claims damages therefor, any interference by the plaintiff which rendered such occupation less profitable or less valuable to the occupant constituted a cause of action arising out of the transaction set forth in the petition, and is connected with the plaintiff's cause of action; and although it amount to a trespass or other tort, it may constitute the ground of a counter-claim. If the crop growing on the land when the plaintiff was restored to the possession was his, to do with as he pleased, his taking and disposing of it would not constitute a cause of action or a counter-claim, but would surely be a good defense, partial or general, to the demand for

the rent of that year, or should go in reduction of damages claimed for the withholding of the possession for that year. But as the injunction gave the protection of the law to the occupant during its pendency, and as the bond secured the other party in the rent during such occupancy, such occupant, when his original entry is lawful, and under a lease or permission of uncertain duration, may be regarded as in effect a tenant or *quasi*-tenant, under rent during the pendency of the injunction; and although the defendant may rightfully take the possession on the dissolution of the injunction, it does not follow that he is absolutely entitled to the crop then growing on the land. But as the duration of the occupancy as dependent on the injunction is uncertain, it would seem to be just and reasonable that although, by improvidence or inadvertence, the decree directing immediate restitution, the possession of the land may be rightfully taken, the party turned out before the crop is gathered has the right to the emblements. In this view, which we think is correct, a cause of action arose upon the taking and disposing of the crop by the plaintiff when he obtained possession. This was, therefore, a good counter-claim under the code."

¹ Gilbert v. Loberg, 86 Wis. 661, 57 N. W. Rep. 982.

² Ludlow v. McCarthy, 5 App. Div. 517, 38 N. Y. Supp. 1075.

and the landlord had breached his covenant to renew and permanently repair the premises, the claim of one party was presumed to be just equal to the claim of the other, or as nearly so as can be reasonably computed. The rule of damages, it was said, would be the same as if there had been an eviction.¹

¹ Union Water Power Co. v. Pingree, 91 Me. 440, 448, 40 Atl. Rep. 333. See § 864 as to the rule of damages.

CHAPTER XXI.

CARRIERS.

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SECTION 1.

ACTIONS BY CARRIERS.

§ 877. Breach of contract to furnish goods for shipment. .

Contracts of affreightment are sometimes made for the [178] transportation of property generally, without reference to any

particular route or mode of conveyance; such a contract is one for particular work. Other contracts are more specific, and consist of an undertaking on the part of the freighter to furnish cargo for a particular vessel for a voyage or a stated period of time; such are contracts to employ the vessel, and are like a contract of service. On breach of the former by the party agreeing to provide goods for carriage the measure of damages is the same as upon other contracts for particular works: the contract price less the expense and cost of earning it, or the profits of the contract, shown with the requisite certainty, lost by reason of the defendant's non-performance of its requirements.¹

¹ Bangor Furnace Co. v. Magill, 108 Ill. 656; Stone v. Woodruff, 28 Hun, 534; Wolf v. Studebaker, 65 Pa. 459.

In Utter v. Chapman, 38 Cal. 659, the contract appears to have been a general one, but the court say: "The case is argued upon the theory that the grain was to be transported by the plaintiff's steamer," and it was decided upon that theory. See S. C., 43 Cal. 279.

A very interesting case was decided in Maine in 1877. Its leading facts are thus stated in the opinion by Barrows, J.: "The plaintiff, having been engaged since 1868 in running a stage between Dexter and Greenville, carrying railroad passengers on through tickets as well as local passengers, and having a contract for carrying the mail which was to expire July 1, 1873, and being agent of the Eastern Express Co., from which business and the transportation of freight he realized considerable sums annually, and being the owner of stage property on the line to a considerable amount, and having purchased in the fall of 1871 a steamboat to run on the lake between Greenville and Mt. Kineo, on the 18th of June, 1872, made a written contract with the defendants whereby he agreed to 'run a first-class stage line from Dexter to

Greenville by the most direct line, for the conveyance of travel coming from or going to' the defendants' railroad, according to a certain timetable, the details of which were inserted in the contract and made subject to changes in the time-table of the railroad company; in consideration of which the defendants agreed to give him 'the exclusive right of ticketing between Dexter and Greenville for the term of five years from the 1st day of July, 1872,' at a fixed rate. The time-table provided that he should leave Dexter at a certain hour, arrive at Greenville at a certain time, and leave Greenville for Kineo and arrive at Kineo at the times mentioned in the schedule. Round-trip tickets were issued by the defendants from Boston and points east of Boston to Kineo and return by Frye's stages from Dexter and by steamboat. The plaintiff was to receive \$2.50 per passenger each way for passengers carried on through tickets. Dissatisfaction arose between the parties. Defendants claimed that there was a failure to perform on the part of the plaintiff (which was negatived by the verdict), and notified him May 5, 1873, that for that reason they had contracted with other parties to do the work from July 1, *prox.*, and that he

§ 878. Measure of damages on charter-parties. Where, [179] however, the action is against the charterer of a ship for not loading it or any particular vehicle the measure of dam- [180] ages is the amount of freight which would have been earned

must discontinue operations under the contract at that time. His contract for carrying the mail expired at the same date. Another party secured it for the next four years; and he lost the express business because by the rule of the express company that was always given to those who had the mail contract, to whom also the defendants, under the contract bearing a general similarity to the one previously made with the plaintiff, gave the exclusive right of ticketing between Dexter and Greenville. . . . The defendants claimed that the measure of damages was the difference between what plaintiff was to receive, which was \$2.50 each for carrying the through passengers, and what it would actually or probably cost to carry each passenger, and this without reference to any other contracts or any other business. The judge ruled *pro forma* that the contract did cover the distance between Greenville and Kineo, and instructed the jury to find specially what amount of damage, if any, the plaintiff had sustained between Greenville and Kineo, if the defendants had wrongfully and without sufficient cause terminated the contract, and include it with the other damages in their general verdict." The trial court instructed the jury as to the second position: "What was the plaintiff to do? Of what was the plaintiff deprived? The plaintiff is deprived of the exclusive right of ticketing between Dexter and Greenville for the term of four years from July 1, 1873. The plaintiff had the exclusive right to transport passengers from Dexter to Greenville at a

specified rate of compensation. Now the loss the plaintiff has sustained is the profits upon the carriage of passengers between the points indicated." Referring to the situation of the plaintiff in regard to his preparation and equipment for the transaction of this business, the jury were instructed that "the plaintiff had obviously the right and the expectation of passengers from other sources, such as way-passengers, express profits, etc. Now, bearing this in mind, what are the elements of damage? The number of passengers; the price of carriage; the cost of carriage; if profits, the gains which would have been made are the losses which have been sustained. If Frye was so situated that he, in connection with other business, at little relative cost could carry passengers cheaply,—more cheaply than anybody else,—it is his good fortune, of which he is entitled to reap the benefits. The measure of damages, then, is the loss of profits which would have been made by carrying the passengers under the contract, as stipulated in the contract." . . . The jury were informed that "while the bargain itself might not be valuable to him, yet it might be of value to him in connection with his other business, situated as he was;" that upon the evidence produced, "loss upon the coaches and horses, if sold, would not be an element of damage;" nor would the loss of the plaintiff in attempting to carry on the contract after notice from the defendants that they had terminated it; nor the loss of the way-travel by means of the competing line to which the de-

if the charter-party or other agreement to furnish loading had been performed, deducting the expenses of earning it, and also [181] any profit which the ship or vehicle earned during the period over which the charter extends.¹ A charge to the jury in such a case, which was affirmed, limited the deduction for the freight earned by the ship to the time "between the expiration of the lay-days and the time when the employment of the ship under the charter would have ended."² In a similar case in New York the approved instruction was that "the de-

fendants transferred their contract. "The only loss is his being deprived of the carriage of passengers from Dexter to Greenville and back. That is all the company agreed to give him; it is all he has lost. . . . The measure of damages is just what he has lost by not being permitted to perform the contract which he made; that is, what the gains would have been after deducting the expenses. Whatever the cost was, that should be deducted from the receipts, whatever they were, and the balance is the gain; and the gain only is that to which he is entitled. He is likewise entitled to interest, not as interest, but by way of damages, from the date of the writ." In reviewing exceptions to the instructions, Barrows, J., said: "We think the defendants have no just cause to complain of the substantial overruling of the second position which they took. If by reason of its connection with other business in which he was engaged, the plaintiff could transport passengers to and from the defendants' cars without largely increasing his outlay, the legitimate profits of the contract to him were proportionately increased, and the wrongful termination of it by the defendants, which the jury have found, necessarily occasioned to him a greater loss; and the matters to which reference was made by the presiding judge were so obvious in their nature that it cannot but be

supposed that both parties entered into the contract with an eye to them as existing facts. The contract did not contemplate the exclusive devotion of the plaintiff's time and property to the transportation of the defendants' passengers, nor would there be any propriety in measuring the plaintiff's profits in the performance of the contract, and his consequent loss in being deprived of it, by the standard that the defendants claimed to set up. The nature of the contract was such that its terms would inevitably be affected by the other contracts and business to be carried on in connection with it; and the claim that damages for its breach should be estimated 'without reference to any other contracts or any other business' cannot be sustained." *Frye v. Maine Central R. Co.*, 67 Me. 414. See *Richmond v. Dubuque, etc. R. Co.*, 40 Iowa, 264.

¹ *Stone v. Woodruff*, 28 Hun, 534; *Watts v. Camors*, 10 Fed. Rep. 145, affirmed, 115 U. S. 353, 6 Sup. Ct. Rep. 91; *Jordan v. Eaton*, 2 Hask. 236; *The Gazelle and Cargo*, 128 U. S. 471, 487, 9 Sup. Ct. Rep. 139; *Smith v. McGuire*, 3 H. & N. 554; *Leblond v. McNear*, 104 Fed. Rep. 826, citing the text; *McNear v. Leblond*, 123 id. 384, — C. C. A. —; *Dalbeattie Steamship Co. v. Card*, 59 Fed. Rep. 159.

² *Smith v. McGuire*, 3 H. & N. 554, recognized in *Aitken v. Ernsthausen*, [1894] 1 Q. B. 773, as declaring the correct rule.

fendant should be charged with the full amount of the freight which he had agreed to pay under the charter, and for the purpose of determining it the jury must find how much cargo the vessel could safely have carried. The defendant should then be credited with the amount of the schooner's earnings during the time that an average passage . . . with the lay-days would have occupied."¹ If necessary preparations have been made to receive the cargo the charterer agreed to furnish, the expense thereof may be recovered;² as may the sum necessarily paid for trimming a cargo after loading, its improper condition being due to the fact that the loading was done at an improper place, contrary to the terms of the charter.³

Where the ship is described in the charter-party to be of a certain tonnage the description is not a warranty, and an agreement to furnish a cargo will be construed to require the freighter to put on board the quantity of goods the ship was capable of carrying with safety.⁴ The stipulation is not that the owner should receive and the freighter put on board a cargo equivalent to the tonnage described in the charter-party, but that the one should receive a full and complete cargo, not exceeding what the ship was capable of receiving with safety, and that the other should put such a cargo on board.⁵ Abbott, C. J., said: "It is, indeed, quite impossible that the burden of a ship—as described in the charter-party—should, in [182] every case, be the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons of a given species of goods, that were of a great specific gravity, than she would of another of less specific gravity, and the freighter would therefore pay freight in proportion to the specific gravity of the goods."⁶

¹ *Ashburner v. Balchen*, 7 N. Y. 262; *Dean v. Ritter*, 18 Mo. 182; *Bradley v. Denton*, 3 Wis. 557; *Heilbronner v. Hancock*, 33 Tex. 714; *Loud v. Campbell*, 26 Mich. 239.

² *Watts v. Camors*, 10 Fed. Rep. 145, affirmed, 115 U. S. 353, 9 Sup. Ct. Rep. 139; *Bulkley v. United States*, 19 Wall. 37.

³ *Carbon Slate Co. v. Ennis*, 114 Fed. Rep. 260, 52 C. C. A. 146.

⁴ *Hunter v. Fry*, 2 B. & Ald. 421; *Ashburner v. Balchen*, 7 N. Y. 262; *Watts v. Camors*, 115 U. S. 353, 9 Sup. Ct. Rep. 139.

⁵ *Hunter v. Fry*, *supra*.

⁶ *Id.*

§ 879. **Recovery for partial breach.** The same rule applies as to the measure of damages where there is only a partial breach of the contract to furnish cargo. The controlling principle, whether the breach is total or partial, is full indemnity for all the carrier has lost through the shipper's default.¹ The mode of ascertaining the amount of damages for the breach of an executory agreement must, of course, vary in different classes of cases. If it were a contract to employ the plaintiff to build a house and pay him an agreed price for the entire work and the defendant prevented performance the proper rule is the difference between the sum agreed to be paid and the sum it would have cost to perform. That rule does not meet the cases of contracts for freight as they are generally made. It does not meet the case of a vessel engaged in carrying merchandise generally for all who may apply, and making up her cargo from various owners of goods. Such a ship must usually sail on or about a given day to fulfill her other contracts, thus having no time or opportunity to fill up a deficient cargo, and also necessarily incurring all the expenses that would have been incident to the voyage had the shipper fulfilled his particular contract to furnish a certain amount of goods. On the other hand, if the shipper's contract were to fill the entire ship with his goods at a certain freight, upon his refusal or neglect to fulfill it the carrier might abandon the whole voyage, and engage in some new adventure equally or more profitable, and thus all future expenses incident to the first voyage be saved. Here it is quite obvious the damages would be much less than in the case of a voyage that must be performed notwithstanding the failure of a single individual customer to ship goods according to his contract. So, too, if under no obligation to other shippers to sail at a given day, or if that day is remote and the demand for transportation of goods such as to afford full opportunity to fill up the ship before that day, these circumstances would materially affect

¹ *Bailey v. Damon*, 3 Gray, 92; and six tons were supplied, an allowance of five tons only was made on account of the indefiniteness of the language. *Parker v. Tiers*, 29 Fed. Rep. 800.

Where the contract was to furnish a cargo of "about one hundred and fifty tons," and only one hundred

the amount required to be paid by the shipper to the carrier to indemnify him for the non-performance of the contract. It seems, therefore, proper that all the attendant circumstances be brought before the jury in each particular case to enable them to estimate the proper sum to be awarded as damages for the breach of a contract of this nature. The carrier is to receive full indemnity. He is to be made as good, in a pecuniary point of view, as if the shipper had furnished the goods according to his contract, if the carrier has not been guilty of laches as to substituting other freight, or adopting other available arrangements to mitigate the loss, or to avoid the expenditure incident to the proposed voyage.

§ 880. **Carrier must mitigate his loss.** If, by proper and reasonable efforts, the carrier can substitute other goods in lieu of those the charterer was to furnish, he is bound to do so, and to the extent of the freight thus received this should go in reduction of the damages. Nor is the reduction necessarily confined to his receipts from goods actually substituted. The carrier may have been remiss in his attempts to fill up his ship, or have neglected to avail himself of opportunities presented by other offers of goods, and if guilty of negligence in these respects this may be a ground for a deduction from the entire sum stipulated to be paid by a shipper for freight of certain articles which are not furnished to the carrier. It may be also that the carrier was under no obligation to others to prosecute the proposed voyage, and might have abandoned it for another and more profitable employment of his ship; and in that case he ought not to pursue such voyage for the mere purpose of charging the defaulting shipper with the gross sum he stipulated to pay for transporting his goods to a distant port.¹ Upon a contract to furnish three cargoes at a foreign port, if the master pursues his voyage, but the freighter has no freight there, the master is not bound to go to another port in search of freight, but is bound to seek freight at the port designated and obtain it if possible, and if after such endeavor he is compelled to return empty the rule of damages is the

¹Bailey v. Damon, 3 Gray, 92; Harries v. Edmonds, 1 C. & K. 686; Bradley v. Denton, 3 Wis. 557; Utter Murrell v. Whiting, 32 Ala. 54. See v. Chapman, 38 Cal. 659, 43 id. 279; Gilchrist v. Lumbermen's Min. Co., 65 Heckscher v. McCrea, 24 Wend. 304; Fed. Rep. 1005, 13 C. C. A. 272.

contract price.¹ So when a party contracts to load a ship to a given number of tons, at a stipulated price per ton, and falls short in shipping the whole number, the owner or master is entitled to recover in the nature of damages freight for deficiency; but where in such case goods are offered by a third person to be shipped to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master is bound to receive such goods and place to the credit of the original charterer the net earnings in respect to such substituted cargo, after making all reasonable deductions resulting from the circumstances of the [185] case.² The carrier is not bound to anticipate a failure

¹ *Bradley v. Denton, supra*; *Duffie v. Hayes*, 15 Johns. 327; *Stone v. Woodruff*, 28 Hun, 534.

² *Greenwell v. Ross*, 34 Fed. Rep. 656; *Heckscher v. McCrea, supra*.

In *Utter v. Chapman*, 43 Cal. 279, the freighter made a total breach of the contract on his part, and the carrier earned during the time a performance of the contract would have occupied \$341.24, but in earning this, and in a reasonable effort to earn other sums, which efforts the court had decided it was the carrier's duty to make, he incurred an expense of \$777. This net loss of \$435.16 he claimed as part of his damages to be added to the net profit he would have made by performing the contract. The court said: "The correct interpretation of our decision on the former appeal is that the plaintiffs are entitled to recover only the actual loss which they suffered from the breach of the contract; and if it appeared that during the space of time which would have been requisite for the performance of the contract by them they had, or by the use of reasonable diligence might have, realized a profit from the use of the boat or barge equal to or exceeding the profit which they would have made by performing the contract, in that event they would have suffered no loss, and would have been entitled to nominal damages only. The burden of proof was on the defendant to show that the boat and barge had or might have realized a profit. And if the net earnings did not equal or exceed the profit which the plaintiff would have made by performing the contract, then such net earnings would reduce, *pro tanto*, the amount of the plaintiff's loss. But we did not decide nor intend to intimate that the defendant stood in the relation of a guarantor, incurring the hazard of whatever loss the plaintiff might sustain by reason of a fruitless effort to obtain a profitable employment for the boat and barge. It was incumbent on the defendant to show, if he could, that a profit had been or might have been realized by the boat and barge; and, failing in this, the only result would have been that the plaintiffs would have recovered the difference between the contract price and the cost of performing the contract. But if a person should charter a ship for a number of months, or for a long voyage, and should immediately thereafter repudiate the contract and refuse to perform it, no one, I apprehend, would seriously contend that the owner could send the vessel on a long and expensive voyage in a fruitless effort

on the part of the shipper to furnish full cargo, and accept in advance an offer of other goods; but after a breach of his contract it is the duty of the carrier to accept the offer of the goods the shipper had contracted to furnish, though at a reduced freight, to save the latter from damages to that extent.¹

A recent case decided in the English court of appeal covers a question under this head previously untouched by authority. The defendants chartered the plaintiff's ship for the carriage of a full cargo at 1*l.* 17*s.* 6*d.* per ton. The charter-party contained the usual exception of "fire," and stipulated for the signing of bills of lading without prejudice to it or to the owners' lien, provided that the bill of lading freight in the aggregate should fully cover the freight due (5,600*l.*). The defendants shipped one thousand five hundred and nineteen tons under bills of lading making freight payable at 1*l.* 5*s.* per ton. A fire destroyed one thousand tons of the goods put on board, and delayed the sailing of the ship. The defendants refused to load any more goods, and the plaintiffs filled up the ship with goods — some at 1*l.* 5*s.* per ton, and some at a lower rate. The plaintiffs brought an action for breach of the charter-party in not loading a full cargo. The position of the respective parties after the fire was as follows: the plaintiffs could not insist that the defendants should load cargo to take the place of that which was burnt, and the defendants could not insist on so doing. Each party, as to that, had *pro tanto* fulfilled their obligations — the defendants by loading, and the plaintiffs being exempted from carrying such portion of the cargo. The defendants were under no liability to pay freight for the bales burnt, and the plaintiffs had lost that freight. The space therefore occupied by the burnt bales became vacant space in the plaintiffs' ship, and the only obligation then attaching to the

to obtain profitable employment for her during the term of the charter-party without the consent of the charterer, and thereby fasten upon the latter the whole expense of the voyage. In such case the proper measure of damages would be the difference between the contract price and the cost which the owner would have incurred if the contract

had been performed, subject only to such reduction as the charterer would have been entitled to on his proving affirmatively that the ship had, or might by a reasonable effort have, earned a profit during the term of the charter-party."

¹Greenwell v. Ross, 34 Fed. Rep. 656; Harries v. Edmonds, 1 C. & K. 686.

defendants was to fill up the residue of the space in the plaintiffs' ship, and when this was done they would have loaded a full and complete cargo pursuant to the charter. The obligation of the plaintiffs to mitigate the damages was admitted, and the defendants claimed that they were bound to fill up, if they could, with other cargo for the defendants' benefit the space left vacant by the burnt cargo, and that, as other cargo was found to fill up such space, the freight received for it should also be credited against the damages the plaintiffs would otherwise recover from the defendants, and should not go to mitigate the loss the plaintiffs had incurred by losing their freight upon the burnt cargo. This position was pronounced untenable. The provision in the charter-party as to fire having modified the application of the general rule as to the measure of damages — the difference between the charter-party freight and the net freight actually earned — by in effect reducing as between the parties the capacity of the ship by the space previously occupied by the burnt cargo. It was said by A. L. Smith, L. J., whose opinion Lindley, L. J., said was to be taken as being also his: Under the charter-party the obligation of the ship-owner was only, if he reasonably could, to find cargo to take the place of that cargo which the goods owner has made default in shipping, and for which default damages are, and can alone be, sought for in this action. As regards the jute burnt, the defendants have made no default, and for such no damages are or could be asked herein. For that jute the shipowner was under no obligation to try and find other cargo, for, as regards this, there were no damages to be mitigated. With the space left vacant in the ship by reason of the burnt jute the defendants had nothing whatever to do. All they had to do after the fire was to fill up the residue of the ship. If the defendants after the fire had had to fill up again the space left vacant by the burnt jute, and they wrongfully omitted to do so, I agree then the ship-owner should, if he could, have obtained other cargo for that space; but that is not the case. The ship-owners might do with that vacant space what they liked so long as they did not delay the voyage upon which they had contracted to carry the defendants' goods. As to the cargo which the plaintiffs procured to fill up the space which the defendants should have filled up after the fire the

latter were entitled to be credited with the freight which was in fact earned at the rate paid for it, and not at the average rate of all the freight carried. It was also decided that the fire only absolved the defendants from the payment of the freight which would have been payable on the burnt goods according to the bills of lading, and that after the fire the total amount of freight for which they were liable was 5,600*l.*, less 1*l.* 5*s.* per ton on the one thousand tons burnt, not 5,600*l.*, less the charter freight of 1*l.* 17*s.* 6*d.* per ton, on such one thousand tons.¹

§ 881. **Shipper's rights in profits made by carrier.** It was covenanted in a charter-party providing for an outward and return cargo at a given freight per ton on a voyage from London to St. Petersburg that if political or other cir- [186] cumstances should prevent the shipping of a return cargo or discharging the outward cargo after waiting a specified time, the master should be at liberty to return, and the freighters should at once pay him 2,500*l.* The freighters procured a policy of insurance by which the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at St. Petersburg on the chartered voyage. The contingency of not being permitted to unload, and consequently of reloading, happened; thereupon, the master, judging for the best, instead of returning immediately to London, proceeded to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo and earned freight thereon. In an action by the freighters on the policy of insurance it was held that, as they would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the return cargo from Stockholm, though such intermediate voyage was not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy, every contract of insurance being in its nature a contract of indemnity.² In a subsequent case, under a similar charter, the master returned direct, bringing back the outward cargo, but took in other goods as freight, and the court held

¹ *Aitken v. Ernsthäusen*, [1894] 1 Q. B. 773. ² *Puller v. Stainforth*, 11 East, 232.

that he was entitled to receive the gross sum stipulated and also to retain the freight earned. Lord Mansfield said: "Since the homeward cargo could not be obtained, the defendants were, I suppose, to have their load brought back, though it is not so expressed; and it may be conjectured that the reason why the deed is so inaccurately drawn was that the parties inferred that if the load should not be unloaded it would come back to London on the same terms on which the ship would return empty in case there was no return cargo; but that is inconsistent with the other clause which makes the dead freight payable on the ship's arrival at any port in England; for certainly the charter-party imposes on the plaintiff no obligations to bring back the load to London. This makes a very extraordinary case; and none of the cases mentioned by Mr. Abbott, or elsewhere, apply to afford a rule for the present case. Because, even supposing that the captain is bound by his covenant to bring back the load for the 2,700*l.*, it is nothing more than a contract to bring back a certain quantity of goods, not according to a rate of freight proportioned to any certain bulk or weight, but merely as a wagoner might agree for a gross sum to carry goods in his own wagon from London to Exeter, or elsewhere. Now considering this as a mere contract to bring certain goods to England, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit. In common cases of charter-parties there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the freight port, and if he does not, the plaintiff has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you I will pay you so much; would not the owner in that case have a right to take goods on board for his own account. His ship is at full liberty for him to make any other profit of, and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; and in such a case I see no reason why the person who had stipulated to pay such liquidated damages should be discharged from any part thereof on account of the profit which the plaintiff might make by the cargo supplied by any other person. I was at

first much staggered by the case in the court of king's bench, which is very similar;¹ but there the captain did not bring home the load, but instead thereof went to Stockholm, and there sold the load and got other goods and brought them home. . . . This strong difference subsists between the two cases: there the load was the property of . . . (the freighter), but the load was not brought back; it was sold at Stockholm; and for aught that appears the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the load there; and on that account, perhaps, the court of king's bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole 2,500*l*. But in this case, on the best consideration, we think that the defendants are not entitled to deduct from the 2,700*l*. the profit which the captain made."²

§ 882. **Burden of proof.** The burden of proof as to the carrier having obtained or having it in his power to obtain other cargo or employment for his ship or other vehicle is on the defaulting freighter.³

§ 883. **Damages for breach of charter to load with enumerated articles.** In an action for not supplying a cargo under a charter-party, according to the terms of which different articles of freight are to be paid for at various rates by weight, and the freighter is at liberty to supply what articles he pleases, the average value of freight, calculated upon the various rates of freight in the proportions of the articles usually carried on such a voyage, is the proper measure of damage.⁴ If the freighter under a charter-party loads the vessel with commodities wholly or in great part different from those enumerated in the charter-party, he will be liable to damages as though he had performed the contract in the way most favorable to himself and least favorable to the ship-owners;⁵ that is, at the lowest amount of freight to which they would

¹ Puller v. Stainforth, *supra*.

Murrell v. Whiting, 32 Ala. 54; Dean

² Bell v. Puller, 2 Taunt. 285. See Stainforth v. Lyall, 7 Bing. 169.

v. Ritter, 18 Mo. 182.

⁴ Thomas v. Clarke, 2 Stark. 450.

³ Utter v. Chapman, 43 Cal. 279;

⁵ Capper v. Forster, 3 Bing. N. C.

938.

have been entitled for a full cargo of enumerated articles taken in the proportions provided by the charter-party.¹

[189] § 884. **Carrier's action for freight charges.** Service may be performed in the transportation of goods on request without any express or tacit agreement fixing the rate of freight. It is then a *quantum meruit* demand,² to be ascertained by usage and the reason of the case.³ Such transactions, however, are rare and comparatively unimportant. Since the adoption of modern improved methods of transportation the business has assumed large proportions and been minutely systematized; fixed and detailed rates of through and local freight are generally scheduled and published. Even in the absence of an actual contract the circumstances afford evidence of an implied agreement for specific freights conformable to the published

¹ *Cockburn v. Alexander*, 6 C. B. 791, per Williams, J. Maule, J., said: "Suppose there were goods, which the charterer might have put on board if he had chosen to do so, and did not,—it may be that he had the option of shipping any one of the enumerated articles; there may have been goods at the port of loading which he might have shipped, but none of the enumerated goods; there may have been goods the loading of which would have been the most profitable to the owner, and the most onerous to the charterer, or the converse may have been the case. Again, suppose there were no goods at all at the place ready for shipment, that would present a totally different state of things; there the non-shipment of a cargo would result from the charterer's inability to ship a cargo. If you could show that there were goods which the charterer might have obtained, then the proper measure of damages would be the non-shipment of that cargo. But, if there were none, it may be that, in ascertaining the damages, an average is to be taken of all possible kinds of goods. It is in that way, I think, that Lord Tenterden arrived at the opinion he

expressed in *Thomas v. Clarke*, viz.: that where there is no cargo at all to be had, the average is to be taken of all possible kinds of cargo; that is, that you are to assume, contrary to the fact, that there are goods of each of the kinds enumerated,—because the obtaining of goods of any one kind, where none are in truth obtained, cannot *a priori* be considered as more probable than the obtaining of any of the others; and taking an average, and assuming that to be the way in which the contract, if performed at all, would probably have been performed, you are to make that the basis of the calculation of freight."

² *Louisville, etc. R. Co. v. Wilson*, 119 Ind. 352, 21 N. E. Rep. 341, 4 L. R. A. 244; *London, etc. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Bastard v. Bastard*, 2 Show. 81; *Simmes v. Marine Ins. Co.*, 2 Cranch C. C. 618; *Hollister v. Nowlen*, 19 Wend. 238; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 35.

³ 3 Kent's Com. 202, 219; *Harris v. Packwood*, 3 Taunt. 264; *Wallace v. Matthews*, 39 Ga. 617; *Holford v. Adams*, 2 Duer, 471.

rates of the carrier. Sometimes questions arise in respect to them when there are discriminations inimical to the public interest or in conflict with statutory regulations. On common-law principles a reasonable compensation may be charged and recovered.¹ The commonness of the duty of a carrier to carry for all, it has been held, does not necessitate a uniform rate of compensation. The tariff of rates, or what is charged to one party, is but matter of evidence to determine whether a particular charge to another is reasonable.² If the general rates are reasonable a deviation from them by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical the charges to all shippers for the same service must be equal.³ This principle is not violated by a special agreement giving reduced rates to customers who stipulate to give the carrier all their business and by a refusal to give those rates to others who will not so stipulate, provided the rates given the latter are not excessive or unreasonable.⁴

If freight has been carried for many years at the schedule price, the shipper not objecting thereto, he cannot recover any money paid, although evidence is given which shows that the price was in excess of a reasonable compensation.⁵ But if compensation in excess of the agreed rate is extorted the excess may be recovered,⁶ and so if the amount collected is greater than is

¹ *Louisville, etc. R. Co. v. Wilson*, 119 Ind. 352, 21 N. E. Rep. 341, 4 L. R. A. 244.

² *Johnson v. Pensacola, etc. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Gaston v. Bristol & E. R. Co.*, 1 B. & S. 112, 154; *Baxendale v. Eastern, etc. R. Co.*, 4 C. B. (N. S.) 63; *Cleveland, etc. R. Co. v. Closser*, 126 Ind. 348, 26 N. E. Rep. 159, 22 Am. St. 593, 18 L. R. A. 729.

³ *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. Rep. 292, 42 Am. St. 712, 5 L. R. A. 674, 68 Hun. 486, 22 N. Y. Supp. 976; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. Corp.*, 115 Mass. 422; *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div.

544, 23 id. 598, 17 App. Cas. 25; *Evershed v. London & N. R. Co.*, 3 Q. B. Div. 135.

⁴ *Lough v. Outerbridge*, *supra*. See *Bayles v. Kansas Pacific R. Co.*, 13 Colo. 181, 22 Pac. Rep. 341, 5 L. R. A. 480; *State ex rel. v. Cincinnati, etc. R. Co.*, 47 Ohio St. 130, 23 N. E. Rep. 928, 7 L. R. A. 319.

⁵ *Killmer v. New York, etc. R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. Rep. 293.

⁶ *Atchison, etc. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. Rep. 451; *Mount Pleasant Manuf. Co. v. Cape Fear, etc. R. Co.*, 106 N. C. 207, 10 S. E. Rep. 1046.

It makes no difference whether the

allowed by law,¹ though the statute fixing the rate has been repealed.² A payment made to secure transportation is not made voluntarily so that the payee cannot recover the portion which the payee had no right to exact. A carrier cannot increase its freight charges by wrongfully sending the property shipped by an indirect way, instead of over its direct lines.³

shipper has paid the increase of freight or has been obliged to lower the price of the commodity he ships and sells to meet the rate made to another shipper; he may recover in either case. *Lake Shore, etc. R. Co. v. Scofield*, 2 Ohio Ct. Ct. 305.

Where, by mistake, a lower than the usual rate was quoted to a shipper and he, relying upon the rate given, made sales for a price based thereon and guaranteed that the rate to the buyer should not exceed that quoted, and the last carrier refused to deliver the goods except upon the payment of a higher rate, which difference the shipper paid to the purchaser, the shipper was entitled to recover it from the carrier. *Missouri Pacific R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, 70 N. W. Rep. 964.

On the shipment of freight over connecting lines no action lies against the last carrier to recover an overcharge as against the contract of the initial carrier unless it is shown that it was authorized to bind the former by its contract, or that the last carrier agreed to refund the excess. *Mount Pleasant Manuf. Co. v. Cape Fear, etc. R. Co.*, *supra*.

Where the agent of a connecting carrier gave, by mistake, a shipper an unusually low rate and the initial carrier, not knowing of such rate, violated its contract by sending the goods over a different road from that specified in the bill of lading, the shipper being compelled to pay a much higher rate of freight, it was held that the initial carrier could not avoid liability for the entire differ-

ence between the rate agreed upon and that which the shipper paid either because the rate contracted for was contrary to the interstate commerce act or because such damages were not in the contemplation of the parties when the contract was made. *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. Rep. 846, 30 C. C. A. 430, reversing 81 Fed. Rep. 277.

¹ *West Virginia Transportation Co. v. Sweetzer*, 25 W. Va. 434; *Peters v. Railroad Co.*, 42 Ohio St. 275; *Heiserman v. Burlington, etc. R. Co.*, 63 Iowa, 732, 18 N. W. Rep. 903; *Osborne v. Chicago, etc. R. Co.*, 48 Fed. Rep. 49; *Chicago, etc. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. Rep. 451, 50 Am. St. 320; *Louisville, etc. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. Rep. 311; *London, etc. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029. But see *Arnold v. Georgia R. & B. Co.*, 50 Ga. 304.

A railroad company which charges greater compensation for a shorter than for a longer haul, contrary to section 4 of the interstate commerce act, is liable for the excess in the rate charged for the former over that of the latter, multiplied by the number of hundred pounds shipped. The company which makes the overcharge is liable for the whole damages. The jury may allow interest on the amount of the overcharge. *Osborne v. Chicago & N. R. Co.*, 48 Fed. Rep. 49.

² *Graham v. Chicago, etc. R. Co.*, 53 Wis. 473, 10 N. W. Rep. 609.

³ *Burlington, etc. R. Co. v. Chicago Lumber Co.*, 25 Neb. 390, 19 N. W. Rep. 451.

The *bona fide* indorsee of a bill of lading is liable for freight only according to its terms; he is not affected by the stipulations in a charter-party of which he has no knowledge or notice.¹ If the freight rate agreed upon is based upon delivery during the pending season of navigation, the amount which may be collected on delivery made during the following season, although the delay was unavoidable, may, it seems, be scaled.² In a later case the court did not find it necessary to hold in accordance with the foregoing proposition because the delay in delivery was the result of the master's bad faith. The recovery was limited to the highest rate paid when delivery was made, instead of the extra rate agreed upon.³

According to the weight of authority, a carrier who receives goods in the usual course of business from a connecting carrier without knowledge that the latter was instructed by the consignor to deliver them to another carrier may recover its reasonable charges for forwarding them to a point on its line.⁴ If a car is hired for a specified class of goods at a price fixed with reference thereto and the shipper loads goods of another class which are chargeable for at a higher rate, he must pay such rate.⁵

§ 885. Freight charges as affected by value of property.

It is settled that when the carrier has not given notice that he would not be answerable beyond a specified sum, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or value of the property offered for shipment.⁶ It is the duty of the carrier to make inquiry if he wishes to have a reward proportionate to the value, or to know whether the goods are of that quality for which he has a sufficiently secure conveyance.⁷ If inquiry is made the shipper must answer truly at his peril; and if it is

¹ The *Querini Stamphalia*, 19 Fed. Rep. 123.

² *Wilcox v. Five Hundred Tons of Coal*, 14 Fed. Rep. 49.

³ *Holland v. Seven Hundred, etc. Tons of Coal*, 36 Fed. Rep. 784.

⁴ *Price v. Denver, etc. R. Co.*, 12 Colo. 402, 21 Pac. Rep. 188; *Patten v. Union Pacific R. Co.*, 29 Fed. Rep. 590; *Whitney v. Beckford*, 105 Mass.

271. *Contra*, *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

⁵ *Smith v. Findley*, 34 Kan. 316, 8 Pac. Rep. 871.

⁶ *Batson v. Donovan*, 4 B. & Ald. 29; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Levois v. Gale*, 17 La. Ann. 302; *Story on Bailm.*, § 567.

⁷ *Id.*

not made and the parcel is received at such price for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is responsible for its loss whatever may be its value.¹ If a carrier has, without inquiry, unwittingly received a package of great value and charged a disproportionately low freight, and on payment of it undertakes to transport it he cannot, on discovering its true value, exact additional payment, where no fraud has been practiced to conceal its real value.² But he may protect himself against unknown responsibility by a stipulation in the bill of lading to the effect that the additional freight shall be paid on the total value of the property shipped, if its real value shall prove to be in excess of that stipulated.³ In such a case a consignee who has notice of the actual value of the property, and pays the freight due, though he is only a factor, is liable for any balance unpaid.⁴ Where a carrier accepted a sealed package containing registered government bonds valued at \$234,000, being informed that the value was \$1,000, which package it carried at the usual price for carrying a package of the latter value, it was not entitled to recover for the carriage on the theory that its liability, in case of loss, would have been \$234,000. The limit of its liability was the cost of restoring bonds of the value of \$1,000. "But even this liability may have been considerably increased by the fact that the aggregate face value of the bonds in the package was so great. There is much greater temptation to steal a package of bonds of such apparently great value than there is to steal a package of such bonds the face value of which does not exceed \$1,000. . . . While none of these facts increased the limits of the plaintiff's liability, they may have increased the risk within that limit, and they might have been taken into consideration in deter-

¹ *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Walker v. Jackson*, 10 M. & W. 168; *Phillips v. Earle*, 8 Pick. 182; *Relf v. Rapp*, 3 W. & S. 21, 37 Am. Dec. 528; *Little v. Boston, etc. R. Co.*, 66 Me. 239; *Hollister v. Nowlen*, 19 Wend. 234.

² *Baldwin v. Liverpool, etc. S. Co.*, 74 N. Y. 125, 20 Am. Rep. 277. See *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

³ *North-German Lloyd v. Heule*, 44 Fed. Rep. 100, 10 L. R. A. 814; *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 618, 13 Sup. Ct. Rep. 444, citing the text; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 340, 5 Sup. Ct. Rep. 151.

⁴ *North-German Lloyd v. Heule*, *supra*.

mining the amount of that risk and the amount of compensation which should have been allowed for the same" if the case had been tried on that theory. Because the carrier offered no evidence to show other than nominal damages, in addition to the amount paid for the carriage, a recovery was denied.¹ If freight is fraudulently misclassified so as to obtain lower rates the consignee is liable for the rate of freight according to the correct classification.²

§ 886. Discrimination unlawful when conditions similar.

The duty to serve alike all who apply for the carriage [190] of goods is founded on the consideration that the calling is a public employment, as the right to accept or reject an offer of business is necessarily incident to all private traffic.³ "Recognizing this as the settled doctrine," says Beasley, C. J., "I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for the identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all; and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. . . . The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B. when the goods of both are tendered for carriage must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rule that the carrier shall receive all the goods tendered loses half its value as a politic regulation if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it

¹ *United States Exp. Co. v. Koerner*, 65 Minn. 540, 68 N. W. Rep. 181, 553, 21 S. W. Rep. 290.
33 L. R. A. 600.

³ *Messenger v. Pennsylvania R. Co.*,

² *Missouri, etc. R. Co. v. Trinity* 36 N. J. L. 407, 410, 13 Am. Rep. 457.

existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge for precisely the same offices to another, I think it should be held that the higher charge is not reasonable."¹ In the case in which this [191] opinion was given it was held that an agreement by a railroad company to carry for certain persons at a cheaper rate than under the same conditions for others is void for creating an illegal preference.² The commonness of the right necessarily implies an equality of right in the sense of freedom from unreasonable discrimination; and statutes which require of carrying corporations equality in terms, facilities and accommodations are held to be declaratory of the common law.³ It has been said by one who has made a protracted review of very many cases that "mere irregularity in charges does not of itself amount to an unjust discrimination. It only becomes such when such a discrimination is made in the rates charged for transportation of goods of the same class, of different shippers, under like circumstances and conditions. So a mere reduction from the established rate is not necessarily an unjust discrimination. But it becomes such when it is either intended, or has a natural tendency, to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly of the business."⁴

[192] § 887. When freight due and earned. No freight is due before the commencement of the voyage or transportation, although the goods may have been put in possession of

¹ *Id.*; *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 27 Atl. Rep. 282, 36 Am. St. 43, 22 L. R. A. 263.

² *Sandford v. Catawissa, etc. R. Co.*, 24 Pa. 378, 64 Am. Dec. 667; *Palmer v. Grand Junction R.*, 4 M. & W. 749; *Parker v. Great Western R. Co.*, 7 M. & G. 253; *New England Exp. Co. v. Maine Central R. Co.*, 57 Me. 188, 2 Am. Rep. 31; *Chicago, etc. R. Co. v. Parks*, 18 Ill. 460.

³ *Sandford v. Catawissa, etc. R. Co.*, *supra*; *New England Exp. Co. v. Maine Central R. Co.*, *supra*; *McDuffee v. Portland R. Co.*, 52 N. H. 430, 13 Am. Rep. 72.

⁴ *Hutchinson on Carriers* (2d ed.), § 302; *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 239, 27 Atl. Rep. 282, 36 Am. St. 43, 22 L. R. A. 263.

the carrier and placed on board his vessel or other means of conveyance;¹ but if the shipper retakes his goods after their delivery and acceptance for carriage, the carrier is entitled to compensation for any expense or trouble he has been put to as well as damages for the breach of contract to furnish them for transportation.² A carrier may require prepayment of freight; but if he does not and receives goods, he cannot maintain an action for their carriage until they are delivered at their destination.³ Freight is not earned until delivery, or what is equivalent thereto, to the consignee or owner at the place of destination,⁴ unless it is prevented by the act or default of the shipper.⁵ If it becomes impossible to deliver for a cause not attributable to the fault of either shipper or carrier, no freight can be demanded.⁶ If the crew abandon a ship because of the perils of the sea, without intending to resume possession of her, and she is afterwards saved through the efforts of the crew of another vessel and brought into port, the cargo owners are not liable to the abandoned vessel for freight.⁷ This doctrine has been much criticised, as may be seen by the opinion of Judge Aldrich in a recent case⁸ in which a vessel was abandoned

¹ *Bailey v. Damon*, 3 Gray, 92-94; *Curling v. Long*, 1 B. & P. 634; *Clemson v. Davidson*, 5 Bin. 392, 401; *Burgess v. Gun*, 3 Har. & J. 225; 3 Kent's Com. 223. But see 2 Par. on Cont. 287; *Bartlett v. Carnley*, 6 Duer, 194.

² *Id.*

³ *Barnes v. Marshall*, 18 Q. B. 785; *Hutchinson on Carriers*, § 469; *Grand Rapids & I. R. Co. v. Diether*, 10 Ind. App. 206, 37 N. E. Rep. 39, 53 Am. St. 385; *Southern Indiana Exp. Co. v. United States Exp. Co.*, 92 Fed. Rep. 1022, 35 C. C. A. 172.

If common carriers undertake to carry goods without having been previously paid the law presumes that they consider the possession of the goods as a sufficient security for their expected remuneration; and in conformity with this presumption it authorizes them to retain their possession at the end of the transit until they have received satisfaction

for their labor, etc.; and this is the foundation of a *lien*. Ang. on Car., § 356.

⁴ *Lorillard v. Palmer*, 15 Johns. 12; *Brown v. Ralston*, 4 Rand. 504; *Price v. Hartshorn*, 44 Barb. 655; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Stevens v. Sayward*, 8 Gray, 215; *Harris v. Rand*, 4 N. H. 259, 261, 17 Am. Dec. 421; *Adams v. Haught*, 14 Tex. 243; *The Ship Hooper*, 3 Sumn. 542; *Brittain v. Barnaby*, 21 How. 527; *The Ann D. Richardson*, 1 Abb. Adm. 499; *East Tennessee, etc. R. Co. v. Hunt*, 15 Lea, 261; *Duthie v. Hilton*, L. R. 4 C. P. 138.

⁵ *Id.*

⁶ *Thibault v. Russell*, 5 Harr. 293; *Halwerson v. Cole*, 1 Spear, 321, 40 Am. Dec. 603; *Crawford v. Williams*, 1 Sneed, 205; *Withers v. Macon*, etc. R. Co., 35 Ga. 273; *McKibbin v. Peck*, 39 N. Y. 262, 270.

⁷ *The Cito*, 7 Prob. Div. 5.

⁸ *The Eliza Lines*, 114 Fed. Rep.

under circumstances which did not amount to an actual renunciation of the contract, or show any intention, one way or the other, she being picked up by others, and, without any substantial change in her condition or that of her cargo, brought into port. There the master made due effort to regain possession of the property. The cargo owner prevented the resumption of the voyage. After the sale of the cargo under a judicial order the question arose as to what the ship-owner should receive in damages by way of indemnity for being kept out of his rights. The court were clear that the cargo owner could not take advantage of the misfortune which befell the ship-owner, and adjudged that the latter was entitled to gross freight less what it would have cost to complete the voyage and what the vessel ought to have earned in the time which would necessarily have been occupied in carrying the voyage forward to the port of destination. Where some portion of a perishable cargo has been lost by decay, without the fault of the master, and was for that reason left behind on the voyage, the ship-owners are entitled to recover freight on the residue [193] due duly transported and delivered,¹ but no freight is payable in respect to the part not carried.² So if molasses or liquids have wasted in bulk during the voyage, or live animals die, no freight on the part not delivered is earned;³ and if a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable.⁴ But where the cargo is taken at a lump freight, the whole may be recovered on right delivery of part if the other part be lost without the carrier's fault.⁵ Thus if the bills of

307, 52 C. C. A. 195, 61 Fed. Rep. 308, 102 id. 184.

¹ The Brig Collenberg, 1 Black, 170.

² Dakin v. Oxley, 15 C. B. (N. S.) 665, per Willes, J.; The Industrie, [1894] Prob. Div. 58.

³ Frith v. Barker, 2 Johns. 327; The Cuba, 3 Ware, 260; Duthie v. Hilton, L. R. 4 C. P. 138; Nelson v. Stephenson, 5 Duer, 538; Ang. on Carr., § 211; Gibson v. Brown, 44 Fed. Rep. 98.

"If the deterioration proceeds from an intrinsic principle of decay

naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of the hold of a ship, the merchant must bear the loss and pay the freight." MacLachlan on Ship. (3d ed.) 470; Seaman v. Adler, 37 Fed. Rep. 268.

⁴ The Saratoga, 2 Gall. 164; Liddard v. Lopes, 10 East, 526.

⁵ Merchants' Shipping Co. v. Armitage, L. R. 9 Q. B. 99; Galt v. Archer, 7 Gratt. 307; Leckie v. Sears, 109 Mass. 424.

lading recite that the shipments were so many tons, at a given price per ton, and the evidence is silent as to any other contract for carriage, freight may be recovered on the stipulated quantity though much less was delivered.¹ Where the shipper contracted to load a full and complete cargo at a certain rate of freight per ton "on the quantity to be delivered to the consignees," payment of freight to be made two-thirds after sailing, ship lost or not lost, balance on delivery, and a part of the cargo was burned on the ship, the balance being subsequently loaded, the carrier was not entitled to the payment of advance freight on the part of the cargo burned, the charter-party excepting fire as one of the perils.²

Freight has been well defined to be the price payable for the carriage of goods from the port of loading to their port of discharge.³ If the cargo increases in bulk on the voyage, as by the birth of infants,⁴ or the swelling of grain by heating, freight is payable only on the quantity shipped rather than on that delivered.⁵ And if the property is delivered in specie, although in a damaged condition, and even if worthless, whether the damage be accidental or by the carrier's fault, freight is earned, subject in the latter case, in this country, to the right of recoupment for such damage.⁶ But in the case of an actual loss or destruction by sea damage of so much of the

But payment of a lump sum as freight will not be compelled unless the intent of the parties to that effect has been expressed in clear language in the bill of lading or charter-party. *Gibson v. Brown*, 44 Fed. Rep. 98.

¹ *Planters' Fertilizer Manuf. Co. v. Elder*, 101 Fed. Rep. 1001, 42 C. C. A. 130.

² *Weir v. Girvin*, [1899] 1 Q. B. 193, [1900] 1 Q. B. 45.

³ *Gibson v. Sturge*, 10 Ex. 637.

⁴ *Malley*, Bk. 2, ch. 4, § 8.

⁵ *Gibson v. Sturge*, 10 Ex. 637.

This rule has been applied where cargoes of cotton in tightly compressed bales have expanded during the voyage or upon being removed from the ship's hold. *Shand v. Grant*, 15 C. B. (N. S.) 324; *Buckle v.*

Knoop, L. R. 2 Ex. 125, 333; *Coulthurst v. Sweet*, L. R. 1 C. P. 649. And when the freight was to be computed according to the weight of the property carried (*Nine Thousand, etc. Dry Hides*, 6 Bene. 199); or according to the number of bushels. *Allen v. Bates*, 1 Hilt. 221; *Hutchinson's Carr.* (2d ed.), §§ 453, 454.

⁶ *McGaw v. Ocean Ins. Co.*, 23 Pick. 405; *Lord v. Neptune Ins. Co.*, 10 Gray, 109; *Hugg v. Augusta Ins. & B. Co.*, 7 How. 595; *Ogden v. General Ins. Co.*, 2 Duer, 204; *Stedman v. Taylor*, 3 Ware, 52; *Nelson v. Woodruff*, 1 Black, 156; *Nelson v. Stephenson*, 5 Duer, 538; *Griswold v. New York Ins. Co.*, 1 Johns. 205, 3 id. 321, 3 Am. Dec. 490. See § 896.

cargo that no substantial part of it remains, as if sugar mats shipped as sugar and on freight to be paid at so much per ton are washed away so that only a few ounces remain, and the mats are worthless; or a valuable picture has arrived as a piece of spoilt canvass, cloth in rags, or crockery in broken sherds, it may be questioned that any freight would be due. In such instances the proper course seems to be to ascertain from the terms of the contract, construed by mercantile usage, if any, [194] what was the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived.¹ Where a vessel, on board which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the voyage, and subsequently raised, and on her arrival at the port of discharge it was found, although the dates still retained the appearance of dates and were of considerable value for the purpose of distillation into spirits, they were so impregnated with sewage and in such a condition of fermentation as to be no longer merchantable as dates, the freight was not payable in respect to them.²

§ 888. **Same subject.** After the transportation commences under a contract for a specified freight, if the shipper prevents delivery at the place of destination, he is nevertheless liable

¹ *Dakin v. Oxley*, 15 C. B. (N. S.) 665.

² *Asfar v. Blundell*, [1895] 2 Q. B. 196, [1896] 1 Q. B. 123. Lord Esher, M. R., said: "We are dealing with dates as a subject-matter of commerce: and it is contended that although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a pretty well known test which has for many years been applied to such cases as the present—that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not neces-

sarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. [1896] 1 Q. B. 123.

for full freight on receiving the goods at an intermediate point.¹ When goods are shipped and the voyage commenced the right of the ship-owner to full freight has attached; and in case of accident and detention, either by putting back to the port of departure or by stopping at an intermediate one, more or less distant from the port of destination, the shipper has no right, without the consent of the ship-owner, to demand and obtain the goods without paying full freight, in case the ship-owner or the master in his behalf can either refit his own ship within a reasonable time, and proceeds to do so, or within a like time will transport the goods in another vessel.² If the master without sufficient cause refuses to repair his ship at the intermediate port and to send on the goods or to procure another vessel for that purpose, he cannot recover freight.³ In *Bork v. Nor-*

¹ *Braithwaite v. Power*, 1 N. D. 455, 48 N. W. Rep. 354; *Palmer v. Lorillard*, 16 Johns. 347; *Ellis v. Willard*, 9 N. Y. 529; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Nelson v. Stephenson*, 5 Duer, 538; *Merchants', etc. Ins. Co. v. Butler*, 20 Md. 41; *Violett v. Stettinius*, 5 Cranch C. C. 559; *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 17; *Bradstreet v. Baldwin*, 11 Mass. 229; *Murray v. Ætna Ins. Co.*, 4 Biss. 417.

A railroad company having no interest in a contract for through transportation made between other parties cannot prevent the consignee from stopping the goods before reaching their line or road; and if they carry them over their line in spite of the consignee's objection they have no right to collect any freight or expenses. *Withers v. Macon & W. R. Co.*, 35 Ga. 273.

² *McGaw v. Ocean Ins. Co.*, 23 Pick. 405.

In *Hadley v. Clarke*, 8 T. R. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her until further orders of the council;

it was held that such embargo suspended but did not dissolve the contract, and that even after two years when the embargo was taken off, the defendants were answerable to the plaintiff in damages for its non-performance.

³ *Welch v. Hicks*, 6 Cow. 504, 16 Am. Dec. 443.

In *Palmer v. Lorillard*, 16 Johns. 348, the bill of lading was for transportation from Richmond to New York. The jury found that the vessel, in the beginning of February, proceeded from Richmond in the prosecution of the voyage, and came to Hampton Roads, but finding the Chesapeake blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into Norfolk, and finally returned to Richmond; that in September following the plaintiffs demanded their goods in order to transport them to New York by land, but the master refused to deliver them unless he was paid half freight. The court held that the contract of affreightment was not discharged by the blockade, and the carriers had a right to retain the goods until they could prosecute the

[195] ton,¹ an action for freight, it appeared that the defendant shipped on the plaintiff's vessel at Buffalo merchandise consigned to Chicago. The vessel left C. in October, and having reached Detroit was prevented by ice from proceeding farther until navigation opened in the spring following. On reaching D. the cargo, being somewhat injured, was unladen. During the winter the defendant had the greater part of his goods conveyed to C. by land at a heavy expense. So soon as navigation opened in the spring, the vessel, with that part of the cargo which remained at D., sailed for C., and delivery was there made some time in March. The question was whether the plaintiff was entitled to full freight. The court say: "It may well be matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of this case may test this principle. The defendant is a merchant, and the cargo in question consisted of merchandise. It was important that his goods should be conveyed to C. expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the delivery of his goods? The vessel arrived at C. some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor any reasonable [196] construction which can be given to the contract. . . . A distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risks are numerous, and, being well understood, may, to some extent at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is that transportation by sea is the only means of conveyance in the one case, while in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted; and the contract is made in refer-voyage, unless the shipper tendered they would have been entitled on its them the whole freight to which completion.

¹ 2 McLean, 422.

ence to this fact. It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months that the owner of the goods should be bound to wait this period for their delivery.”¹

§ 889. **When shipper not liable for freight.** Various circumstances will entitle the shipper to demand and take possession of the goods at a place short of the port or place of destination without subjecting him to the payment of full or *pro rata* freight. He may do so, for example, when the carrier refuses or is unable to carry them further;² when necessary to save the property from destruction, or when it has been wrongfully disposed of by the carrier.³ If a ship be disabled from completing her voyage the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the port of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding be dispensed with or there be some new bargain. If the ship-owner will not forward them the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him unless he has earned his freight or is going on to earn it.⁴

§ 890. **When pro rata freight due.** The principle [197] that an entire contract cannot be apportioned and that full performance of conditions precedent is necessary to a right of action thereon applies to contracts of affreightment as well as to others.⁵ And so does the principle that if the party entitled to full performance waives it and voluntarily accepts the benefit of partial performance, a promise will be implied to make compensation *pro tanto*. Therefore, where the owner

¹ See *Wilcox v. Five Hundred Tons of Coal*, 14 Fed. Rep. 49; *Holland v. Seven Hundred, etc. Tons of Coal*, 36 id. 784; § 884.

² *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Welch v. Hicks*, 6 Cow. 504, 16 Am. Dec. 443.

³ *Western Transportation Co. v. Hoyt*, 69 N. Y. 236, 25 Am. Rep. 175; *Hunter v. Prinsep*, 10 East, 378.

⁴ *Hunter v. Prinsep*, 10 East, 378.

⁵ *Western Transportation Co. v. Hoyt*, 69 N. Y. 236, 25 Am. Rep. 175.

voluntarily accepts the goods before the transportation is completed, and in fact discharges the carrier from further transportation without being compelled thereto by any wrong done by or default or inability of the carrier, a contract to pay freight *pro rata* will be implied.¹ To justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate place in such mode as to raise a fair inference that their further carriage is intentionally dispensed with;² mere acceptance at a place short of the destination without regard to other circumstances is not a decisive fact.³ The ground on which the right to receive *pro rata* freight rests is that the [198] owner who receives the goods at an intermediate port has the benefit of their transportation to that place; this benefit is the foundation of an implied promise.⁴ The original contract is not executed, and the stipulated freight is not earned; but by the consent of both parties the original contract is relinquished, and then from the beneficial service performed by the one party for the other the law raises a promise, upon equitable considerations, to pay a part of the stipulated freight in the proportion that the service actually done bears to that undertaken to be done.⁵ In case the vessel puts back to the port of departure, freights remaining as high as when the ship-

¹ *Id.*; *Harris v. Rand*, 4 N. H. 261, 17 Am. Dec. 421; *Rand v. Harris*, 4 N. H. 555; *Liddard v. Lopes*, 10 East, 526; *Cook v. Jennings*, 7 T. R. 381; *Shields v. Davis*, 6 Taunt. 65; *Mulloy v. Backer*, 5 East, 316; *Christy v. Row*, 1 Taunt. 300; *Vlierboom v. Chapman*, 13 M. & W. 539; *Luke v. Lyde*, 2 Burr. 882; *Post v. Robertson*, 1 Johns. 24; *Scott v. Libby*, 2 id. 336; *Parsons v. Hardy*, 14 Wend. 215; *Welch v. Hicks*, 6 Cow. 504; *Griswold v. New York Ins. Co.*, 1 Johns. 205, 3 id. 321, 3 Am. Dec. 431; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Crawford v. Williams*, 1 Sneed, 205; *Rossiter v. Chester*, 1 Doug. (Mich.) 154; *Law v. Davy*, 2 S. & R. 553; *Gray v. Waln*, id. 229, 7 Am. Dec. 642; *Caze v. Baltimore Ins. Co.*, 7 Cranch, 358; *Herbert v. Hallett*, 3 Johns. Cas. 93; *Whitney v. New*

York Ins. Co., 18 Johns. 208; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405; *Hove v. Mason*, 1 Wash. (Va.) 264; *The Mohawk*, 8 Wall. 153; *Whitney v. Rogers*, 2 Disney, 421.

² *Vlierboom v. Chapman*, 13 M. & W. 238.

³ See *Hurtin v. Union Ins. Co.*, 1 Wash. C. C. 530; *Marine Ins. Co. v. United Ins. Co.*, 9 Johns. 186; *Penoyer v. Hallett*, 15 id. 332, 8 Am. Dec. 239; *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 17; *Armroyd v. Union Ins. Co.*, 3 Bin. 445; *Escopiniche v. Stewart*, 2 Conn. 391; *Brown v. Ralston*, 4 Rand. 504; *Christy v. Row*, 1 Taunt. 300.

⁴ *Harris v. Rand*, 4 N. H. 261, 17 Am. Dec. 421.

⁵ *McGaw v. Ocean Ins. Co.*, 23 Pick. 411.

ment was made; or if the detention be at a place from which to the port of destination freights are as high as the freight stipulated to be paid, then no benefit has been conferred on the shipper, no equitable obligation arises to pay freight *pro rata itineris*; and if the shipper consents to take back his goods, and the ship-owner to surrender them, no freight is earned.¹ A mere agreement to accept goods at an intermediate port is not, for the purpose of *pro rata* freight, tantamount to an actual acceptance. To raise an implied promise to pay such freight the goods must be actually delivered and received. Until this is done the owner cannot be considered as having received any benefit from the transportation.²

§ 891. **Same subject; transshipment of freight.** If the vessel under charter is lost after the commencement of the voyage by one of the causes excepted in the charter, the master is required, in respect to the cargo, to do the best he can for all concerned. It is his duty to the ship-owner, if freight can be saved, to send on the goods by another vessel if it is practicable to do so; but where the cost of transshipment admits of no such saving he seems to have no authority as agent of the ship-owner to hire another vessel to forward them, but in such an emergency he owes a duty to the owner of the cargo to forward or otherwise dispose of it according to his interest, and the master may reasonably forward at an enhanced freight where the interest of the freighter will justify it. Where [199] the goods are transshipped by the master in the performance of this duty the increased freight for such transshipment is chargeable on the cargo and to the freighter.³ And to ascertain the extra freight, the proper rule has been held to be to determine what would be the difference between the amount of freight under the original charter-party for the portion of the goods delivered at the port of destination and the amount of a ratable freight to the port of necessity for the goods saved, added to the freight of the new ship.⁴ This appears to be the rule where the freight is adjusted on the assumption that the master at the port of necessity was entitled to freight *pro rata itineris* on the goods being sent forward in the interest of the

¹ McGaw v. Ocean Ins. Co., 23 Pick. 411.

³ Searle v. Scovell, 4 Johns. Ch. 218; 2 Par. on Con. 298.

² Harris v. Rand, 4 N. H. 261, 17

⁴ Id.

Am. Dec. 421.

shipper. But where the delivery at the port of destination is a necessary condition the authority of the master to transship as agent of the ship-owner depends on whether there can be any saving of freight. If the master must pay for the freight onwards more than the freight the owners are to receive for the whole voyage he no longer acts, or has authority to act, as their agent, because they have no interest in the transshipment, but as the agent of the shippers whose goods he forwards.¹ If he transship the goods in case of necessity at less than the original freight, the shipper will derive no advantage from it, but on their right delivery at the destination he will be liable for the stipulated freight.²

§ 892. **Right to freight when cargo insured.** The carrier cannot recover freight for goods lost merely because the owner insured them and collected insurance on their value at the place of delivery.³ But where the loss in such case is not such as to absolve the carrier from the duty of making effort for [200] the preservation of the property nor so imminent as to preclude all hope of such preservation so as to continue the transportation and the earning of the stipulated freight, and the owner interrupts such efforts by settling with the insurance company as for a total loss, thereby vesting in it the *spes recuperandi*, and whatever could be saved, such settlement will be an acceptance of the property and entitles the carrier to *pro rata* freight.⁴

§ 893. **Rule for adjusting pro rata freight.** The rule adopted by Lord Mansfield in *Luke v. Lyde*⁵ was to ascertain how much of the voyage was performed when the disaster happened which compelled the vessel to seek a port. In *United States Insurance Co. v. Lenox*⁶ it was decided that the true measure of the amount was to be found in the proportion of the voyage performed, not at the place where the accident

¹ 2 Par. on Con. 298; Crawford v. Williams, 1 Sneed, 295; Thwing v. Washington Ins. Co., 10 Gray, 443.

The cases of *Lemont v. Lord*, 52 Me. 365, and *Gibbs v. Grey*, 2 H. & N. 22, discuss the principles which limit the powers of the master; the former, as agent of the ship-owner, and the other as agent of the owner of the

cargo. See *Coffin v. Storer*, 5 Mass. 251; *Featherston v. Wilkinson*, L. R. 8 Ex. 122.

² *Shipton v. Thornton*, 9 Ad. & El. 314.

³ *McKibbin v. Peck*, 39 N. Y. 262.

⁴ *Id.*

⁵ 2 Burr. 882.

⁶ 1 Johns. Cas. 377, 2 id. 443.

happened, but that where the cargo was accepted by the owners. This has generally been approved by the American courts as the more correct and equitable rule.¹ A recent work on Carriers² says: "The rule thus adopted forbids all investigation into the questions of benefit received by the shipper from the partial transportation and of the expense of reshipment from the port of acceptance to destination, and divides the amount due by the terms of the original contract of shipment in the proportion of the distance performed to the whole distance of the voyage as originally contemplated. It is admitted that its strict application to many cases would occasion injustice to the shipper, as where the ship had been obliged by stress of weather to depart from the direct course of the voyage and being wrecked, the expense of sending the goods to their destination is much greater in proportion to the distance than that agreed upon for the entire voyage. This was the case of *Coffin v. Storer*³ in which it was said by Parsons, C. J., that "the rule adopted in *Luke v. Lyde* is manifestly unjust, for it is in that case admitted that the expense of freight to the destined port from the port where the freighter received the goods was as great as from the shipping port, so that he received no benefit from the proportion of the transportation for which payment was demanded of him. But while these objections to the general rule are admitted to be sometimes well taken, it is said to commend itself on account of its certainty and simplicity of application, and will be followed, except perhaps in cases in which it would cause palpable and serious injustice."

§ 894. Charges and expenses if delivery hindered or prevented. It is established that when a ship reaches the port of destination, and has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; this he should do rather than throw them overboard. Where they cannot be landed, nor remain where they are, it seems to be a legitimate extension of the implied agency of the master to hold that in the absence of all advice he has a right to carry or send them on

¹ *The Mohawk*, 8 Wall. 153; *Smyth v. Wright*, 15 Barb. 51; *Robinson v. Marine Ins. Co.*, 2 Johns. 323.

² *Hutchinson* (2d ed.), § 462.

³ 5 Mass. 252, 4 Am. Dec. 54.

to such other place as in his judgment, prudently exercised, appears to be most convenient for their owner; and that the expenses properly incurred in so doing may be charged to him. And if, in the exercise of such judgment, he carries the freight back to the place of shipment, he is entitled to freight, back freight and expenses.¹ The demurrage, and expenses incurred in ineffectual attempts to land at neighboring ports, are not allowable; but are part of the expenses of the voyage.²

§ 895. **Freight under charter to load with enumerated articles.** Where a ship is chartered to bring home a cargo of enumerated articles at rates of freight specified for each, and the articles are not provided by the charterer, freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated.³ The ship-owner, under such a charter, is entitled to earn the stipulated freight; the amount cannot be reduced either by total failure to load the [201] vessel, nor by loading her with goods of a different description.⁴ If the charter-party limits the quantity of some of the enumerated articles, and these are loaded up to the limit and there is a substitution as to the residue of the cargo, the above rule applies to the latter.⁵ To effectuate the obvious intention in respect to certainty of the amount of freight, while the charterer takes a wide latitude in selecting cargo according to circumstances not foreseen, arbitrary rules of measurement will be adopted when necessary to conform the cargo to the standard of the contract.⁶

¹Gaudet v. Brown, L. R. 5 P. C. 134; 3 Kent's Com. 223.

²Id.; Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Morgan v. Insurance Co., 4 Dall. 455. See Burrill v. Cleeman, 17 Johns. 72; Scott v. Libby, 2 id. 336, 3 Am. Dec. 481.

³Capper v. Forster, 3 Bing. N. C. 938.

⁴See Thomas v. Clarke, 2 Stark. 450.

⁵Cockburn v. Alexander, 6 C. B. 791.

⁶By a charter-party it was agreed that a ship should proceed to Baltimore and there load a full cargo of produce, and proceed therewith to

the United Kingdom, and deliver the same on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal and naval stores, and 11s. per quarter of four hundred and eighty pounds for Indian corn or other grain;" that the cargo was not to consist of less than three thousand barrels of flour, meal and naval stores, and that not less flour or meal than naval stores was to be shipped. The vessel arrived with a cargo consisting of seven hundred and sixty-nine hogsheads of tobacco, six thousand and forty-seven bushels

§ 896. Recoupment against freight. The shipper or consignee may recoup against freight any cross-claim against the carrier for negligence or violation of his contract of affreight-

of bran, two thousand bushels of oats, five thousand oak staves and three barrels of flour. The evidence showed that a quarter of Indian corn or wheat weighing four hundred and eighty pounds would occupy a space of ten and a half cubic feet, and that a quarter of American oats, which weighed upon an average two hundred and seventy-two pounds, would occupy a space of sixteen cubic feet. It also appeared that oats were not a usual shipment from America. Maule, J., said: "The ship arrived at her destination without a full cargo, the freighter being unable to furnish a full cargo. The owner, no doubt, is entitled to compensation for this breach of contract. The cargo the freighter engaged to furnish was a full and complete cargo of produce, which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. That being what the parties contemplate and describe, they proceed to stipulate for the rate of compensation which the owner is [202] to receive, which they say is to be as mentioned above. Now that enumerates and specifies certain articles of produce, and the respective prices to be paid for them; it applies the rate in terms to all produce. . . . I . . . think that the clause in question provides a rate of freight which is to be paid for any description of produce shipped under this charter-party. It is manifest that the intention of the parties was that the cargo should be delivered only on payment of *some* freight; and unless the construction I have mentioned is put upon the charter-party no freight at all would be provided for in respect to any but the actually enumerated

articles. Taking it then to be a clause by which the parties intended to regulate the amount of freight to be paid for all descriptions of goods coming within the general term 'produce,' it helps us towards the construction of another part of the instrument, which depends upon the nature of the trade at the loading port. We think—not without some doubts crossing the minds of some members of the court—that the clause, when speaking of 'Indian corn or other grain,' must be construed to mean other grain *exclusive of oats*, which are a description of grain but recently the subject of exportation from America to England. But as this clause was intended to regulate the freight, not for grain only, but for every description of goods—for which purpose it was necessary that it should ascertain a precise, or reasonably precise, rate of payment,—we think there is sufficient reason for excluding oats as not being within the probable intention of the parties when speaking of 'other grain.' The relation in which oats, according to the evidence given in the cause, stand to other produce, confirms us in this view. With respect to Indian corn, which weighs about four hundred and eighty pounds per quarter, and wheat, 11s. per quarter is to be paid. But oats being a grain to which that is not applicable, and not having long been imported from that place, we think they are like any other produce to be brought, the freight of which is not regulated by that stipulation, but that they are to be paid for after a rate to be deduced from the rate of 5s. 6d. per barrel of meal, and 11s. per quarter of Indian corn or other grain

ment by which the former has suffered damage.¹ It is otherwise in England. An exceptional rule there prevails—where there is an agreement for a specific freight no evidence can be given of a deficient performance of a contract, not amounting to the breach of a condition precedent, with a view to a reduction of damages.² But where the master had sold part of the cargo without authority Lord Ellenborough held that the owner was entitled to set off the value against the freight notwithstanding the freight had been assigned to a stranger.³ And it seems also to be settled in England that advances made on freight cannot be recovered, although the ship be lost before coming to a delivery port and the freight, therefore, not becoming payable.⁴ But in this country the doctrine is settled the other way;⁵ and in England “damages for injuries which

of the average weight of four hundred and eighty pounds per quarter. The proper mode, therefore, of estimating the damages will be to assume that the stipulated number of barrels of flour was put on board, and the residue of the vessel filled up with other goods, at an amount of freight calculated upon the rule which the parties have laid down, viz.: 5s. 6d. per barrel of flour, and 11s. for every four hundred and eighty pounds of Indian corn or other grain.” *Warren v. Peabody*, 8 C. B. 800.

¹ *Miami Powder Co. v. Port Royal*, etc. R. Co., 47 S. C. 324, 330, 25 S. E. Rep. 153, 58 Am. St. 880; *La Motte v. Angel*, 1 *Hawaii*, 237; *Bancroft v. Peters*, 4 Mich. 619; *Dedekam v. Vose*, 3 Blatchf. 44; *Byrne v. Weeks*, 7 Bosw. 372, 4 Abb. App. Dec. 657; *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579; *Kennedy v. Dodge*, 1 Bene. 215; *Nichols v. Tremlett*, 1 Sprague, 387; *Leech v. Baldwin*, 5 Watts, 446; *Edwards v. Todd*, 2 Ill. 462; *Ewart v. Kerr*, 2 McMullen, 141; *Sears v. Wingate*, 3 Allen, 103; *Davis v. Patterson*, 27 N. Y. 317; *Merrick v. Gordon*, 20 id. 93; *Glendell v. Thomas*, 56 id. 194; *Snow v. Carruth*,

1 Sprague, 324; *Hinsdell v. Weed*, 5 Denio, 172; *Edmundson v. Baxter*, 4 Hayw. 112, 9 Am. Dec. 751; *Hill v. Leadbetter*, 42 Me. 572, 66 Am. Dec. 305; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15; *Schwinger v. Raymond*, 83 N. Y. 192, 38 Am. Rep. 415; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350; *The Tangier*, 32 Fed. Rep. 230. See *Lowenburg v. Jones*, 56 Miss. 688, 31 Am. Rep. 379.

² *Mayne on Dam.* (6th ed.) 300; *Bornman v. Tooke*, 1 Camp. 377; *Davidson v. Gwynne*, 12 East, 381.

³ *Campbell v. Thompson*, 1 Stark. 490. See *Mediterranean & N. Y. Steamship Co. v. Mackay*, [1903] 1 K. B. 297.

⁴ *Byrne v. Schiller*, L. R. 6 Ex. 325, per Lord Cockburn, C. J.; *Hicks v. Shield*, 7 El. & B. 633, 2 Shower, 283; *De Cuadra v. Swann*, 16 C. B. (N. S.) 772; *Jackson v. Isaacs*, 3 H. & N. 405.

⁵ *Reina v. Cross*, 6 Cal. 29; *Lawson v. Worms*, id. 365; *Phelps v. Williamson*, 5 Sandf. 578; *Emery v. Dunbar*, 1 Daly, 408; *The Kimball*, 3 Wall. 37; *Lee v. Barreda*, 16 Md. 190; *Griggs v. Austin*, 3 Pick. 20, 15 Am. Dec. 175; *Chase v. Alliance Ins. Co.*, 9 Allen, 311; *Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206; *Hagedorn*

are not strictly matters of set-off or deduction can now be recovered by proper counter-claims."¹

§ 897. **Demurrage.** Demurrage, in the strict sense [204] of the term, means a sum of money due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party.² Charter-parties usually fix the sum to be paid per day for such delays; sometimes it is fixed by reference to the custom of the port.³ Where the time for the discharge of the vessel is stipulated or is definitely fixed by the charter or bill of lading, so that it can be calculated beforehand, the charterer thereby agrees absolutely to discharge her within that time, and takes the risk of all unforeseen circumstances.⁴ Wherever payment of freight is the condition of the delivery of goods and a consignee accepts them, he thereby becomes a party to the contract, and incurs not only the obligation to pay it, but also the demurrage for detention in unloading beyond the lay-days, according to the stipulation in the bill of lading or other paper therein referred to.⁵ "But in the absence of such a stipulation it is generally held that the consignee is not

v. St. Louis Ins. Co., 2 La. Ann. 1005; Watson v. Duykinck, 3 Johns. 335; Pitman v. Hooper, 3 Sumn. 66. See Mashiter v. Buller, 1 Camp. 84; 3 Kent's Com. 226-228.

¹ Mayne on Dam. (6th ed.) 301.

² Abb. on Shipping (5th Am. ed.), pt. 4, ch. 1; Wordin v. Bemis, 32 Conn. 273, 85 Am. Dec. 255; Clendaniel v. Tuckerman, 17 Barb. 184; Blech v. Balleras, 3 E. & E. 203; Sprague v. West, 1 Abb. Adm. 548; Dayton v. Parke, 142 N. Y. 391, 398, 37 N. E. Rep. 642.

³ Morse v. Pesant, 2 Keyes, 16.

The words in a charter-party "to discharge with customary dispatch . . . cargo to be . . . discharged according to the custom of the port," do not include a custom governing the sale of the cargoes of ships, as where the custom was to sell only one cargo of fruit a day and none on Saturdays. Such a custom does

not interfere with the discharge of the ship. Milburn v. Thirty-five Thousand Boxes of Oranges & Lemons, 57 Fed. Rep. 236, 6 C. C. A. 317.

⁴ Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co., 77 Fed. Rep. 919, 23 C. C. A. 564, 35 L. R. A. 623; Gabler v. McChesney, 60 App. Div. 583, 588, 70 N. Y. Supp. 191; Cross v. Beard, 26 N. Y. 85; Williams v. Theobald, 15 Fed. Rep. 465, 471; Sixteen Hundred Tons Nitrate of Soda v. McLeod, 61 Fed. Rep. 849, 10 C. C. A. 115; Burrill v. Crossman, 69 Fed. Rep. 747, 752, 16 C. C. A. 381; Huron Barge Co. v. Turney, 71 Fed. Rep. 972.

⁵ Morse v. Pesant, 2 Keyes, 16; Dobbin v. Thornton, 6 Esp. 16; Jesson v. Solly, 4 Taunt. 52. See Chappel v. Comfort, 10 C. B. (N. S.) 802; Cawthorn v. Trickett, 15 id. 753; Wegener v. Smith, 15 C. B. 295.

bound to respond for damages in the nature of demurrage, because not being a party to the contract in the bill of lading the contract implied from its subsequent acceptance by him cannot extend beyond the conditions upon which its delivery is made dependent."¹ While not strictly liable for demurrage, a consignee who is also the owner of a cargo may be liable for damages in the nature of demurrage when the vessel is detained, through his fault, an unreasonable length of time at the port of discharge.² In such case not only must the detention be proved, but the damages, and their nature. There is no express contract to refer to for the purpose of computing the amount to be paid; hence the necessity for establishing proof of their existence and amount.³ If the contract between the carrier is with the shipper and the delay occurs at the place of loading the consignee is not liable. In such a case the vendor who shipped goods to the vendee and received a bill of lading in which he was named as shipper, though it was silent as to demurrage, was liable to the ship-owner for damages caused by unreasonable delay in loading.⁴ Where delay was caused a vessel with full cargo and crew by a sub-charterer, he was not bound for the stipulated rate of demurrage between the vessel and the charterer. The court said that it sometimes occurs that where freighters are not bound by the stipulated rate, and there is no other evidence bearing upon the question of the damages resulting from the detention, they are necessarily assessed on the basis of the rate stipulated. That will not be done, however, if there is evidence of the gross and net yearly earnings of the vessel, especially if the stipulated rate is very high; but such earnings will furnish the basis upon which the recovery will be based.⁵

¹ Van Etten v. Newton, 134 N. Y. 143, 31 N. E. Rep. 334; Dayton v. Parke, 143 N. Y. 391, 398, 37 N. E. Rep. 642; Gage v. Morse, 12 Allen, 410, 90 Am. Dec. 155; Young v. Miller, 5 El. & B. 775; Jesson v. Solly, 4 Taunt. 52; Brouncker v. Scott, id. 1; Evans v. Forster, 1 B. & Ad. 118, 25 Eng. C. L. 420; Gabler v. McChesney, 60 App. Div. 583, 70 N. Y. Supp. 191.

² Dayton v. Parke, *supra*; Ford v.

Cotesworth, L. R. 4 Q. B. 127; Scholl v. Albany, etc. Iron Co., 101 N. Y. 602, 5 N. E. Rep. 782; Van Etten v. Newton, *supra*; Crawford v. Rittenhouse, 1 Fed. Rep. 638; Fisher v. Abeel, 66 Barb. 381; Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co., 77 Fed. Rep. 919, 23 C. C. A. 564, 35 L. R. A. 623, and cases cited.

³ Dayton v. Parke, *supra*.

⁴ Van Etten v. Newton, *supra*.

⁵ Keyser v. Jurvelius, 122 Fed. Rep.

As between the parties damages in the nature of demurrage are recoverable for detention beyond a reasonable time in unloading where there is no express stipulation to pay them. They are in the nature of demurrage because they are for the detention of the vessel and measured by the day like demurrage; they are damages because they are recovered for breach of the implied contract of the shipper that he will receive the goods in a reasonable time.¹ What is such time will be determined upon the particular facts. In one case² the master was directed to deliver to a railroad company, but the bill of lading, which contained the contract, did not provide for such delivery; and after arrival of the vessel there was a detention for eight days for twenty other vessels which had arrived earlier to unload in their turn; the court held that there was no unreasonable detention. Butler, J., said: "Influenced by the equity of the case, I had first some doubt whether the finding in respect to the excuse came up to the necessities of their defense. It is not found that the accumulation was owing to any *un-* [205] *expected cause*, or that it might not have been foreseen and provided against by proper foresight and diligence. In several cases cited the vessels were detained by a storm or storms, and all arrived together when the weather cleared up. There the elements were the cause. Here the cause is not found, nor is it found that the accumulation was not the result of a previous want of diligence or other fault on the part of the company. Still, it is expressly found that the company did all they could do to hasten the discharge of the vessel after the arrival of the plaintiff, and there is no presumption that they or the defendants expected or could have foreseen the arrival of so many vessels, or were in any way the cause of the accumulation, and we are constrained to hold the excuse sufficient." A somewhat stricter rule was laid down by Judge Drummond in a case of detention from a similar cause. It was held that the plaintiff,

218, — C. C. A. —; *Huron Barge Co. v. Turney*, 79 Fed. Rep. 109.

¹ *Van Etten v. Newton*, 134 N. Y. 143, 31 N. E. Rep. 434; *Wordin v. Bemis*, 32 Conn. 273, 85 Am. Dec. 255; *Esseltyne v. Elmore*, 7 Biss. 69; *Clen-daniel v. Tuckerman*, 17 Barb. 184; *The M. S. Bacon v. Erie & W. Trans-*

portation Co., 3 Fed. Rep. 344; *Scholl v. Albany & R. Iron & S. Co.*, 101 N. Y. 603, 5 N. E. Rep. 782; *Baldwin v. Sullivan Timber Co.*, 20 N. Y. Supp. 496, affirmed, 142 N. Y. 279, 36 N. E. Rep. 1060.

² *Wordin v. Bemis*, 32 Conn. 273, 85 Am. Dec. 255.

the master, was not responsible for the arrival of the vessels consigned to the defendants about the same time; that was a risk which the defendants themselves took. The plaintiff reported his arrival on the morning of the 18th, and was detained to the 22d of November, to commence unloading on account of other vessels being there first; but it was held that the charterer of a vessel takes all the risks of delay from unforeseen circumstances, and only one day was allowed as reasonable time for commencing to unload.¹ Where the charter stipulated. "Lay days not to commence to count until 12 o'clock noon after the steamer is entered at the custom house and in every respect ready to load," the lay days began at that time. A further clause that the ship should load "when, where and as directed" did not modify the first clause, nor did it relieve the charterer from liability for delay in loading though such delay resulted from a custom of the port which compelled the vessel to await her turn to get to the berth to which she had been assigned.²

In the absence of a stipulation as to the time for unloading, the implied agreement is that it must be done with reasonable diligence. Usually the customary time for the discharge of vessels at any port is the time within which they are discharged under ordinary circumstances.³ But where the circumstances are extraordinary, as where a ship was delayed sixty-three days on account of the crowded condition of the docks, before its turn came, the consignee was excused from unloading within the time required under ordinary circumstances, and was not liable for the detention of the vessel until its turn came.⁴ In determining what is a reasonable time all the cir-

¹ *Esseltyne v. Elmore*, 7 Biss. 69. Compare *Crawford v. Jesup & M. Paper Co.*, 24 Fed. Rep. 303. See on the general subject of excusing detention, *Farwell v. Thomas*, 5 Bing. 188; *Hill v. Idle*, 4 Camp. 327; *Randall v. Lynch*, 2 id. 352; *Burmster v. Hodgson*, id. 488; *Robertson v. Jackson*, 2 C. B. 412; *Barrett v. Dutton*, 4 Camp. 333; *Hudson v. Ede*, 8 B. & S. 631, 640, L. R. 3 Q. B. 412; *Erichsen v. Barkworth*, 3 H. & N. 601; *The Swallow*, 27 Fed. Rep. 316, 30 id. 204.

² *Carbon Slate Co. v. Ennis*, 114 Fed. Rep. 260, 52 C. C. A. 146.

³ *Higgins v. Steamship Co.*, 3 Blatch. 282, Fed. Cas. No. 6,469; *Whitehouse v. Halstead*, 90 Ill. 95; *The Nether Holme*, 50 Fed. Rep. 434; *The Z. L. Adams*, 26 Fed. Rep. 655.

⁴ *Hick v. Raymond*, [1893] App. Cas. 22, affirming *Hick v. Rodocanachi*, [1891] 2 Q. B. 626; *Burmester v. Hodgson*, 2 Camp. 488. To the same effect are *The Glover*, Fed. Cas. No. 5,488; *Bellaty v. Curtis*, 41 Fed. Rep. 479;

cumstances are to be considered, as a strike of the charterer's employees, entered upon without grievance or warning, and a successful effort on their part to prevent others from assisting in unloading a vessel. Under such circumstances a delay of one week was excusable.¹ But demurrage for detention beyond a reasonable time in loading has been allowed notwithstanding the ship, if she had been loaded in time, would have been prevented by ice from sailing earlier than she did.² Where the charterer guaranteed a cargo and quay berth ready at the port of shipment, and owing to inability to provide the berth the ship went on demurrage, and, while lying at anchor waiting for a berth, was run into by another vessel, which necessitated taking her to another port for repair, and during her absence a berth became vacant and would have been given her but for her absence, her inability to secure a berth after her return gave the owner the right to claim demurrage for the time she was obliged to wait thereafter. No claim for it was made during the time of her absence for repairs.³

If a ship is detained beyond the time allowed by the charter-party the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent for the owner or the freighter to show that this would be more or less than fair compensation,⁴ as by proof of what her probable net earnings would have been during the period of detention.⁵ Where the stipulation is to pay a specified sum as demurrage, if the vessel is detained because of delay arising from a desig-

The *J. E. Owen*, 54 Fed. Rep. 185; The *Elida*, 31 Fed. Rep. 420, and other cases cited in *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.*, 77 Fed. Rep. 919, 23 C. C. A. 564, 568, 35 L. R. A. 623, in which an extended examination of the English and American cases is made by Sanborn, C. J.

¹ *Empire Transportation Co. v. Philadelphia & R. Coal & Iron Co.*, *supra*.

In *Hick v. Raymond*, [1893] App. Cas. 22, affirming *Hick v. Rodocanachi*, [1891] 2 Q. B. 626, the unloading of the cargo was interrupted for several days by a strike of the dock

laborers which delayed the discharge far beyond the time which would otherwise have sufficed. It was not possible to find other laborers to do what was necessary in order that the unloading might be completed. No stipulation was made respecting the time for discharging the cargo. The consignee was not liable for the delay.

² *Randall v. Sprague*, 74 Fed. Rep. 247, 21 C. C. A. 334.

³ *Tyne & Blyth Shipping Co. v. Leech*, [1900] 2 Q. B. 12.

⁴ *Moorsom v. Bell*, 2 Camp. 616.

⁵ *Huron Barge Co. v. Turney*, 79 Fed. Rep. 109.

nated cause, it will be presumed, without proof of actual damage or the amount thereof, that delay produced by another cause is equally injurious to the owner of the vessel.¹ If the language of the contract is clear demurrage will be allowed for Sundays intervening between the time when the vessel should have been and when in fact she was at liberty.² As between an indorsee of the bill of lading who has purchased the goods and the vessel, the bill is the only contract as respects demurrage. If no reference is made in it to the charter and the indorsee has no notice of it and the bill does not refer to the charter, nor specify a rate of demurrage, the rate must be determined by the value of the use of the vessel, though the charter stipulates for an amount in excess thereof, and the charterer shipped the goods.³ In fixing the amount of demurrage to be paid for detention of a vessel during repairs a deduction should be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in earning the freight.⁴ If, in consequence of the delay in loading, the carrier obtains a cargo which is more profitable than that the shipper agreed to furnish, the latter's liability for the stipulated demurrage is accordingly diminished.⁵

The English merchant shipping act⁶ gives the board of trade, if they have reason to believe that a British ship is unsafe, power to order her detention for the purpose of being surveyed. It provides that if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the board shall be liable to pay the owner of the ship his costs of and incidental to the detention and survey of the ship, and also "compensation for any loss or damage" sustained by him by reason of the detention or

¹ *Baldwin v. Sullivan Timber Co.*, 20 N. Y. Supp. 496, affirmed, 142 N. Y. 279, 36 N. E. Rep. 1060; *Harris v. Jacobs*, 15 Q. B. Div. 247.

² *Baldwin v. Sullivan Timber Co.*, *supra*; *The Oluf*, 19 Fed. Rep. 459; *Lindsay v. Cusimano*, 12 id. 503.

The term "working day" means, in maritime affairs, running or calendar days on which the law per-

mits work to be done. It excludes Sundays and legal holidays, but not stormy days. *Sorenson v. Keyser*, 59 Fed. Rep. 163, 2 C. C. A. 650.

³ *The Pietro G.*, 39 Fed. Rep. 366.

⁴ *The Gazelle*, 2 Rob. Adm. 279.

⁵ *Pregenzer v. Burleigh*, 6 N. Y. Misc. 140, 26 N. Y. Supp. 35.

⁶ 39-40 Vict., ch. 80, sec. 6.

survey. The quoted words do not permit the recovery of general damages in respect to the injury to the reputation of the ship-owner as such by reason of the vessel's detention.¹ Though the bill of lading is silent as to demurrage, the consignor is primarily liable to the vessel for an unreasonable delay in discharging the cargo. The question whether he or the consignee is bound to discharge her does not affect the right of the owner of the vessel to be reimbursed at once.² Usually interest has not been allowed on the amount due as demurrage,³ but where a charter-party provided for demurrage at a stipulated rate per day and made it payable day by day, and it was demanded each day, interest was allowed from the time of demand.⁴ The right of railroad companies to fix by reasonable rules the time within which cars shall be unloaded and to thereby impose a fair charge for their detention beyond such time is generally sustained where knowledge thereof or the means of knowledge are brought to the notice of consignees.⁵

¹ *Dixon v. Calcraft*, [1892] 1 Q. B. 458.

² *Jameson v. Sweeney*, 29 N. Y. Misc. 584, 61 N. Y. Supp. 498; *Shaver v. Gillespie*, 46 N. Y. St. Rep. 772, 19 N. Y. Supp. 237.

³ *Johanssen v. Bark Eloina*, 4 Fed. Rep. 573, and cases cited.

⁴ *Milburn v. Thirty-five Thousand Boxes of Oranges & Lemons*, 57 Fed. Rep. 236, 6 C. C. A. 317.

⁵ *Pennsylvania R. Co. v. Midvale Steel Co.*, 201 Pa. 624, 51 Atl. Rep. 313, 88 Am. St. 836; *Miller v. Mansfield*, 112 Mass. 260; *Norfolk, etc. R. Co. v. Adams*, 90 Va. 393, 18 S. E. Rep. 673, 44 Am. St. 916, 23 L. R. A. 580; *Kentucky Wagon Manuf. Co. v. Ohio, etc. R. Co.*, 98 Ky. 152, 32 S. W. Rep. 595, 56 Am. St. 326; *Darlington v. Missouri Pacific R. Co.*, — Mo. App. —, 72 S. W. Rep. 122; *Miller v. Georgia R. & B. Co.*, 88 Ga. 563, 15 S. E. Rep. 316, 50 Am. & Eng. R. Cas. 79; *Kentucky Wagon Manuf. Co. v. Louisville & N. R. Co.*, 11 Ry. & Corp. L. J. 49; *Baltimore & O. R.*

Co. v. Fisher, 5 Ohio Dec. 659. *Contra*, *Chicago, etc. R. Co. v. Jenkins*, 103 Ill. 588, 599; *Burlington, etc. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. Rep. 451.

A railroad company has no lien upon goods for demurrage in the absence of a contract (*East Tennessee, etc. R. Co. v. Hunt*, 15 Lea, 261; *Chicago, etc. R. Co. v. Jenkins*, 103 Ill. 588, 599; *Cleveland, etc. R. Co. v. Holden*, 73 Ill. App. 582; *Same v. Lamm*, id. 592; *Crommelin v. New York & H. R. Co.*, 10 Bosw. 77), unless possibly by usage and custom which have acquired the force of law. *Burlington, etc. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390, 19 N. W. Rep. 451. *Contra*, *Miller v. Mansfield*, 112 Mass. 260.

The cases which sustain such rules do so in reference to the carrier's performance of his duty. If goods are not delivered according to that duty and the consignee therefore refuses to receive them, though without justification, he is not lia-

SECTION 2.

ACTIONS AGAINST CARRIERS.

[206] § 898. **General statement of carrier's liability.** Common carriers¹ by holding themselves out as such assume and are bound to do what is required of them in the course of their employment, if they have the requisite vessels or vehicles with which to carry² and are offered a reasonable and customary price; and if they refuse without some just ground to transport property in the order in which it is offered,³ equally as when they have contracted to carry, they are liable to an action.⁴ For breach of this duty or contract compensation to the injured party may involve the consideration of an increased expense of carriage otherwise, or an advance in rates of freight as well as injury from delay or deprivation of transportation.⁵

ble for a charge in the nature of demurrage, at least if he is not shown to have notice of the rule. *Baumbach v. Gulf, etc. R. Co.*, 4 Tex. Civ. App. 650, 23 S. W. Rep. 693.

¹ "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes, to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier." *Jackson Agricultural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. Rep. 665, 70 Am. St. 432.

² *Memphis News Pub. Co. v. Southern R. Co.*, 75 S. W. Rep. 941 (Tenn.).

The carrier must show affirmatively that he could not, with proper diligence, have furnished transportation after notice given of the purpose to ship. *Ayres v. Chicago & N. R. Co.*, 71 Wis. 372, 37 N. W. Rep. 432, 5 Am. St. 226.

³ *H. & T. C. R. Co. v. Smith*, 63 Tex. 322.

To make the carrier liable for fail-

ure to ship a specific lot of property it must be shown that the contractual relation of shipper and carrier existed, or was sought to be established with reference to such property. *Little Rock, etc. R. Co. v. Conatser*, 61 Ark. 560, 33 S. W. Rep. 1057.

⁴ *Louisville, etc. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. Rep. 370, 3 Am. St. 674; *Ayres v. Chicago & N. R. Co.*, *supra*; 2 Kent's Com. 599; *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372; *Chicago, etc. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. Rep. 451.

⁵ *Gulf, etc. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. Rep. 110; *Davis v. Texas & Pacific R. Co.*, 91 Tex. 505, 44 S. W. Rep. 822; *Seasongood v. Tennessee & Ohio River Transportation Co.*, 21 Ky. L. Rep. 1142, 54 S. W. Rep. 193, 49 L. R. A. 270.

Where there was a refusal to transport sheep from New York to Newcastle, England, and the charterer sold his right as to a portion of the sheep which were to be carried at an advance on the price he was to pay and shipped the residue to Bristol, England, by another vessel which sailed six days later, but ar-

A carrier who is applied to to furnish cars for the transportation of cattle must furnish such as are reasonably safe¹ and not infected with any contagious cattle disease. Furnishing cars so infected will render it liable for such damages as result to the shipper.²

§ 899. **When damages for refusal to carry measured by cost of transportation.** The object of all transportation being to have the use of or opportunity to sell the property at the place of destination, the elements and amount of the loss will depend on the circumstances of each case. If on the refusal of the carrier to receive the goods another carrier can be found without trouble or delay who will take and convey them at the same or less expense or hire, only nominal damages can be recovered, for there is no actual injury.³ If the subject to be transported be merchandise, and the purpose of the transportation is merely to obtain a better net price than it will sell for where it is, then a refusal of the carrier to fulfill his contract or duty to convey will not wholly deprive the owner of that profit if he can procure the conveyance otherwise at a [207] price that enables him to make the transportation profitable; if the substituted conveyance, by being more expensive, reduces that profit, the increased expense of the transportation is the measure of damages;⁴ but if no other conveyance is available, that is, if none can be had at all, or if any which is attainable would be so expensive, as to leave no margin of profit, then the

rived at nearly the same time as the vessel in default, there being no substantial difference between the market prices at the places named, and no market price for the transportation of sheep at New York when the breach of the contract occurred, it was held, no claim for special damages being in question, that the recovery was limited to the loss of profit upon the right to ship, the difference in the actual cost of transporting the sheep taken to Bristol, the expense of keeping them while awaiting shipment and their depreciation and the difference in the market price. *The Rossend Castle*, 30 Fed. Rep. 462.

¹ *Union Pacific R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. Rep. 986.

² *Illinois Central R. Co. v. Harris*, 184 Ill. 57, 48 L. R. A. 175, 56 N. E. Rep. 316, 84 Ill. App. 462.

³ Where there is an express contract to carry and the property is delivered at the designated point the shipper may rely upon its performance, and need not seek other modes of transportation until notified of the carrier's refusal or inability to perform. *Louisville, etc. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. Rep. 370, 3 Am. St. 674.

⁴ *Waterbury v. Street*, 50 Fed. Rep. 835, 2 C. C. A. 45; *The Oregon*, 55 Fed. Rep. 666, 5 C. C. A. 229.

owner suffers injury to the extent of the difference between the value of the property where it is and the value it would have at the place of destination, less the expenses of shipment under the contract to that place.¹

In an action for the refusal by the defendant to perform an agreement to transport corn from New York to Liverpool at a certain price, the plaintiff was held entitled to recover for his damages the difference between the contract price and what he would be compelled to pay for the same services. When a refusal is shown and it appears that the price of transportation has risen before the sailing of the ship, the plaintiff is entitled to damages measured by the rise in the price without showing that he had the corn to ship.² If sent by another route or conveyance at a greater expense not unreasonably incurred, the excess of such expense is obviously a proper item of damages.³ But if the subject to be transported is mere merchandise contracted to be shipped to a better market the owner has not an absolute right to ship by another carrier at such greater expense as such shipment may involve. He has no right to send the goods forward for the mere purpose of charging the increased expense to the defaulting carrier, or where that will be the sole effect. Where the defendant broke his contract to carry salt by vessel, it was held that the owner had no right to send the salt by rail in small quantities as he needed it, and

¹Shores Lumber Co. v. Starke, 100 Wis. 498, 76 N. W. Rep. 366; Capehart v. Granite Mills, 97 Ala. 353, 12 So. Rep. 44; Inman v. St. Louis, etc. R. Co., 14 Tex. Civ. App. 39, 37 S. W. Rep. 37.

²Ogden v. Marshall, 8 N. Y. 340, 59 Am. Dec. 497; The Flash, Abb. Adm. 119. See Nelson v. Plimpton Fire Proof Elevating Co., 55 N. Y. 480; Bohn v. Cleaver, 25 La. Ann. 419.

In Lord v. Strong, 6 Mich. 61, the defendant agreed to convey six cargoes at a fixed price, one in August, two in September, one in October, and one in November. He carried five only—one in August, one in September, one in October, and two in November. Freight rates were

higher in October than previously, and much higher in November. In the absence of an agreement as to the application to be made of the extra cargo carried in November, it was held that defendant had the right to have it stand as a substituted performance for the cargo which he omitted to carry in October, and was liable only for such damages as resulted from the neglect to transport one of the cargoes which should have been taken in September.

³McEwan v. McLeod, 9 Ont. App. 239; Crouch v. Great Northern R. Co., 11 Ex. 742; Grand v. Pendergast, 58 Barb. 216; Inman v. St. Louis, etc. R. Co., 14 Tex. Civ. App. 39, 37 S. W. Rep. 37.

recover the difference between the expense agreed on with the defendant and what was paid for transportation by rail.¹ A contract to carry at a specified price gives a vested right to each party, and the value of it when performance is due should be the basis of recovery. It is not necessary, in analogous cases, to go into the market for, or to procure from another, what had been contracted for in order to be entitled to have its value determined and to recover damages accordingly.²

§ 900. **Liability for the loss of shipper's profits.** The difference between the agreed price and the actual cost or value of the service is not the only measure or item of damages recoverable. The carrier's refusal to receive and convey property may deprive the owner of an opportunity to market it at an advanced price, subject him to a loss by a decline, or consequential damage in ulterior transactions of which the carrier had notice at the time of making his contract. An important case in Iowa³ is an instance of the allowance of such damages. The action was brought to recover on account of the failure and refusal of the defendant to carry a large [209]

¹ Ward's Central & P. Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544. The court said: "Salt is not an article of specific utility for preservation, but an article of merchandise, [208] and only valuable as such. The only advantage he could have gained by a timely shipment, according to contract, would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City, and the expense of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more. He would not have been justified in procuring shipment by rail, if the railroad price would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain

point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account. *Le Blanche v. London & N. W. R. Co.*, 1 C. P. Div. 286; *Irvine v. Midland, etc. R. Co.*, 6 L. R. Ire. 55; *The Oregon*, 55 Fed. Rep. 666, 5 C. C. A. 229. Compare *McEwan v. McLeod*, 9 Ont. App. 239; *Connal v. Fisher*, 10 *Rettie (Scotch)*, 824.

² *Louisville, etc. R. Co. v. Flanagan*, *supra*.

³ *Cobb v. Illinois Central R. Co.*, 38 Iowa, 601.

quantity of oats from Dubuque and other points on the defendant's railroad to Cairo. The plaintiffs were government contractors, engaged in the business of supplying forage for the United States armies during the late rebellion. The court say: "The measure of damages against a carrier for violation of his duty or contract in respect to the transportation of property should be such as to do justice and award full compensation, and no more, to the party injured.¹ Plaintiffs must be compensated for the profit they would have realized, which is the difference between the price they paid, or contracted to pay, for the oats and the price under their contract with the government, less the freight to Cairo. They must also recover for the sum they paid, or are liable to pay, for the oats purchased by them or agreed to be delivered by the various parties with whom they contracted. If the oats were actually received by them, or were not, and only contracted to be delivered, in either case they must recover the sum paid by them on account of the oats, or on account of their liability upon their several contracts to purchase oats. They must be made whole on account of these outlays, and also, as we have seen, must recover the profits that would have accrued to them." The court also held that "interest on the sums lost by plaintiffs, and for which compensation in this action can be recovered," was an element of damages.² In *Mace v. Ramsey*³ there

¹ *Bridgman v. Steamboat Emily*, Kan. 385, 2 Pac. Rep. 795. See §§ 913, 914, 18 Iowa, 509.

² To the same effect, *H. & T. C. R. Co. v. Smith*, 63 Tex. 322; *Gulf, etc. R. Co. v. McCorquodale*, 71 id. 41, 9 S. W. Rep. 80; *Day v. Gravel*, 72 Minn. 159, 75 N. W. Rep. 1. Liability for lost profits is declared in *Baxley v. Tallassee & M. R. Co.*, 128 Ala. 183, 29 So. Rep. 451, which cites *Vicksburg R. Co. v. Ragsdale*, 46 Miss. 458; *Fort Worth & D. C. R. Co. v. Great-house*, 82 Tex. 104, 17 S. W. Rep. 834; *Central Trust Co. v. Savannah & W. R. Co.*, 69 Fed. Rep. 683; *Simpson v. London & N. R. Co.*, 1 Q. B. Div. 274; *Jameson v. Midland R. Co.*, 50 L. T. Rep. 426; *Hamilton v. Western N. C. R. Co.*, 96 N. C. 398, 3 S. E. Rep. 164; *Missouri Pacific R. Co. v. Nevin*, 31

In reliance upon a carrier's promise to transport certain ice for the plaintiff at fixed rates, he bought and sold the ice to one who agreed to purchase at an advanced price and pay the freight at such rates. The carrier refused to perform. It was liable for the price at which the ice was sold, less the expense of shipping it, and less, also, such sum as might have been obtained for it from other parties to whom it might have been sold, together with interest from the commencement of the action. *Bigelow v. Chicago, etc. R. Co.*, 104 Wis. 109, 80 N. W. Rep. 95.

³ 74 N. C. 11. To the same effect, *Houston, etc. R. Co. v. Hill*, 70 Tex.

was a failure to furnish a boat which had been contracted for for the purpose of conveying excursionists in and around a designated bay. The damages were measured by what such a boat as was to be supplied would have been worth to the person who engaged it for the use to which it was to have been put. Evidence showing that the boat would have been filled with passengers was received.

In a late Massachusetts case, against a carrier for breach [210] of an executory contract to carry goods, it was held that the measure of damages is the market value of the goods at the place to which they should have been carried, less the value at the place where the carrier agreed to receive them, and less freight.¹ But it was also held that the fact that their owner informed the carrier at the time of making the contract that he made it because he *wished to make* contracts with third persons for the sale of goods to them, and that he did make such contracts afterwards, does not entitle him to recover of the carrier the profits he would have made by such contracts but for the breach of the contract of carriage. Endicott, J., said: "The damages for which a carrier is liable upon failure to perform his contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation, and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond in case of breach for special and exceptional damages. In such case the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not

51, 7 S. W. Rep. 659, 63 Tex. 381, 51 Am. Rep. 642.

¹Bracket v. McNair, 14 Johns. 170, 7 Am. Dec. 447; O'Connor v. Forster, 10 Watts, 418; Cowley v. Davidson, 13 Minn. 92; Texas Pacific R. Co. v. Nicholson, 61 Tex. 491; Harvey v. Grand Trunk R. Co., 2 Hask. 124, 250; Pennsylvania R. Co. v. Titusville, etc. Co., 71 Pa. 350; Chicago, etc. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. Rep. 451, 50 Am. St. 320; Missouri, etc. R. Co. v. Witherspoon, 38 S. W. Rep. 833; Inman v. St. Louis, etc. R. Co., 14

Tex. Civ. App. 39, 37 S. W. Rep. 37, citing the text.

If animals are delivered by a carrier at a place other than that to which they were shipped and are sold at the place of delivery, the carrier is liable for the difference between the price realized there and what would have been realized if the sale had been made at the place to which the animals were shipped. Tandy v. Wabash R. Co., 68 Mo. App. 431.

then made. The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose a liability upon the [211] defendant for loss of profits on such contracts. Whether there would be a loss of profits it was of course then impossible to determine, and probable profits would be incapable of estimation."¹

§ 901. **Increased expenditures; loss of customers.** The defendants agreed, by charter-party, with the plaintiff that their ship should, at a specified time, load one thousand three hundred tons of coal in the river Tyne to be carried to Havre for him. They broke their contract, and the plaintiff had in consequence, first, to hire other vessels at an advanced freight, and also to buy one thousand three hundred tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, they admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre, and it was held that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover.² If the shipper has been unable to secure other means of transportation during the season the property was to be carried and there is no market for it at the place of shipment he may recover, in addition to the difference between the market price at the place of sale

¹ *Harvey v. Connecticut, etc. R. Co.*, 124 Mass. 421, 26 Am. Rep. 673; *Houston, etc. R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. Rep. 1015, 61 Am. St. 288.

A charterer cannot recover the profits he would have made if he had transferred his contract. *Bohn v. Cleaver*, 25 La. Ann. 419; *Richard v. Holman*, 123 Fed. Rep. 784.

² *Featherston v. Wilkinson*, L. R. 8 Ex. 122.

Where animals offered for shipment were to be pastured at their destination the shipper recovered the additional cost of pasturing them at the place they were offered for shipment over the cost of doing so at the place to which they should have been shipped. *Gulf, etc. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. Rep. 110.

when it should have been carried and the market price when it could be carried and sold, the cost of insurance and the value of the use of the proceeds of the property during that time.¹

In a late case decided in the house of lords, it was held that damages were recoverable for loss of customers resulting from such a default of a carrier. The lord chancellor thus affirmed, hypothetically, that item of damage: "There may have been two or three collieries supplying with coal one of the towns or places mentioned in the case, the owner of one of these collieries being Mr. G., and the other collieries belonging to other persons; the restrictions and the impediments placed in the way of the carriage of coal for Mr. G. may have been such as to supplant him in the supply of coal to that particular place, and to give the supply of coal virtually into the hands of his rival or competitor in trade. That would clearly be a loss of customers, and the loss occasioned by that circumstance, among others, would be a head under which damages might be awarded."²

§ 902. Not liable for remote consequences. As is true in other cases, the plaintiff can recover only such damages [212] as are the natural and proximate consequence of the defendant's breach of his contract.³ A ship's husband covenanted that his ship should at one port take in a quantity of brandy and convey it to another port and there receive a cargo of freight, etc., which the freighters covenanted to supply. The ship did not take the brandy, and the freighters did not furnish a full homeward cargo. In an action on the charter-party by them for not taking the brandy, it was alleged that the failure to furnish the homeward cargo was the consequence, and that in an action by the ship's husband therefor he had recovered damages to a stated amount, and they were

¹ *Shores Lumber Co. v. Starke*, 100 Wis. 498, 76 N. W. Rep. 366.

² *Lancashire & Y. R. Co. v. Gidlow*, L. R. 7 Eng. & Ir. App. Cas. 517. See *Richmond v. Railroad Co.*, 40 Iowa, 264, and *Louisville & N. R. Co. v. Queen City Coal Co.*, 13 Ky. L. Rep. 832 (Ky. Super. Ct.), the latter deny-

ing the right to recover for loss of trade.

³ *St. Louis, etc. R. Co. v. Neel*, 56 Ark. 279, 19 S. W. Rep. 963; *Houston, etc. R. Co. v. Jackson*, 62 Tex. 209; *Armistead v. Shreveport & R. R. Co.*, — La. —, 32 So. Rep. 456; *The Georg Dumois*, 115 Fed. Rep. 65, 52 C. C. A. 659.

put to costs to a stated amount. On the trial, Tindal, C. J., interrupted counsel, intimating that these sums could not be recovered, and said the breach of contract for not shipping the brandy should have been set up by the freighters in the former action. He held that the law will not allow so idle a ceremony as for one party to recover a sum that it might be recovered back by the other. In answer to the contention that though the damages were not the precise sum recovered before, still that recovery could be considered as a mode of showing the amount to which the plaintiff was entitled, he added: "The damages will be the loss in consequence of not shipping the brandy, and all such damages as are the natural and necessary consequences. Might you not have bought brandy yourselves and charged the difference in the price? No man would be safe if your rule were to prevail. If I contract to transfer stock, and do not, the party with whom I contracted has no right to tell me a month afterwards that if I had transferred the stock he could have bought an estate with the money. There was a case of a man who brought an action against the keeper of a ferry-boat for refusing to carry him across a river, in consequence of which he sustained loss by not being able to keep an appointment. But it was held that he could not recover damages on any such ground." They were too remote.¹

In a recent Irish case the carrier failed to transport horses which he knew were wanted at a certain place by a given time for the purpose of being exposed to inspection preliminarily to an auction sale. In consequence of such neglect the horses were driven, and being in soft condition on account of the feed they had were injured in appearance by the journey, and one of them was lamed. Those sold brought smaller prices than would otherwise have been realized; some were not sold. The evidence was to the effect that the journey would not have injured the horses if they had been fed differently. The carrier's liability was limited to such deterioration as the horses would have sustained if they had been in their usual condition and fit to make the journey, and for the time and labor expended on the road.² In an action

¹ Walton v. Fothergill, 7 C. & P. 392.

² Waller v. Midland, etc. R. Co., 4 L. R. Ire. 376, reversing 2 id. 520.

against a common carrier for refusing to receive and transport grain properly stored for transportation it is competent for the plaintiff to give evidence that because of such refusal his grain became heated and spoiled, notwithstanding the fact that such damage resulted from something inherent in the nature of the grain itself.¹ The deterioration in the quality of animals which are not shipped must be compensated for by the carrier.² A carrier who deviates from his agreement or instructions by dispatching the goods from the terminus of his route by a different conveyance or carrier, and thereby subjects them to increased freight, is liable for the difference.³ The refusal to transport property when the carrier is unable to store it does not authorize its owner to leave it exposed to the elements; he must secure it from damage thereby, and may recover the expense incurred in doing so.⁴ The liability of the carrier for property received for shipment attaches at the time it is received regardless of the date of the bill of lading.⁵ Where a railroad company failed to transport coal from the mine it was proper for the jury to consider the plaintiff's expenses while he was waiting expecting cars to be furnished, and any reasonable profits he could have made during the time his men were unemployed, and as to coal mined, the difference between its value at the mine and on the mar-

¹ *Pittsburgh, etc. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

² *Texas Pacific R. Co. v. Nicholson*, 61 Tex. 491.

³ *Proctor v. Eastern R. Co.*, 105 Mass. 512; *Monteith v. Merchants' Despatch Co.*, 9 Ont. App. 282, 1 Ont. 47; *Irvine v. Midland, etc. R. Co.*, 6 L. R. Ir. 55; *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. Rep. 846, 30 C. C. A. 430, stated in note to § 884.

In the Irish case cited a carrier had agreed to carry hay in large carriages at so much per load. A small quantity was delivered and placed in carriages of less capacity for which the contract price was charged. After the refusal to furnish such vehicles as the contract called for the shipper declined to deliver the balance of the hay, and eventually sold

it, after giving notice of his intention to do so, for less than he paid for it. He sued to recover the difference between the cost price and the amount he would have realized if the hay had been carried according to the contract. It was held that his damages were limited to the extra cost of the transportation growing out of the difference in the capacity of the wagons, and this applied only to the quantity of hay delivered.

⁴ *H. & T. C. R. Co. v. Smith*, 63 Tex. 322; *The Flash, Abb. Adm.* 119; *St. Louis, etc. R. Co. v. Neel*, 59 Ark. 279, 19 S. W. Rep. 963; *Inman v. St. Louis, etc. R. Co.*, 14 Tex. Civ. App. 39, 55, 37 S. W. Rep. 37.

⁵ *St. Louis, etc. R. Co. v. Neel*, *supra*.

ket; but loss of trade was not an element of damage.¹ If property which a carrier has refused to carry remains in the possession of the owner he cannot recover interest paid for money borrowed nor the cost of insuring the property.²

§ 903. Must respond for negligent delay; proximate cause. A carrier is liable for damages resulting from delay in transportation where he fails to convey and deliver within the time fixed by his agreement.³ In the absence of any special contract the law implies an agreement on his part to transport property within a reasonable time.⁴ The actual cause of delay, in the latter case, is open to inquiry and explanation, and unless the carrier be at fault he is not liable for the damages which ensue. He is bound to reasonable diligence; accident or misfortune will excuse him.⁵ A carrier by river navigation, who, owing to the low water, is unable to

¹ *Louisville & N. R. Co. v. Queen City Coal Co.*, 13 Ky. L. Rep. 832 (Ky. Super. Ct.). See p. 2683.

² *Inman v. St. Louis, etc. R. Co.*, *supra*.

³ *Harmony v. Bingham*, 1 Duer, 209; *Wilson v. York, etc. R. Co.*, 18 Eng. L. & Eq. 557, note; *Cowley v. Davidson*, 13 Minn. 92; *Sangamon, etc. R. Co. v. Henry*, 14 Ill. 156; *Leach v. New York, etc. R. Co.*, 89 Hun, 377, 35 N. Y. Supp. 305.

The action may be brought on the contract or for neglect of duty; in either case the measure of recovery is determined by the same principles. *Baltimore & O. R. Co. v. Pumphrey*, 59 Md. 390.

If the action is on the contract the breaking down of the carrier's train is not an excuse for the non-performance of its contract. *Gann v. Chicago Great Western R. Co.*, 72 Mo. App. 34.

⁴ *Louisville, etc. R. Co. v. Brinley*, 17 Ky. L. Rep. 9, 29 S. W. Rep. 305; *Denman v. Chicago, etc. R. Co.*, 52 Neb. 140, 71 N. W. Rep. 967; *Wells Fargo Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. Rep. 824; *Johnson v. East Tennessee, etc. R. Co.*, 90 Ga.

810, 17 S. E. Rep. 121; Story on Bailments, § 554a; *Ward v. New York Central R. Co.*, 47 N. Y. 29; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Bowman v. Teal*, 23 Wend. 306, 35 Am. Dec. 562; *Vicksburg, etc. R. Co. v. Ragsdale*, 46 Miss. 458.

⁵ *Newport News, etc. Co. v. Mercer*, 96 Ky. 475, 29 S. W. Rep. 301; *Louisville & N. R. Co. v. Queen City Coal Co.*, 13 Ky. L. Rep. 832 (Ky. Super. Ct.); *Geismer v. Lake Shore, etc. R. Co.*, 102 N. Y. 563, 7 N. E. Rep. 828, 55 Am. Rep. 837; *Haas v. Kansas City, etc. R. Co.*, 81 Ga. 792, 7 S. E. Rep. 629; *Lake Shore, etc. R. Co. v. Bennett*, 89 Ind. 457; *International, etc. R. Co. v. Tisdale*, 74 Tex. 5, 11 S. W. Rep. 900, 15 Am. St. 813; *Wibert v. New York & E. R. Co.*, 12 N. Y. 245; *Pittsburg, etc. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422; *Conger v. Hudson River R. Co.*, 6 Duer, 375; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Steadman v. Western Transportation Co.*, 48 Barb. 97; *Blackstock v. New York & E. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *Nashville, etc. R. Co. v. Jackson*, 6 Heisk. 271; *East Tennessee & C. Co. v. Nelson*, 1 Cold. 272; *Lipford v.*

proceed to the end of the voyage, may unload and store the goods at an intermediate point during the existence of the obstruction, but he is liable for the expense thereof and is bound to take care of them whilst so detained.¹ When a carrier is liable for a negligent delay in the transportation and [214] delivery of goods intrusted to him, he is liable for such proximate damages as naturally result therefrom,² including reasonable expenses incurred because thereof.³ The Alabama court was not in doubt as to the liability of a carrier for all damage referable to a negligent prolongation of the transportation through its natural effect upon the physical condition or latent vicious propensities of the animals being carried, whereby they are reduced in weight or strength more than they would have been had prompt carriage and delivery been made, and injure each other in consequence of viciousness aroused by the excess of their confinement beyond the time necessary for transportation and delivery.⁴

Where the delivery of a package of confederate money was prevented by the war and its return to the consignor made impossible by the same cause, though reasonable efforts were made to accomplish the latter, the carrier thereafter ceased to be such and became a bailee. Its duty was to return the money on demand after the restoration of peace. It was not liable for interest during the war, nor for the depreciation in the value of the currency.⁵ Where a telegraph company negligently delayed to transmit money to pay a note until the day following the protest thereof, it was held not to be liable

Charlotte, etc. R. Co., 7 Rich. 409; Faulkner v. South Pacific R. Co., 51 Mo. 311.

On the removal of an impediment to the transportation of goods, or as soon as it can reasonably be overcome, the carriage must be completed without further delay. Railroad Co. v. O'Donnell, 49 Ohio St. 489, 502, 32 N. E. Rep. 476, 34 Am. St. 579.

¹ Bennett v. Byram, 38 Miss. 17, 75 Am. Dec. 90; Braithwaite v. Power, 1 N. D. 455, 48 N. W. Rep. 354.

² Colvin v. Jones, 3 Dana, 576;

Briggs v. New York Central R. Co., 28 Barb. 515; Hadley v. Baxendale, 9 Ex. 341; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390; Tebbs v. Cleveland, etc. R. Co., 20 Ind. App. 192, 50 N. E. Rep. 486; Leach v. New York, etc. R. Co., 89 Hun, 377, 35 N. Y. Supp. 305.

³ San Antonio & A. P. R. Co. v. Josey, 71 S. W. Rep. 606.

⁴ Richmond & D. R. Co. v. Trousdale, 99 Ala. 389, 13 So. Rep. 23, 42 Am. St. 69.

⁵ Caldwell v. Southern Exp. Co., 1 Flip. 85.

for damages to the credit of the maker in the absence of proof of pecuniary loss.¹ A shipper who incurs liability for demurrage to a railroad company in consequence of a ship not being ready to have property loaded may recover from the shipowner, though it was unusual to deliver property by cars and the carrier was not informed that the delivery would be so made.² According to the weight of authority, a carrier who neglects to transport grain stored in an elevator is not responsible for its destruction by fire while it remains there. The fire, not the negligence, is the proximate cause of the loss.³ The opposing view is strongly maintained in several courts.⁴

§ 904. Limitation of liability by contract. Carriers may, to some extent, varying in the different states, limit their common-law liability by contract, provided the contract is just and reasonable in the eye of the law.⁵ The general current of

¹ *Smith v. Western U. Tel. Co.*, 150 Pa. 561, 24 Atl. Rep. 1049.

² *Welch v. Anderson*, 8 T. L. Rep. 119.

³ *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. 852. But see § 37.

The view of the Vermont court is in harmony with that held in *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. New York, etc. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Railroad Co. v. Reeves*, 10 Wall. 176; *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Michigan, etc. R. Co. v. Burrows*, 33 Mich. 6; *McVeagh v. Atchison, etc. R. Co.*, 3 N. M. 327, 5 Pac. Rep. 457.

⁴ *Hernsheim v. Newport News & Mississippi Valley Co.*, 18 Ky. L. Rep. 227, 35 S. W. Rep. 1115, citing *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 59.

In opposition to the rule of the Vermont case are *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, and several earlier cases in that state; *Michigan, etc. R. Co. v. Curtis*, 80 Ill. 324; *Wolf v. American Exp. Co.*,

43 Mo. 421, 97 Am. Dec. 406; *Davis v. Wabash, etc. R. Co.*, 89 Mo. 340, 58 Am. Rep. 117; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; and, it seems, *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631. See §§ 37, 38.

⁵ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Alair v. Northern Pacific R. Co.*, 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. 588, 19 L. R. A. 764; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534; *Kellerman v. Kansas City, etc. R. Co.*, 136 Mo. 177, 34 S. W. Rep. 41; *Johnstone v. Richmond, etc. R. Co.*, 39 S. C. 55, 12 S. E. Rep. 512; *Duntley v. Boston & M. R.*, 66 N. H. 263, 20 Atl. Rep. 327, 9 L. R. A. 449; *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. Rep. 328, 49 Am. St. 610, 9 L. R. A. 453; *Davis v. Central Vermont R. Co.*, 66 Vt. 290, 29 Atl. Rep. 313, 44 Am. St. 852; *Schaller v. Chicago & N. R. Co.*, 97 Wis. 31, 71 N. W. Rep. 1042; *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 86 N. W. Rep. 176; *Jennings v. Smith*, 106 Fed. Rep. 139, 45 C. C. A. 249; *O'Malley v. Great Northern R.*

authority is to the effect that contracts which exempt them from the consequences of their negligence or misconduct, or that of their agents or servants, are not just and reasonable, but are void.¹ In New York, and to some extent in Illinois,

Co., 86 Minn. 380, 90 N. W. Rep. 974. See *Railway v. Cravens*, 57 Ark. 112, 20 S. W. Rep. 803, 38 Am. St. 217, 18 L. R. A. 527; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162; *Illinois Central R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 30 So. Rep. 43; *Hughes v. Pennsylvania R. Co.*, 202 Pa. 222, 51 Atl. Rep. 990; *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595, 59 S. W. Rep. 949; *Hutchinson on Carriers* (2d ed.), ch. 7; § 926, *infra*.

¹ *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469; *East Tennessee, etc. R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *St. Louis, etc. R. Co. v. Lesser*, 46 Ark. 236; *Rosenfeld v. Peoria, etc. R. Co.*, 103 Ind. 121, 2 N. E. Rep. 344, 53 Am. Rep. 500; *Kansas City, etc. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. Rep. 821, 46 Am. Rep. 104; *McFadden v. Missouri Pacific R. Co.*, 92 Mo. 343, 4 S. W. Rep. 689, 1 Am. St. 721; *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31; *Merchants' Dispatch Transportation Co. v. Bloch*, 86 Tenn. 392, 6 S. W. Rep. 881, 6 Am. St. 847; *Southern Pacific R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. Rep. 815; *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. Rep. 244, 42 Am. Rep. 713; *Reno v. Hogan*, 12 B. Mon. 63, 54 Am. Dec. 513; *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 97 Am. Dec. 179; *Louisville, etc. R. Co. v. Hodges*, 9 Bush, 645, 15 Am. Rep. 740; *Rhodes v. Louisville, etc. R. Co.*, 9 Bush, 688; *Welsh v. Pittsburg, etc. R. Co.*, 10 Ohio St. 65, 75 Am. Dec. 490; *Powell v. Pennsylvania R. Co.*, 32 Pa. 414, 75 Am. Dec. 564; *Camden, etc. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Golday v.*

Pennsylvania R. Co., 30 Pa. 242, 72 Am. Dec. 703; *Empire Transportation Co. v. Wamsutta O. R. & M. Co.*, 63 Pa. 14, 3 Am. Rep. 515; *Farnham v. Camden & A. R. Co.*, 55 Pa. 53; *American Exp. Co. v. Sands*, *id.* 140; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *The Pacific, Deady*, 17; *York Manuf. Co. v. Illinois Central R. Co.*, 1 Biss. 377; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Michigan, etc. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Bank v. Adams Exp. Co.*, 93 U. S. 174; *Welch v. Boston, etc. R. Co.*, 41 Conn. 333; *Jacobus v. St. Paul, etc. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360; *Moses v. Boston, etc. R. Co.*, 24 N. H. 71, 55 Am. Dec. 222; *Bodenham v. Bennett*, 4 Price, 31; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Jones v. Voorhees*, 10 Ohio, 145; *Lee v. Raleigh, etc. R. Co.*, 72 N. C. 236; *Ashmore v. Pennsylvania Steam Towing & T. Co.*, 28 N. J. L. 180; *Atchison, etc. R. Co. v. Washburn*, 5 Neb. 117; *Ketchum v. American Exp. Co.*, 52 Mo. 390; *Lupe v. Atlantic, etc. R.*, 3 Mo. App. 77; *School District v. Boston, etc. R. Co.*, 102 Mass. 552, 3 Am. Rep. 502; *Sager v. Portsmouth, etc. R. Co.*, 31 Me. 228, 50 Am. Dec. 659; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Little v. Boston, etc. R. Co.*, 66 Me. 239; *Goggin v. Kansas, etc. R. Co.*, 12 Kan. 416; *Railroad Co. v. Pratt*, 22 Wall. 123; *Alair v. Northern Pacific R. Co.*, 53 Minn. 160, 165, 19 L. R. A. 764, 54 N. W. Rep. 1072, 39 Am. St. 588, and local cases cited; *Fairchild v. Philadelphia, etc. R. Co.*, 148 Pa. 527, 24 Atl. Rep. 79; *Lang v. Pennsylvania R. Co.*, 154 Pa. 342, 26 Atl. Rep. 370, 35 Am. St. 846, 20 L. R. A. 360; *Bal-*

contracts limiting the carrier's liability for negligence or misconduct of their servants and agents are valid and effectual.¹ In the former state it has been held that when general words in the contract of a carrier limiting his liability may operate without including his negligence or that of his servants, it will not be presumed that they were intended to include it; every presumption is against such an intention, and the contract will not be construed as exempting from liability for negligence [215] unless it is expressed in unequivocal terms. Accordingly, when by a contract of shipment the carrier, or railroad company, in consideration of a reduced rate, was released from liability for any damage or injury "from whatsoever cause arising," the exemption did not include a loss arising from his negligence.² Where cattle were delivered for immediate shipment, but a written contract was executed two days afterwards, in an action for damages for unreasonable delay it was held

lou v. Earle, 17 R. I. 441, 22 Atl. Rep. 113, 33 Am. St. 881, 14 L. R. A. 433; Union Pacific R. Co. v. Rainey, 19 Colo. 225, 34 Pac. Rep. 986; Louisville, etc. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. Rep. 796, 58 Am. St. 348, 38 L. R. A. 93; Hudson v. Northern Pacific R. Co., 92 Iowa, 231, 60 N. W. Rep. 608, 54 Am. St. 550; Louisville & N. R. Co. v. Owen, 98 Ky. 201, 19 S. W. Rep. 590; Leonard v. Chicago & A. R. Co., 54 Mo. App. 293; Vaughn v. Wabash R. Co., 62 Mo. App. 461; Atchison, etc. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. Rep. 968; Chicago, etc. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. Rep. 508; Dixie Cigar Co. v. Southern Exp. Co., 120 N. C. 348, 27 S. E. Rep. 73, 58 Am. St. 795; Pittsburgh, etc. R. Co. v. Sheppard, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. 732; International, etc. R. Co. v. Foltz, 3 Tex. Civ. App. 644, 22 S. W. Rep. 541; Gulf, etc. R. Co. v. Eddins, 7 Tex. Civ. App. 116, 26 S. W. Rep. 161; Houston, etc. R. Co. v. Davis, 11 Tex. Civ. App. 24, 31 S. W. Rep. 308; Williams v. Oregon Short Line R. Co., 18 Utah, 210, 54 Pac. Rep. 991, 72 Am. St. 777; Berry v. West Virginia & P.

R. Co., 44 W. Va. 538, 545, 30 S. E. Rep. 143, 67 Am. St. 781; Abrams v. Milwaukee, etc. R. Co., 87 Wis. 485, 58 N. W. Rep. 780, 41 Am. St. 55; Davis v. Chicago, etc. R. Co., 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. 935; Lamb v. Chicago, etc. R. Co., 101 Wis. 138, 76 N. W. Rep. 1123; Calderon v. Atlas Steamship Co., 170 U. S. 272, 18 Sup. Ct. Rep. 588; Baltimore & O. R. Co. v. McLaughlin, 73 Fed. Rep. 519, 19 C. C. A. 551; Railroad Co. v. Cabinet Co., 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; Thomas v. Lancaster Mills, 71 Fed. Rep. 481, 19 C. C. A. 88; Illinois Central R. Co. v. Bogard, 78 Miss. 11, 27 So. Rep. 679.

¹ Wescott v. Fargo, 63 Barb. 349, 61 N. Y. 542, 19 Am. Rep. 300; Maginn v. Dinsmore, 56 N. Y. 163; Arnold v. Illinois Central R. Co., 83 Ill. 273, 25 Am. Rep. 383; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Cragin v. New York Central R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Wilson v. Same, 27 Hun, 149.

² Mynard v. Syracuse, etc. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Holsapple v. Rome, etc. R. Co., 86 N. Y. 275.

that the contract would be the measure of the obligations of the parties from the time it was made, but that it would not merge any liability the carrier might have incurred previously, there being nothing in its terms to indicate such an intention.¹

Contracts of the nature here treated of do not exempt a carrier from liability for negligently transporting freight beyond its destination and detaining it there.² A clause in a bill of lading limiting liability "for decay of perishable articles, or injury by heat or frost," does not relieve from liability for negligence in furnishing a defective refrigerator car for the transportation of hams.³ Exceptions in a bill of lading as to the liability of the carrier have no effect upon its liability as a warehouseman.⁴ A clause exempting the carrier from liability for the negligence of the pilot, master and mariners applies only to negligence during the voyage, and not to negligence after the ship had been brought to her dock, though the relation of carrier to the property still subsisted.⁵ Where the carrier delivered goods, contrary to its duty to the consignor, the conditions upon which they were shipped ceased when the obligation to stop them *in transitu* arose, and thereafter they were held as bailee, and a condition limiting the carrier's liability did not absolve it from responsibility for the full value of the goods.⁶ A carrier cannot avail himself of a limitation of liability if he is guilty of a misfeasance, as by departing from the course agreed upon,⁷ or from the method of carriage agreed upon,⁸ or where he delivers to the wrong person,⁹ or on the unexcused failure to deliver to a connecting carrier.¹⁰ Where property is exposed, during a delay in transportation, to danger that ordinary foresight should have guarded against, the carrier cannot rely on any stipulation in its favor.¹¹

¹ Cleveland, etc. R. Co. v. Perkins, 17 Mich. 296. See St. Louis, etc. R. Co. v. Law, 68 Ark. 218, 57 S. W. Rep. 258.

² Bryant v. Southwestern R. Co., 68 Ga. 805.

³ Chicago & A. R. Co. v. Davis, 159 Ill. 53, 42 N. E. Rep. 382, 50 Am. St. 143.

⁴ Union Pacific R. Co. v. Moyer, 40 Kan. 184, 19 Pac. Rep. 639, 10 Am. St. 183.

⁵ Gleadell v. Thompson, 56 N. Y. 194.

⁶ Rosenthal v. Weir, 170 N. Y. 148, 63 N. E. Rep. 65, 54 App. Div. 275, 66 N. Y. Supp. 841.

⁷ Maghee v. Camden & A. R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

⁸ Pavitt v. Lehigh Valley R. Co., 153 Pa. 302, 25 Atl. Rep. 1107.

⁹ Erie Dispatch v. Johnson, 87 Tenn. 490, 11 S. W. Rep. 441.

¹⁰ Rawson v. Holland, 59 N. Y. 611, 17 Am. Rep. 394.

¹¹ Thomas v. Lancaster Mills, 71 Fed. Rep. 481, 19 C. C. A. 88.

Such contracts are to be strictly construed both as to the property they include¹ and the liabilities excluded by them. Though the language employed is broad enough to cover the negligence or misconduct of employees it will not be given that effect if the damage was the result of obeying an order issued by the corporation.² A carrier may exempt itself from liability for the loss of baggage after it has been delivered to a connecting carrier.³ The Illinois rule permitting a carrier to contract for exemption from liability, except in case of gross negligence, applies only to the carriage of property; it has no application to the carriage of passengers, whether on a freight train with the carrier's consent or on a passenger train.⁴ But an express messenger carried in a special car and under a special contract to attend to his employer's business is not a passenger within the rule last stated.⁵

§ 905. Illustrations of liability for delay; unmarketable property. Common carriers of goods and passengers have a public employment, and owe the public a general duty, independently of contract. They are bound to carry for all persons who apply, unless they have a reasonable excuse for refusing to do so, and to deliver goods at their destination, or at the end of their route to the next carrier, in a reasonable time according to the usual course of business, with all convenient speed.⁶ A carrier who has no notice that it is important that delivery be made at a certain time is not liable for the value of any special use prevented by an unreasonable delay.⁷ The mere omission to transport and deliver property within a reasonable time does not necessarily make the carrier

¹ *Richardson v. Chicago & A. R. Co.*, 149 Mo. 311, 50 S. W. Rep. 782, 62 Mo. App. 1.

² *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 47 Pac. Rep. 874, 52 id. 302, 40 L. R. A. 350.

³ *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. Rep. 952.

⁴ *Illinois Central R. Co. v. Beebe*, 174 Ill. 13, 59 N. E. Rep. 1019, 26 Am. St. 253, 43 L. R. A. 210; *Same v. Anderson*, 184 Ill. 294, 56 N. E. Rep. 331.

⁵ *Blank v. Illinois Central R. Co.*, 182 Ill. 332, 55 N. E. Rep. 332; *Louis-*

ville, etc. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. Rep. 796, 58 Am. St. 348, 38 L. R. A. 93.

⁶ *East Tennessee & G. R. Co. v. Nelson*, 1 Cold. 272.

⁷ *Hales v. London, etc. R. Co.*, 4 B. & S. 56; *Murrell v. Pacific Exp. Co.*, 54 Ark. 22, 14 S. W. Rep. 1098, 26 Am. St. 17; *Missouri, etc. R. Co. v. Webb*, 20 Tex. Civ. App. 481, 49 S. W. Rep. 526; *St. Louis Southwestern R. Co. v. Cates*, 15 Tex. Civ. App. 135, 38 S. W. Rep. 648; *Giachetti v. Speeding*, 15 T. L. Rep. 401.

liable for its value. He is liable for the damages caused by such omission, but the owner cannot, on the sole ground of unreasonable delay, refuse to receive the property, and recover as for its conversion.¹ The carrier is chargeable in all cases of negligent delay with the value of the ordinary use of property having a usable value, after the time when he should have made delivery at the place of destination. When property is not of a perishable nature, nor an ordinary sub- [216] ject of sale in market, nor liable to its fluctuations, but is designed for a particular purpose in a special business, the rule of damages is very different from that applicable to merchandise. For delay in the transportation of machinery, the value of its use for the time it was detained is the measure of damages.² In North Carolina if the machinery is part of a mill or manufacturing establishment, the liability extends to interest on the capital, expenses incurred in endeavoring to obtain the delayed machinery, the expenses of employees, and such other damages as were the direct and necessary result of the negligence.³ In the absence of special damage, interest may be recovered during the period of negligent delay in the transportation of money.⁴ So where there is no change in the market value during such a delay of delivery, it has been held that interest may be recovered on that value from the time

¹ St. Louis, etc. R. v. Mudford, 44 Ark. 439; Scovill v. Griffith, 12 N. Y. 509; Nettles v. South Carolina R. Co., 7 Rich. 190, 63 Am. Dec. 409; Baumbach v. Gulf, etc. R. Co., 4 Tex. Civ. App. 650, 23 S. W. Rep. 693. See Hackett v. Railroad, 35 N. H. 390, 400.

² Priestly v. Northern, etc. R. Co., 26 Ill. 205, 79 Am. Dec. 369; Texas & P. R. Co. v. Hassell, 23 Tex. Civ. App. 681, 58 S. W. Rep. 54; Gulf, etc. R. Co. v. Gilbert, 4 Tex. Civ. App. 366, 22 S. W. Rep. 760.

By rental value is meant the general rental value—not the value of a machine at a particular place, it not appearing that the carrier had notice that it was to be immediately

used there. Texas & P. R. Co. v. Hassell, *supra*.

But the carrier must have notice of the circumstances. Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; Swift River Co. v. Fitchburg R. Co., 169 Mass. 326, 47 N. E. Rep. 1015, 61 Am. St. 288; Rogan v. Wabash R. Co., 51 Mo. App. 665, 674; Gray v. St. Louis, etc. R. Co., 54 id. 666 (notice that the shipper of a steam-shovel had a contract is not enough).

³ Foard v. North Carolina R. Co., 8 Jones, 235 (53 N. C.), 78 Am. Dec. 277; Sharpe v. Southern R. Co., 130 N. C. 613, 41 S. E. Rep. 799.

⁴ United States Exp. Co. v. Haines, 67 Ill. 137.

when delivery ought to have been made.¹ Where the consignee of unmarketable property incurred expense in trying to locate it and for its transportation from the railroad station at which it should have arrived, he recovered therefor.² A factor who has accepted a draft for the goods consigned to him may maintain an action against a carrier for negligent delay in their transportation, although it resulted from directions given by the consignor after the shipment was made. His recovery cannot exceed the advances made, expenses and commissions after deducting the value of the goods when they are received.³ Where there was negligent delay in transporting the scenery and paraphernalia of a theatrical troupe, in consequence of which a performance could not be given, a recovery of the amount which would probably have been received if the performance had been given was sustained.⁴

§ 906. Liability for loss of market value, quantity or quality. The carrier is also liable for any loss on the value of the property pending his negligent delay of transportation whether it results from a decline in the market price⁵ or from intrinsic deterioration.⁶ This rule applies whether the property

¹ *Cramer v. American Exp. Co.*, 56 Mo. 524.

² *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. Rep. 1015, 61 Am. St. 288.

³ *Ober v. Indianapolis, etc. R. Co.*, 13 Mo. App. 81.

⁴ *Leach v. New York, etc. R. Co.*, 89 Hun, 377, 35 N. Y. Supp. 305.

⁵ "The term 'market value' or 'market price' is not limited to the price which an article might realize at a forced sale. It means the fair value of the property as between one who desires to purchase and one who desires to sell. It is not what could be obtained for it under peculiar circumstances, when by reason of the necessities of another more than a fair price could be realized." *Palmer v. Penobscot Lumbering Ass'n*, 90 Me. 193, 38 Atl. Rep. 108.

⁶ *Fox v. Boston & M. R. Co.*, 148 Mass. 220, 19 N. E. Rep. 223, 1 L. R. A. 702; *Sloop v. Wabash R. Co.*, 93

Mo. App. 605; *Robertson v. National Steamship Co.*, 60 N. Y. Super. Ct. 132, 17 N. Y. Supp. 459; *Tebbs v. Cleveland, etc. R. Co.*, 20 Ind. App. 192, 50 N. E. Rep. 486; *Perry v. Chicago, etc. R. Co.*, 89 Mo. App. 49; *International, etc. R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. Rep. 754; *Richmond & D. R. Co. v. Trousdale*, 99 Ala. 389, 13 So. Rep. 23, 42 Am. St. 69; *Illinois Central R. Co. v. Simmons*, 49 Ill. App. 443; *Newport News, etc. Co. v. Mercer*, 96 Ky. 475, 29 S. W. Rep. 301; *Palmer v. Penobscot Lumbering Ass'n*, 90 Me. 193, 38 Atl. Rep. 108; *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164; *San Antonio, etc. R. Co. v. Pratt*, 89 Tex. 310, 34 S. W. Rep. 445; *Inman v. St. Louis Southwestern R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. Rep. 37; *Texas & Pacific R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. Rep. 272; *The Styria*, 101 Fed. Rep. 728, 41 C.

shipped was intended to be put on the market or not,¹ and although the initial carrier's contract covered transportation only over its own line and delivery to a connecting carrier for the remainder of the distance.² This is a damage that the parties are deemed to have contemplated when contracting, and is the direct and immediate consequence of the defendant's breach. As to the decline in market value, Peckham, J., said: ³ "Where a carrier from mere negligence, from plain violation of duty, omits to transport merchandise beyond a reasonable time, and its market value falls in the mean time, the true rule of damages, in my judgment, both upon principle and authority, is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery. The rule is simple, and, though it may sometimes operate harshly, easily applied. Sagacious business men rely upon their ability to judge of the market in undertaking large commercial projects. According to their views of the market they send the merchandise by a quick or a slow carrier, and make compensation accordingly. A contrary rule would deprive [217] them of all benefit of a rapid transit. It would be left to the caprice of the carrier when to transport, and the owner could have no relief. It would be no answer to say that the owner might make a special contract for the transportation at a given time. The contract would have to contain a special provision to pay these damages or the carrier's liability would not be al-

C. A. 639; *McGill v. Grand Trunk R. Co.*, 19 Ont. App. 245; *Missouri, etc. R. Co. v. Truskett*, 2 Indian T'y, 633, 53 S. W. Rep. 444; *Shores Lumber Co. v. Starke*, 100 Wis. 498, 76 N. W. Rep. 366; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. 579, 32 N. E. Rep. 476; *Houseman v. Merchants' Dispatch Transportation Co.*, 104 Mich. 300, 62 N. W. Rep. 290; *Railroad Co. v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; *Gulf, etc. R. Co. v. Butler*, 26 Tex. Civ. App. 494, 63 S. W. Rep. 650; *Gulf, etc. R. Co. v. McCorquodale*, 71 Tex. 41, 9 S. W. Rep. 80; *The Georg Dumois*, 115 Fed. Rep. 65, 52 C. C. A. 659; *The Suffolk*, 31 Fed. Rep. 835;

The Nith, 36 id. 86; *The Flash*, Abb. Adm. 119; *East Tennessee, etc. R. Co. v. Johnson*, 85 Ga. 497; *Goldsmith v. Henderson*, 50 Fed. Rep. 567; *Illinois Central R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83. See § 909, and some observations to the contrary (probably inadvertently made), in *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461, 467.

¹ *Gulf, etc. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. Rep. 110; *Same v. Stanley*, 89 Tex. 42, 33 S. W. Rep. 109.

² *Missouri, etc. R. Co. v. Truskett*, 104 Fed. Rep. 728, 44 C. C. A. 179.

³ *Ward v. New York Central R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405.

tered. If a special contract be needed, I think it falls upon the defendant to make it, or the company will be liable for not delivering in a reasonable time. If the carrier would be liable for these damages upon a special contract to transport by a given time, he clearly would be for a violation of his duty. In the absence of any special agreement the law implies that the carrier agrees to transport in a reasonable time. That is his duty. In failing to do so he not only violates his duty, but also the contract upon which it is based. . . . It is well settled law that a carrier, on an entire failure to deliver, is liable for the market price of the goods at the time and place for delivery.¹ So as to a sale of goods. For all damages to the property while in the custody of the carrier, the measure thereof is to be settled by the market at the place for delivery. This is clearly so as to all inland carriage.² If liable for the market price at the time and place for delivery when not delivered at all, it would seem equally rational that if, by reason of the inexcusably negligent delay of the carrier, the value of the goods has depreciated in market, he should be liable to the owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case. . . . Had the goods been injured by improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, but it deprived the owner of his right to the higher market price. The defendant's negligent violation of duty thus deprived the plaintiff of his right and placed this loss upon him. In substance this loss is the same to the plaintiff as if the in-[218] jury had been done to the property itself, and thus diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person by contract or otherwise."³

¹ O'Hanlan v. Great Western R. Co., 6 B. & S. 484; Bracket v. McNair, 14 Johns. 170, 7 Am. Dec. 447; Sands v. Lilienthal, 46 N. Y. 541.

² Bracket v. McNair, *supra*.

³ Sherman v. Hudson River R. Co., 64 N. Y. 254; Ingledew v. Northern R., 7 Gray, 88; Kent v. Hudson River R. Co., 22 Barb. 278; Medbury v. New York & E. R., 26 Barb. 564; Griffin v. Colver, 16 N. Y. 489; Scott v. Boston & N. O. Steamship Co., 106 Mass. 468; Smith v. New Haven & N. R. Co., 12 Allen, 531, 90 Am. Dec. 166; Cowley

A carrier negligently in default cannot escape this measure of liability by reason of an increase in the market price after the time he might have delivered the property. The profit accruing from an accidental rise in the market belongs to the shipper, and it would be an extraordinary misapplication of the principles of justice to allow the carrier to escape all liability for its negligence and dereliction of duty by depriving the owner of the property of any recompense for the wrong done him because of the advance in price.¹

§ 907. Vindication of the rule stated. This rule is based on the principle upon which damages generally are assessed for the breach of a contract to deliver goods. It is compensation for the injury for not having the very thing, *propter rem ipsam non habitam*, at the time and place at which it should have been delivered, including the damages resulting naturally, or according to the usual course of things, from the breach of the contract itself, as well as such as may reason-

v. Davidson, 13 Minn. 92; Weston v. Grand Trunk R. Co., 54 Me. 376, 92 Am. Dec. 552; King v. Woodbridge, 34 Vt. 565; Collard v. South Eastern R. Co., 7 H. & N. 79; Wilson v. Lancashire & Y. R. Co., 9 C. B. (N. S.) 632; Wilson v. York, etc. R., 18 Eng. L. & E. 557, note; New Orleans, etc. R. Co. v. Tyson, 46 Miss. 729; Peet v. Chicago & N. R. Co., 20 Wis. 594, 91 Am. Dec. 446; Newell v. Smith, 49 Vt. 255; Sturgeon v. St. Louis, etc. Co., 65 Mo. 569; Illinois Central R. v. Cobb, 64 Ill. 128; Plummer v. Penobscot Lumbering Ass'n, 67 Me. 363; Sisson v. Cleveland & T. R. Co., 14 Mich. 489; Bazin v. Steamship Co., 3 Wall. Jr. 229; Deming v. Railroad, 48 N. H. 469, 2 Am. Rep. 207; Hackett v. B. C. & M. R., 35 N. H. 390, 400; Faulkner v. South Pacific R. Co., 51 Mo. 311; Devereaux v. Buckley, 34 Ohio St. 16, 32 Am. Rep. 342; Kansas Pacific R. Co. v. Reynolds, 8 Kan. 623; St. L., etc. R. v. Mudford, 48 Ark. 502, 3 S. W. Rep. 814; Birney v. Wabash, etc. R. Co., 20 Mo. App. 470; Hamilton v. Western North Carolina R. Co., 96

N. C. 398, 3 S. E. Rep. 164; East Tennessee, etc. R. Co. v. Hale, 85 Tenn. 69, 1 S. W. Rep. 620; Tompkins v. Kanawha Board, 21 W. Va. 227; Goldsmith v. Henderson, 50 Fed. Rep. 567.

In a recent case this measure of liability was imposed upon the carrier who wrongfully detained a large number of cattle on a claim for demurrage to a small amount. It was contended that it was the shipper's duty to have made an offer of two or three of the cattle as security for the claim. But the court held that he was not bound to do so in order to mitigate the damages for which the carrier might be liable or to pay the demurrage under protest. Such an offer should have come from the carrier. The Suffolk, 81 Fed. Rep. 835.

¹ Morrison v. I. & V. Florio S. S. Co., 36 Fed. Rep. 569; The Sabioncello, 8 Bene. 90; Rodocanachi v. Milburn, 18 Q. B. Div. 67. See § 919, where some cases to the contrary, in principle, are discussed.

ably be supposed to have been in the contemplation of both parties when they contracted as the probable result of a breach of it.¹ When there is negligent delay in transportation the thing which the owner does not receive when he is entitled to it is goods or their value at the time they were due. The thing which he afterwards receives is goods of a value at a different time, which is not necessarily the same value. The general price of such goods in the market is the appropriate, if not the only, legal evidence of their value at any time in question. If [219] their market value is less when they are actually delivered than it was when they ought to have been delivered, the fall in that value is not a cause, but an incident or consequence of the diminution in their intrinsic or merchantable value, and evidence of the degree of the injury which the owner has suffered by the wrongful act of the carrier. A diminution in the market value of goods by the operation of general laws is an actual loss of a portion of their real and intrinsic value, as much as a change for the worse in their quality.² A fall in the market is no more a cause of the diminished value of the goods than a fall in a thermometer or barometer is the cause of a change in the weather.³ If a common carrier unreasonably delays to transport and deliver goods intrusted to him for carriage, and their value meanwhile falls, the measure of damages in an action against him is the difference between their market value at the time when and the place where they ought to have been delivered and such value at that place on the day when they were delivered; although there was no contract to deliver them within any certain time, and they were not intended to be used for any special purpose at any fixed time, and the carrier finally delivered them in the same condition as when they were received by him.⁴ The principle and the measure of damages are the same when the diminished value at the time of the delayed delivery has resulted from

¹ *Cutting v. Grand Trunk R. Co.*, 48 Ark. 502, 508, 3 S. W. 13 Allen, 381; *Hadley v. Baxendale*, Rep. 814, and is cited in *Houseman v. Merchants' Despatch Transportation Co.*, 104 Mich. 300, 62 N. W. Rep. 162, 163.

² *Stone v. Codman*, 15 Pick. 301; 290.

Monteith v. Merchants' Despatch Co., 3 *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381.

9 Ont. App. 282. The text is quoted with approval in *St. L. etc. R. v.* ⁴ *Id.*

the perishable nature of the property.¹ In case of shipping live animals the losses for negligent delay might include not only such as arise from fall in the market, but shrinkage or injury to them occasioned by detention, and care and expense bestowed upon them.² The recovery for shrinkage must be limited as to time to what the animals lost between the day they should have reached their destination and the first day thereafter on which they can be sold at a fair price,³ and for expense to the time of their arrival.⁴ If goods intended for the market for a particular season do not reach the consignee until the season is over and the carrier neglects to properly care for them, in consequence of which the goods become worthless, their value may be estimated as of such time rather than at a previous period when they might have been delivered.⁵

§ 908. Same subject. The damages measured and [220] recoverable by this rule are not consequential, requiring notice to the carrier that the goods were contracted to be shipped for the purpose of sale,⁶ nor are they special. This is very clearly

¹ *Wilson v. Lancashire, & Y. R. Co.*, 9 C. B. (N. S.) 632; *Ingledeu v. Northern R.*, 7 Gray, 86; *Illinois Central R. Co. v. Owens*, 53 Ill. 391; *Hewett v. Chicago, etc. R. Co.*, 63 Iowa, 611, 19 N. W. Rep. 790.

² *Sangamon, etc. R. Co. v. Henry*, 14 Ill. 156; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166; *Sturgeon v. St. Louis, etc. R. Co.*, 65 Mo. 569; *Chicago, etc. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70; *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *Welsh v. Railroad Co.*, 10 Ohio St. 65, 75 Am. Dec. 490; *Porterfield v. Humphreys*, 8 Humph. 497; *Black v. Camden, etc. R. Co.*, 45 Barb. 40; *Kansas Pacific R. Co. v. Nichols*, 9 Kan. 235; *Wilson v. Hamilton*, 4 Ohio St. 722; *Ayres v. Chicago & N. R. Co.*, 71 Wis. 372, 37 N. W. Rep. 432, 5 Am. St. 226; *Newport News, etc. Co. v. Mercer*, 96 Ky. 475, 29 S. W. Rep. 301; *Gulf, etc. R. Co. v. Hume*, 87 Tex. 211, 27 S. W. Rep. 110; Mis-

souri, etc. R. Co. v. Truskett, 2 Indian Ty. 633, 53 S. W. Rep. 444.

³ *Ayres v. Chicago & N. R. Co.*, 71 Wis. 372, 37 N. W. Rep. 432, 5 Am. St. 226, 75 Wis. 215, 43 N. W. Rep. 1122; *Glasscock v. Chicago, etc. R. Co.*, 86 Mo. App. 114.

⁴ *Louisville & N. R. Co. v. Trent*, 16 Lea, 419.

⁵ *Baumann v. New York, etc. R. Co.*, 35 N. Y. Misc. 223, 71 N. Y. Supp. 632.

⁶ *Gulf, etc. R. Co. v. Pettit*, 3 Tex. Civ. App. 588, 23 S. W. Rep. 761.

This rule has been applied where damages were sought for delay in shipping samples of cotton. "The object of the shipment of samples of cotton from an interior market to the market at Galveston is too well known to require either averment or proof. It is a matter of common information that samples are so shipped to make sales in the market to which the shipment is made, and not for

illustrated in an English case. A cap manufacturer at C. bought cloth at H., for the purpose of making it into caps which he was in the habit of selling through the country by means of travelers. The cloth was delivered to the defendants on the 15th of March to be carried by their railway to M.; but through the negligence of the company's servants it was sent to another station, and did not reach the plaintiff until the 12th of April, which was too late for his purpose; that is, he did not receive the cloth in time to manufacture it into caps, the season having passed before he could execute the orders obtained by his travelers. According to his uncontradicted evidence the cloth thereby became of less value to him by 100%. He also claimed by way of damages the loss of the profits he would have made by the sale of caps that season if the cloth, which could not be procured at C., had arrived in due time. On the trial the jury appealed to the judge for information as to how they were to assess the damages, and were informed by him that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time. Acting upon that information [223] the jury found a verdict for the plaintiff for 80% damages.¹

sale of the samples themselves. It would not be unreasonable to say that the parties contemplated such object by the shipment, and that a breach of the carrier's contract would involve liability for decline in the price of cotton — the bales of cotton represented by the samples." *Wells-Fargo Exp. Co. v. Samuels*, 11 Tex. Civ. App. 15, 31 S. W. Rep. 305.

Devereaux v. Buckley, 34 Ohio St. 16, 32 Am. Rep. 342, is opposed. This point was mentioned, but not decided, in *Smith v. New Haven & N. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166, but was expressly decided in accordance with the text in *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *Deming v. Railroad Co.*, 48 N. H. 455, 2 Am. Rep. 267. This is the rule in Scotland. *Keddie v. North British R. Co.*, 14 Rettie, 233.

¹ The expression "loss of the sea-

son" being ambiguous, on a rule *nisi* to reduce the verdict to a nominal sum *Williams, J.*, said: "If by the expression 'loss of the season' the jury were induced in assessing the damages to take into their consideration the profits which the plaintiff might have made by the manufacture and sale of caps if the material had reached his hands in due time, we are all of the opinion that they would have misconceived the proper principle on which the damages were to be estimated, and that there [221] would be a failure of justice if the verdict were allowed to stand. But if we are to assume the meaning of 'loss of the season' to be that the goods, by reason of their not having been delivered in due time, had become lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff

A similar decision was made in the court of exchequer about the same time. The plaintiff, a hop grower in Kent, sent to London by the defendant's railway some pockets of hops consigned to a purchaser. The defendants kept the hops for

because the articles to be made up would be less marketable as the time for finding customers had gone by, and so the goods were left on the plaintiff's hands, deteriorated or diminished in value, then we do not think there was any mistake in point of law in the direction of the learned judge." On the question whether the plaintiff was entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered, he said: "I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise great injustice would be done; for instance,—to put a familiar case,—suppose a tradesman at a fashionable watering-place sends an order to a warehouseman in London for a quantity of ribbons or other fancy goods, and they are delivered to a carrier so that they ought to reach him at the beginning of the season, and through the negligence of the carrier their delivery is delayed until the season is over, so that the opportunity for offering them for sale is lost and, as their novelty or fashion is gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence?"

. . . It was evidence for the jury that the defendants by reason of their negligence delivered the cloth to the plaintiff at a time when its value was less by 100% than it would have been if they had been guilty of no negligence. But it is contended on the part of the defendants that what-

ever may be the dictates of justice in the matter such damages cannot be awarded to the plaintiff without violating the rule laid down by the court of exchequer in *Hadley v. Baxendale*, 9 Ex. 341. It seems to me, however, that we shall not violate that rule if we hold that the plaintiff is entitled to recover damages in respect to such deterioration in value. It is a damage which [222] fairly and naturally, in the usual course of things, may be said to arise from the defendant's negligence; for if the goods are not delivered at the time they are expected the delay must necessarily superinduce a considerable diminution in their value in the plaintiff's hands." Byles, J., concurred in the foregoing opinion, and added, referring to *Hadley v. Baxendale*, which he said must decide the case in hand: "It is there said that 'where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' I agree . . . that, as the defendants here knew nothing about the nature of the goods, or of the plaintiff's occupation, profits which might have accrued from making up the cloth into caps and selling them clearly were not within the contemplation of both

some days on their premises in an open vat, whereby a small portion was stained by wet, and the purchaser rejected the whole, as he was entitled to do by the custom of the market. The plaintiff dried the stained hops, and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time their market price had considerably fallen from what it was at the time they ought to have been delivered. Martin, B., said: "It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65%. If that be not a direct, immediate and necessary consequence of the defendant's breach of duty it is difficult to understand what would be. It is said that the defendants had no notice of the purpose for which the hops were sent to London; but I think they must have known that they were sent for one of two purposes: either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for

parties at the time they made the contract as the probable result of the breach of it; and therefore loss of profits could not properly enter into the consideration of the jury in assessing the damages here. The difficulty, however, is to distinguish between loss of profits and the difference between the exchangeable value of the goods when received by the carriers, or rather when they ought to have been delivered, and when they were actually delivered. Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods; whereas, diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves. When thoroughly considered, this, I think, will be found to be a sound distinction. It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sus-

tained; it is admitted, also, that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value should not also be taken into account." *Wilson v. Lancashire & Y. R. Co.*, 9 C. B. (N.S.) 632; *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *Schulze v. Great Eastern R. Co.*, 19 Q. B. Div. 30. In the last case a parcel containing samples was delivered to a carrier to be forwarded and notice of its contents was given. It did not reach its destination until the close of the season during which the samples could be used for procuring orders, and in consequence they became worthless; others like them could not be procured in the market. The case was considered to be within the rule of that quoted from, and the damages were measured by the value of the samples to the plaintiff at the time they should have been delivered.

profit.”¹ It is sometimes sought to avoid the general rule of liability by adding qualifying conditions to bills of lading. The judicial mind does not view such conditions with much favor. Thus, where it was provided that the amount of loss or damage should be computed at the place and time of shipment, it was construed not to relate to a loss resulting from delay to transport the goods, but rather to injury sustained by them in shipment.²

§ 909. **Application of the rule to ocean carriage.** In a later case in the probate division the question came up whether a diminution of market value during the time delivery of a cargo shipped in India for London was delayed by a defect of the ship's engine could be allowed as an item of damages, as well as a diminution of quantity by leakage of sugar. The latter only was allowed. The question upon the other item, as stated by the court, was whether, if there is undue delay on a long voyage at sea, it follows as a matter of course that if between the time when the goods ought to have arrived and the time when they did arrive there has been a fall in the price of such goods, damages can be recovered by the consignee. It was answered in the negative.³ The action in which this rule

¹Collard v. Southeastern R. Co., 7 H. & N. 79; East Tennessee, etc. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. Rep. 809.

²Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164.

³The Parana, 2 Prob. Div. 118, reversing on this question the decision of Sir Robert Phillimore in the admiralty division. 1 id. 452. Mellish, L. J., said: “There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long sea voyage, where there has been what may be called a merely accidental fall in the price between the time when the goods ought to have arrived and the time when they did arrive — no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to

be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish are sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if by reason of breach of contract they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time that may be ground for giving damages for their arriving too late and selling for a

was announced was on the shipping contract. A more recent case applies the principle to an action of tort wherein damages were sought on account of loss of the market against a vessel

lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower. But besides the cases of consignments of goods to be sold at a particular market, cases were cited — and it was on them that the court below proceeded — of the carriage of goods by railway where damages on account of a fall in the market have been recovered. It is said that there can be no difference between the carriage of goods by railway and the carriage of goods by sea, but it appears to me there may be a very material difference between the two cases. When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the courts treated them as if the goods were consigned for the purpose of immediate sale. No doubt if goods are consigned to a railway company under such circumstances, the railway company may be reasonably supposed to know that they are consigned for the purpose of immediate sale, and if by breach of contract on the part of the company they do not arrive in time to be sold when the owner intends them to be sold, that may possibly be a ground for giving damages for what is called 'loss of market.'

"The strongest case in favor of the decision of the court below is that of *Collard v. South Eastern R. Co.* (7 H. & N. 79), but there was a good deal of doubt about that case. The goods in that case were hops, and

were consigned to a hop merchant in fulfillment of an actual contract. The damages arising from the non-fulfillment of that particular contract could not be recovered, because, of course, the railway company would know nothing about it; but the court came to the conclusion that the case must be treated as if the goods were consigned for the purpose of immediate sale. There were apparently very violent fluctuations going on in the hop market at that time, and it might be taken that the owner had selected his own time for selling his hops when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company — which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops (the hops were damaged and had to be dried), — it might be considered that there was a loss of market." The same comment was made on *Ward v. New York C. R. Co.*, 47 N. Y. 29. And the opinion continues: "The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered we must come to two conclusions — first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of these two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst

which through negligence collided with that of the plaintiff.¹ This principle, according to a majority of the Ontario high court and the unanimous opinion of the Ontario court of appeal, does not apply to ocean carriers where the delayed de-

they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bill and insurances is a common mercantile contract made every day. It may be that, from not having samples of the goods, or from not knowing what is the particular quality of the goods, the consignee may have difficulty in selling them until they arrive, but that would not affect the question. Nor would it signify that the goods no longer belonged to the original consignee, but to a man who had acquired them by the assignment of the bill of lading whilst the goods were at sea. We were told that in this case the plaintiff was a person who had advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that or is the purchaser would make no difference. It was said that the goods were sold, and that if the person who sells them does not suffer the damage then the purchaser would suffer the damage. But this is pure speculation. If a man purchases goods while they are at sea no person can say for what purpose he purchases them. He may purchase them because he thinks that if he keeps them for six months they will sell for a better sum, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchases them. In this particular

case the plaintiff did not sell the goods when they arrived, for he sold them some months afterwards, when a further fall had taken place in the market. Of course, he does not seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time. Therefore it seems to me that to give these damages would be to give speculative damages—to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time. According to the principles on which the courts have acted in all such speculative and uncertain cases damages ought not to be recovered." See *The Success*, 7 Blatch. 551.

The preceding English and American cases which have been cited do not appear to proceed on the principle that damages are given "for loss of market" when the market price declines during the delay of delivery; but on the principle that if the property is worth less when it is delivered after a negligent delay the owner suffers a loss proportioned to the diminution of market value whether he sells or not; that he sustains an injury as real as though the quality had been deteriorated, or the quantity reduced; in the language of Byles, J., already quoted, "diminu-

¹ *The Notting Hill*, 9 Prob. Div. 105.

livery is the result, not of ocean transit, but of transmission to a wrong port. In such a case the general rule applies.¹ In a case decided by the English court of appeal in August, 1902, some of the goods carried were destined for an alien enemy, without the knowledge and consent of the shippers of other goods on the same vessel. The vessel was seized and detained by reason of having the first-mentioned goods on board. So carrying them was a breach of duty towards the shippers of the other goods and rendered the carrier liable for damages for the resulting delay caused by a fall in market value.² The contention of the defendant was that his liability was limited to interest on the value of the goods from the time they should have been delivered down to the date of delivery. The court did not understand that any such doctrine was declared by *The Parana*.³ It was said that there can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages, and the consequent uncertainty as to the times of arrival, may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that as a general rule damages for loss of market by late delivery are not recoverable from the carrier by sea. It is certainly not a rule of law, it is only an inference of fact, that from the circumstances of the case no reasonable assumption as to the state of the market at the time of arrival could have been a factor in the contract between the parties. But as the means of sea transit improve, voyages of three and four weeks' duration may be, and are now, accomplished with almost absolute certainty, and the state of the market at the reasonably calculated date of arrival may well be a vital factor present to the minds of both

tion in exchangeable value is only something subtracted from the inherent value of the articles themselves." A sale is no more necessary to make the latter loss manifest than it is to sell the residue when a part has been lost in consequence of the delay in order to demonstrate that a portion is less valuable than the whole. The qualification of the rule laid down in the text in *Peet v. Chi-*

cago & N. R. Co., 20 Wis. 624, 91 Am. Dec. 446, appears to be a departure from the general course of decision in requiring the property to be sold at the depreciated price.

¹ *Monteith v. Merchants' Despatch Co.*, 1 Ont. 47, 78, 9 Ont. App. 282.

² *Dunn v. Bucknall*, [1902] 2 K. B. 614.

³ *Supra*.

parties at the time of making the contract. Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases.

Where there was a delay of fourteen days in shipping a cargo of coal, the carrier not having notice of any special circumstances, and a decline in price not having been shown, the shipper recovered the difference between the rate of freight contracted for and the rate which could have been obtained at the time the delayed vessel began her voyage.¹ While a shipowner is liable for the deterioration of a cargo which was prepared for loading in anticipation of the arrival of the vessel, he is not liable to the charterer for the damages sustained by the cargo after it was loaded in an unfit condition for transportation, in consequence of which it further deteriorated, nor for the sum which the vessel might have earned as freight for the voyage under a contract with a third party if the cargo had been delivered in good condition.²

§ 910. Delay after notice of arrival. Damages measured by the depreciation in the value of the property may be recovered for negligent delay of delivery after its arrival at the place of destination; as where it is occasioned by the carrier's neglect to give the consignee notice of the arrival, when necessary,³ or when he there exposes it to actual injury, and thereby necessitates delay to prepare it for market.⁴

§ 911. Increased cost of obtaining property. It being the duty of the carrier to deliver the property to the consignee upon application and payment of freight, if he wrongfully refuses to do so and obliges the consignee to repeat his application, he is entitled to be compensated for the time and expense

¹ *Giachetti v. Speeding*, 15 T. L. Miss. 729; *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. Rep. 425, 46 Am. Rep. 401.

² *The Georg Dumois*, 115 Fed. Rep. St. 208; *Fenner v. Buffalo, etc. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709.

³ *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. Rep. 402; *Collard v. Southeastern R. Co.*, 7 H. & N. 79. See § 907.

New Orleans, etc. R. Co. v. Tyson, 46

of the extra journey.¹ Where expenses have been incurred, and time and trouble taken in looking for property the delivery of which has been delayed under circumstances justifying such search, they may be recovered for, if the delay has been caused by the carrier's negligence.² The shipper or consignee can, however, recover only for such trouble and expenses as result directly and necessarily from the delay and negligence of the carrier. These he may recover in addition to the loss by depreciation during such delay.³ Where the defendant had failed to carry and deliver iron according to agreement, the plaintiff was held entitled to recover the expenses incurred in searching for it, and the charges he had to pay to get it.⁴ He cannot recover for the time and expenses of going to the place of delivery and waiting there without showing that the carrier had notice at the time of contracting that such journey would be made to receive the goods.⁵ The

¹ Waite v. Gilbert, 10 Cush. 177.

² Deming v. Railroad Co., 48 N. H. 455; Murrell v. Pacific Exp. Co., 54 Ark. 22, 14 S. W. Rep. 1098, 26 Am. St. 17; Savannah, etc. R. Co. v. Pritchard, 77 Ga. 412, 1 S. E. Rep. 261, 4 Am. St. 92; Giachetti v. Speeding, 15 T. L. Rep. 401.

In Davis v. Cincinnati, etc. R. Co., 1 Disney, 23, the action was brought for damages for the carrier's failure to deliver within a reasonable time a boiler constructed to be used in a steam saw-mill. It was admitted that there had been a breach of the contract for the delivery, and the contest was as to the proper measure of damages. The plaintiff claimed, and was held entitled to recover, first, for the trouble and expense incurred in traveling to ascertain what had become of the boiler, which had been detained about a month beyond the period when it should have been delivered; second, the expenses incurred in the preparations for connecting the boiler with the fixtures and machinery of the saw-mill, it appearing obvious from the character of the construction of the boiler

and the point of its destination that it was intended for use, and not for sale in the market.

In a Wisconsin case it was ruled that the fact that a machine was shipped by a manufacturer to a manufacturing company was not sufficient notice to the carrier that the company intended to use it in its business. "Should we presume—as we have no right to do—that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use." Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725. See § 905, note.

³ Deming v. Railroad Co., 48 N. H. 455; Benson v. New Jersey R. & T. Co., 9 Bosw. 412; Rankin v. Pacific R. Co., 55 Mo. 167; Richmond v. Union Steamboat Co., 87 N. Y. 240. See Simpson v. London & N. R. Co., 1 Q. B. Div. 274.

⁴ Farwell v. Davis, 66 Barb. 73; Chicago & N. R. Co. v. Stanbro, 87 Ill. 195; Evans v. Rudy, 34 Ark. 383.

⁵ Briggs v. New York Central R. Co., 28 Barb. 515; Woodger v. Great

principle of compensation is flexible, and can be readily applied to do justice according to the varying circumstances of particular cases. A carrier having undertaken the transportation of peas shipped in Canada for New York, by his negligent delay was stopped on his way by the freezing of the lakes, and would be detained through the season; he refused to forward the peas by rail or deliver them to the owner except on payment of freight; the owner replevied them and judiciously sent them to the Boston market, and was held entitled to recover the difference between the net proceeds of the sale at Boston and their market value at New York at the time they should have been delivered.¹ If the goods are being [228] transported for an illegal traffic, and the carrier is guilty of unnecessary delay or tardiness, he is not liable for damages resulting from their being thereby exposed to seizure, and actually seized by the government by reason of such illegality.² But where a carrier contracted to transport wheat from Canada to the United States by a certain day, when, as he knew, the reciprocity treaty would expire, and he failed to deliver it at that time, he was held liable to the owner for the duty which he had to pay; it was immaterial that prices rose soon after the day fixed for the delivery so that the plaintiff actually received more after paying the duty than he could have done by selling it on that day.³

§ 912. **Expense of further transportation.** Goods were delivered by the plaintiff to a carrier on Thursday to be conveyed to B. It was expected by the plaintiff that they would arrive on the Saturday following, but no notice was given to the carrier of such expectation, that the goods might be ready for the market. On Saturday the plaintiff's clerk proceeded to B., and owing to the non-arrival of the goods until Monday he was obliged to remove them to S. to sell them there. The delay in delivering being unreasonable, the jury were directed that they were at liberty to give as damages the expense of

Western R. Co., L. R. 2 C. P. 318;
 Ingledew v. Northern R. Co., 7 Gray,
 86; Mississippi Central R. Co. v.
 Kennedy, 41 Miss. 671; Denver, etc.
 R. Co. v. De Witt, 1 Colo. App. 419,
 29 Pac. Rep. 524.

¹ Laurent v. Vaughn, 30 Vt. 90.

² Gerhard v. Neese, 36 Tex. 635.

³ Gibbs v. Gildersleeve, 26 Up. Can.
 Q. B. 471. See Robinson v. Holt, 96
 Ga. 19, 23 S. E. Rep. 76.

removal of the goods from B. to S., and the expenses and wages of the clerk if they thought fit. It was a question for the jury whether it was reasonable and proper to send a man to B. If he went down unnecessarily, or remained there an unreasonable time, the defendants ought not to pay the expenses.¹

§ 913. Liability for delay where facts are known. Damages are given against a carrier with reference to a particular use for which property is delivered to him for transportation when such use is brought to his notice at the time of contracting. In a late English case the principle is stated, and said to [229] be settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to him from which the object ought in reason to be inferred, so that it may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.² In this case the plaintiff, the manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made a profit by the practice, delivered them upon a show ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show ground at another place, when and where a similar show, at which he intended to exhibit, was to be held; but nothing was expressly said about this intention of the plaintiff. The samples did not arrive until after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them and in waiting for them. In an action for the breach of contract a verdict was given for damages which included a sum for loss of time or loss of profit. The court inferred as matter of fact that the purpose of the

¹ Black v. Baxendale, 1 Ex. 410.

So far as the recovery of expense is concerned it is doubtful if this case is in harmony with the rule of Hadley v. Baxendale, which was not decided until seven years later. See Woodger v. Great Western R. Co., L. R. 1 C. P. 318, and American cases cited in the next preceding section and in § 905, denying such

liability where the carrier had no notice of the circumstances.

² Simpson v. London & N. R. Co., 1 Q. B. Div. 274 (the goods were addressed "to the show ground at N."); Day v. Gravel, 72 Minn. 159, 164, 75 N. W. Rep. 1; Railroad Co. v. Cabinet Co., 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; Jameson v. Midland R. Co., 50 L. T. Rep. 426. See §§ 900, 908, note.

plaintiff to exhibit was within the contemplation of the parties, and held that he was entitled to damages on the ground that loss of profit was a natural and probable result of the failure of that purpose; no evidence was necessary of the prospect of making profit at the particular show in question.¹ Where the carrier was informed that a museum delivered to it for transportation was being shipped for the purpose of being exhibited, the shipper was entitled to recover for the value of the use of the property at the place and time it was due, which value could not be more properly determined than by ascertaining what the probable net profits of the exhibition would have been. He was also entitled to recover reasonable expenses incurred for himself and employees, these to be considered in fixing such net profits.²

The plaintiff is entitled to recover for damages naturally following under circumstances known to both parties when the contract was made. If the special circumstances under which it was actually made were communicated by the plaintiff to the defendant, and thus known to both, the damages resulting from the breach are those which they might reasonably contemplate would be the amount of injury which would ordinarily follow therefrom under the circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any such circumstances, from the breach of such a contract.³ Where a broken part of the machinery of a mill was

¹ See *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Thorne v. McVeagh*, 75 Ill. 81; *Vicksburgh, etc. R. v. Ragsdale*, 46 Miss. 458; *Illinois Central R. Co. v. Cobb*, 64 Ill. 128; *Mace v. Ransey*, 74 N. C. 11, stated in § 900; *St. L. etc. R. v. Mudford*, 48 Ark. 502, 3 S. W. Rep. 814.

If the carrier wrongfully refuses to deliver goods and the consignee informs him of a contract for their sale, the former is liable for any loss resulting to the latter by a decline

from the contract price between the time of refusal and that of actual delivery. *Schmidt v. The Pennsylvania*, 4 Fed. Rep. 548.

² *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

³ *Hadley v. Baxendale*, 9 Ex. 341; *Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Silver v. Kent*, 60 Miss. 124; *Lindley v. Richmond & D. R. Co.*, 88 N. C. 547; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Columbus & W. R.*

sent by a carrier to serve as a model for making a new one, and the mill in the meantime was stopped, but these circumstances were not known, the carrier was not liable because of unreasonable delay in the conveyance of the property for damages resulting from such stoppage.¹ Where a carrier undertakes to convey machinery necessary to the running of a mill, or material necessary to its working, and has notice of these facts at the time of making the contract, the injury from the mill standing idle, as well as for loss of wages of operatives necessarily unemployed, may be recovered as damages resulting from unreasonable delay on his part.² In a late case in

v. Flournoy, 75 Ga. 745; Wabash, etc. R. v. Lynch, 12 Ill. App. 365; Chicago, etc. R. v. Hale, 83 Ill. 360, 25 Am. Rep. 403; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390; Pacific Exp. Co. v. Darnell, 62 Tex. 639; The Henry Buck, 39 Fed. Rep. 211; Murrell v. Pacific Exp. Co., 54 Ark. 22, 14 S. W. Rep. 1098, 26 Am. St. 17; Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; Wells, Fargo & Co. v. Battle, 5 Tex. Civ. App. 532, 24 S. W. Rep. 353; St. Louis Southwestern R. Co. v. Cates, 15 Tex. Civ. App. 135, 38 S. W. Rep. 648; Missouri, etc. R. Co. v. Belcher, 89 Tex. 428, 35 S. W. Rep. 6; Jones v. Texas & New Orleans R. Co., 23 Tex. Civ. App. 65, 55 S. W. Rep. 376. See § 905.

In Savannah, etc. R. Co. v. Pritchard, 77 Ga. 412, 1 S. E. Rep. 261, 4 Am. St. 92, this measure of liability was imposed without reference to the question of notice. A stillworm for use in the manufacture of turpentine was not delivered until after undue delay. The consignee suffered loss, without fault on his part, by the overflowing of crude turpentine. For such loss the carrier was held responsible. Compare East Tennessee, etc. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. Rep. 809.

¹ Hadley v. Baxendale, 9 Ex. 341; Thomas, etc. Manuf. Co. v. Wabash,

etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; Cooper v. Young, 22 Ga. 269, 68 Am. Dec. 502. See Swift River Co. v. Fitchburg R. Co., 169 Mass. 326, 47 N. E. Rep. 1015, 61 Am. St. 288.

² Vicksburg, etc. R. Co. v. Ragsdale, 46 Miss. 458; Cincinnati Chronicle Co. v. White Line Transportation Co., 1 Cin. Super. Ct. 300; Cooper v. Young, *supra*.

In Gee v. Lancashire & Y. R. Co., 6 H. & N. 211, this subject came before the court of exchequer. The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but did not in fact arrive until four days afterwards. In consequence of this delay a new mill of the plaintiffs was stopped. At the time of the delivery of the cotton to the defendant nothing was said as to the particular inconvenience likely to result from delay in forwarding it; but on the day before it was so delivered, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it, and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand solely on account of the non-

North Carolina the trial court instructed the jury that if the defendant knew, or could have ascertained by ordinary care, that the freight was cotton machinery, and of a kind and a character that a delay would be likely to cause damage to the

delivery of the cotton. The plaintiffs proved that during the time the mill was idle they had paid in wages 7l., and that the profit which would have been made if the mill had been at work was 7l. 10s. It was held a misdirection to instruct the jury to allow these damages as matter of law. Pollock, C. B.: "He (the judge below) assumes this loss to have been sustained in consequence of the non-arrival of the cotton, while in fact it was not in consequence of the non-arrival of the cotton alone, but in consequence of that fact, *and of the plaintiffs having no other cotton in stock*. If it had been established that such is the practice amongst cotton-spinners, so that every carrier must have known that the mill would be at a stand-still until the cotton arrived, the damages would have been properly assessed. And that would be so whether the carrier had notice of the fact, or notice from the well-understood course of business. But the business of life is conducted with reference to the necessity of guarding against certain accidents, and owners of cotton-mills may fairly be expected to guard against the risk of being delayed by having something in stock. Is a railway company bound to take notice that in a particular case a mill would be at a stand if goods were not delivered on a particular day? I think not. I think a carrier is not responsible for such consequences unless distinct notice is given at the time of the sending of the goods to be carried. If the plaintiffs had said, 'Now, there must be no mistake, the cotton must be delivered immediately; it is required for a mill which

is actually at a stand for want of it, and if it is not delivered in due time you will be responsible for all the consequences,' probably the railroad company would not have taken it except at a high rate. Common carriers are bound to carry goods at a reasonable rate, but not to incur such responsibility as would be imposed upon them if the direction of the judge in this case were correct. I think that the rule as to damages of this sort was correctly laid down in *Hadley v. Baxendale*, 9 Ex. 341." Channell, B.: "It cannot be said as a matter of law that these were damages which naturally flowed from the breach of the contract; or that anything had passed to show that they were in the contemplation of the parties when the contract was entered into." Bramwell, B.: "The law on this subject is laid down correctly in *Hadley v. Baxendale*. To ascertain the damage it is necessary to find out how much better off the plaintiffs would have been if the contract had not been broken. The plaintiffs are not necessarily entitled to recover the whole amount given. *Hadley v. Baxendale* decides that a defendant is not liable except for such damages 'as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' I am not sure that another qualification might not be added which would be in favor of the plaintiffs in this case, *viz.*, that

plaintiff and stop his mill, the defendant would be responsible for the damages resulting from the delay and strictly traceable to it. "The rule would be interest on the idle capital, for here it was men unemployed by reason of the delay; and I direct you to allow interest on this idle capital so employed as one of the elements of damage. It would be interest on the capital and the amount paid the hands — such hands as you find were thrown out of employment by the delay, and which you think the defendant might fairly expect would be thrown out of employment by this delayed shipment." This instruction was approved.¹

[231] § 914. **Same subject.** In order to impose on the defaulting party a further liability than for damages arising naturally and directly, that is, in the ordinary course of things, from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of contracting. Generally, notice then given of any special circumstances which would show that the damages to be anticipated [232] from a breach would be enhanced has been held sufficient for this effect.² It has been held to affect carriers equally

in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say, 'If after that notice you persist in breaking the contract I shall claim the damages which will result from the breach.' But in any case you must first find out the loss sustained by the plaintiff, and afterwards give it him minus any damages excluded by these rules. And I cannot but think that if the judge had left it to the jury to determine the damages in that way, they would probably have given the same sum which they have already given. . . . If the judge had said, as a proposition of fact, 'I think that you will consider that the plaintiffs are entitled to claim for wages, I doubt if there would have been any objection to the summing

up. But he says, 'Where under circumstances such as exist in the present case, by the neglect of a carrier a manufacturer has no material to carry on his business, he has a *right*, in my opinion, to charge as *legal damage* such loss as naturally and immediately arose from the stopping of his mill.' He should have added, 'If the jury are of opinion that the stoppage was the natural consequence of the non-delivery of the goods.' I say this in order that the county court may not suppose on the next trial that we think that these two sums are not recoverable; for I do not say so; and I do not understand that the other members of the court think so."

¹ Rocky Mount Mills Co. v. Wilmington & W. R. Co. 119 N. C. 693, 25 S. E. Rep. 854, 56 Am. St. 682.

² Hadley v. Baxendale, 9 Ex. 341; Gee v. Lancashire & Y. R. Co., 6 H.

with other parties;¹ though they are bound by reason of their public employment to serve all who apply. They may doubtless refuse to undertake the carriage of goods in contemplation of increased responsibility unless their demand for reasonable compensation beyond their ordinary rates, according to the enlargement of their liability, is acceded to.² [233]

& N. 211; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, *Allen's Tel. Cases*, 613, 6 Am. Rep. 165; *Deming v. Railroad*, 48 N. H. 455, 2 Am. Rep. 267; *Converse v. Burrows*, 2 Minn. 191, 72 Am. Dec. 89; *Paine v. Sherwood*, 19 Minn. 315; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489; *Wells, Fargo & Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. Rep. 412. See § 915.

¹ *Id.*

² *Gee v. Lancashire & Y. R. Co.*, 6 H. & N. 217, per Pollock, C. B.; *Riley v. Horne*, 5 Bing. 217.

In *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, this obligation of carriers to serve all was supposed to neutralize the effect of mere notice. In that case the plaintiffs being shoe manufacturers at K. were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4s. per pair, an unusually high price. The shoes were to be delivered by the 3d of February, 1871, and the plaintiffs accordingly sent them to the defendant's station at K. for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee. Notice was given to the station master — which for the purpose of the case was assumed to be notice to the company — at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so delivered they would be thrown on their hands, but he was not informed that there

was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2s. 9d. a pair. *Kelly, C. B.*: "A question of very great importance has been raised in the course of the argument to which it is proper to refer, though for reasons I shall presently state I do not think it will ultimately become necessary to decide it — that is to say, the question what the position of a railway company is when goods are intrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the acts relating to the defendant's railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now, suppose that an intimation is made to the railway company, . . . in express terms, stating that they have entered into such and such a contract, and will lose so many pounds if they cannot fulfill it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then,

Where goods are contracted to be sold at a price fixed, to be delivered at a particular place, and a carrier promises to transport and deliver them in due time, or receives them seasonably to be so delivered if there is no negligent delay; and the carrier

they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive goods after such a notice unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned." These views did not receive the sanction of the entire court, and the case was decided on the point that the notice was insufficient; it did not inform the carrier of the unusual price of the shoes. See *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 496.

In *Missouri, etc. R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. Rep. 6, it was contended, in reliance on the English case referred to in the preceding paragraph of this note, that special dam-

ages could not be recovered of a railroad company because it was deprived by law of the privilege of declining to receive shipments, of limiting its liability, or of charging extra compensation for the extra liability, and therefore it cannot be said to have contracted with reference thereto or to have received any compensation therefor. The court could not agree because (1) by the very nature of its business it invites the passage over its line, at the rates fixed by the commission, of the usual commerce of the country, some of which it must know will be tendered to it with notice of such special conditions, and such invitation and tender constitute a contract with reference to such conditions; (2) it must be assumed that the rates fixed by the commission include extra compensation for this class of risks as one of the ordinary and fixed charges of operation, and that therefore the shippers generally have paid for this measure of indemnity, and (3) the carrier has the opportunity to make immediate preparation to guard against the breach. On the other hand, the shipper contended that since the carrier must receive and transport at the rates fixed by the commission and was forbidden to limit its liability by special contract, therefore the liability for special damage is no longer based upon contract, but solely upon a breach of duty to the shipper as a member of the public, and that the reason of the rule limiting the recovery of damages to such as were contemplated when the contract was made as the natural and proximate result of its breach had no application if

so contracts or receives with full notice that they are to [234] be forwarded for delivery on such contract, and of the importance of having them at their destination for a seasonable delivery to the purchaser, the measure of damages for a breach by which the consignor loses the sale is the difference between the contract price and the value of the goods when actually delivered.¹ The recovery may, under such circumstances, exceed the market value of the goods. The right of the shipper to recover the price at which the property shipped could have been sold for, though that price greatly exceeded its actual value, had it been delivered in time, is thus vindicated by Ellison, J., of the Kansas City court of appeals: Plaintiff did not want the property except for the purpose of sale on a certain day, which the defendant knew, and he was deprived of the power of sale on that day by reason of a negligent delay in transportation. He did not want the market value of the corn, wherewith he might have re-supplied himself. The only full measure of his recompense, according to his petition, is the market price which he alleges he would have obtained had it been delivered without delay. So, in general terms, we hold that the shipper of a commodity to the market for sale, who fails to get it to the market through the negligence of the carrier, is entitled to base his claims for damages on the market price regardless of actual value. A market price far beyond the value of an article may be brought about in various ways, innocent in themselves; as by a sudden and apparently well founded rumor of war, which does not occur. And a market price much beyond the value may even be brought about by an unlawful design or combination, whereby a commodity is made difficult to obtain, and whereby it sells for the fixed price to all who deal in it. Here the shipper is also entitled to recover the market price, brought about in that manner, if

notice came to the carrier after the contract was made and in time to have prevented its breach. This contention was also overruled.

See § 52, for a discussion of the question as to what extent the notice of peculiar facts must enter into and become a part of the contract in order that responsibility for conse-

quential damages shall follow; also *Holland v. Seven Hundred, etc. Tons of Coal*, 36 Fed. Rep. 784.

¹ *St. L. etc. R. v. Mudford*, 48 Ark. 502, 3 S. W. Rep. 814; *Schmidt v. The Pennsylvania*, 4 Fed. Rep. 548; *Deming v. Railroad*, 48 N. H. 455, 2 Am. Rep. 267.

he is not connected with the unlawful cause, and this without regard to the actual market value of such property. These statements are based on the plain proposition that a seller, acting *bona fide*, is entitled to sell at whatever price a buyer will pay.¹

While the loss of money received for transportation by a carrier without knowledge of the purpose for which it is sent will lay him under obligation merely to refund the principal sum with interest, if it is seasonably sent for the specific purpose of paying the sender's premium on his life policy, which will lapse if payment be not made at the particular time, and the carrier is informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will hold him primarily, at least, for the net value of the policy which lapsed in consequence of his negligence. Under such circumstances both parties must be presumed to have contemplated that consequence when the money was deposited with the carrier; but these damages may be reduced so far as it was in the plaintiff's power and knowledge to prevent loss by reinstatement or reinsurance.² Where in consequence of the carrier's unreasonable delay in the delivery of the plaintiff's account against a third person, it became barred by the statute of limitations, the carrier was held liable for the amount of the account.³ His liability in such an instance is analogous to that which attaches when he carries perishable property; he is liable for it if it becomes worthless by its inherent qualities in consequence of negligent delay in its transportation.⁴ It has been [235] held that a dentist cannot recover earnings prevented by the loss of his tools.⁵

¹ Johnson-Brinkman Commission Co. v. Wabash R. Co., 64 Mo. App. 590. See Wilson v. Missouri Pacific R. Co., 66 id. 388, 395.

² Grindle v. Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31.

³ Favor v. Philbrick, 5 N. H. 358.

⁴ See Knapp v. United States & C. Exp. Co., 55 N. H. 348; Parks v. Alta California Tel. Co., 13 Cal. 422, 73 Am.

Dec. 589; Bryant v. American Tel. Co., 1 Daly, 585.

In Vicksburg, etc. R. Co. v. Ragsdale, 46 Miss. 458, Simrall, J., concludes a masterly review of the cases on the measure of damages against carriers by saying: "We are constrained to concur in the observations of BB. Martin and Wilde, that a splendid effort was made in Had-

⁵ Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

§ 915. Physical and mental suffering as elements of damage. It has been ruled in a recent Texas case, and also in a very late case in Kentucky, following a series of adjudications which hold that damages for mental suffering may be recovered against telegraph companies for the negligent failure to promptly deliver messages announcing the death or mortal illness of near relatives, that a carrier who neglects without sufficient excuse to promptly forward the corpse of a husband for the transportation of which his widow has contracted is liable to her for the resulting mental distress.¹ Where there was delay

ley v. Baxendale to state the principle in such form as to provide for the more difficult cases, but subsequent experience and discussions have tended to demonstrate that it is not possible, in the nature of things, to declare a fixed rule for many contracts. This much may be accepted as well as settled: 1. The proximate and natural consequences of the breach must always be considered. 2. Such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into. 3. Damages which fairly may be supposed not to have been the necessary and natural sequence of the breach shall not be recovered unless, by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties. 4. Losses of profits in a business cannot be allowed unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself or by explanation of the circumstances at the time the contract was made, that such damages would ensue from non-performance. 5. If the contract is made with reference to embarking in a new business (such as sawing lumber

for market), the speculative profits which might be supposed to arise but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damages. These are dependent largely upon other contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather or breakage of machinery. 6. If the delay is in the transportation of machinery to be applied to a special use and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means: the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. 7. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him."

¹ Hale v. Bonner, 82 Tex. 33, 14 L. R. A. 336, 17 S. W. Rep. 605, 27 Am. St. 850; Louisville & N. R. Co. v. Hull, — Ky. —, 68 S. W. Rep. 433, 24 Ky. L. Rep. 375.

in delivering a package of medicine, the carrier knowing it to be such and that it was for a sick person, both the physical and mental suffering of such person were elements of damage in a suit by her husband to recover for the neglect to promptly deliver it. But the sympathetic suffering of the husband on account of the pain endured by his wife was too remote.¹ The recovery of damages for mental suffering has been denied where it was claimed in connection with compensation for the loss of a museum consisting of birds, animals, etc.² The mental suffering of the plaintiff's wife is not an element of damages in an action brought by him for the breach of a contract made in his name for the transportation of the corpse of their son.³

§ 916. Carrier's responsibility in caring for property. A common carrier is responsible for the safety of the goods intrusted to him, and bound for their delivery in as good condition as they were received at the place to which he undertook to carry them against all hazards excepting losses caused by the act of God or the public enemy. So the exception is often stated for brevity; but these others are also well settled: [236] he is not liable for losses or injuries from any inherent defect of quality or vice of the thing carried,⁴ nor for those arising from the act of the public authorities, or caused by some act or omission of its owner.⁵ His liability is not affected by the kind of motive power he employs,⁶ and does not depend upon contract, but is imposed by law.⁷ He is bound to carry for all persons who apply, and on the common-

In *Wells, Fargo & Co.'s Exp. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. Rep. 824, a recovery of \$2000 for injury to feelings where the corpse of a son was negligently delayed twenty-seven hours, the holding of funeral services at church being thereby prevented and burial at night necessitated, was sustained. But in the Kentucky case cited a verdict for \$1,640, the facts not being essentially dissimilar, was set aside.

¹ *Pacific Exp. Co. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. Rep. 830. But see § 975 as to the last proposition.

² *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

³ *Wells, Fargo & Co.'s Exp. v. Fuller*, 4 Tex. Civ. App. 213, 23 S. W. Rep. 412.

⁴ *Baldwin v. London, etc. R. Co.*, 9 Q. B. Div. 582; *Illinois Central R. Co. v. Bogard*, 78 Miss. 11, 27 So. Rep. 879.

⁵ *Hutchinson on Carriers* (2d ed.), § 170a.

⁶ *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539, 39 Am. Dec. 398.

⁷ *Thurman v. Wells*, 18 Barb. 500; *Burkle v. Ells*, 4 How. Pr. 288.

law liability;¹ though he may, as has been stated, contract with the shipper to abate in some degree its rigor.²

Where a cargo of frozen meat was put on board a ship which was fitted with refrigerating machinery, and the bill of lading was headed "refrigerator bill," a warranty was implied that such machinery was, at the time of shipment, fit to carry such meat in good condition, notwithstanding a clause in the bill of lading expressed that the steamer should not be accountable for the condition of goods shipped under it, nor for any loss or damage thereto from failure or breakdown of machinery, insulation, or other appliances. This clause related to what might happen during the voyage, and not to the original fitness of the machinery.³ The same principle was applied where boxes of gold were placed in the bullion-room of the ship, from which one of them was stolen during the voyage, notwithstanding the bill of lading did not mention a bullion-room, and that the bill contained exceptions to the liability of the ship large enough to cover almost anything that could happen as regards fixing the ship with liability. The ground upon which liability for the loss of the box was put was that the plaintiff knew that the vessels of the defendant were provided with bullion-rooms, and that both parties contemplated that the gold was to be carried in such a room.⁴

§ 917. Burden of proof as to injury or loss. Where goods are delivered to a carrier to be transported a promise to pay freights will be implied, and it is not necessary to prove payment or tender thereof in order to hold him liable.⁵ And in case of their loss or injury the burden is on the carrier to exonerate himself by proof that it happened by one of the

¹ *Southern Exp. Co. v. Moon*, 39 Miss. 322.

² See § 904.

³ *Owners of Cargo on Ship Maori King v. Hughes*, [1895] 2 Q. B. 550.

⁴ *Queensland Nat. Bank v. Peninsular & Oriental Steam Navigation Co.*, [1898] 1 Q. B. 567. See *Owners of Wool Cargo Lately Laden on Board the Steamship Waikato v. New Zealand Shipping Co.*, 4 Com. Cas. 10 (1898).

⁵ Suit may be brought to recover

the damage done to property, when that equals or exceeds the freight, without first paying the freight, and so may an action for claim and delivery (*Miami Powder Co. v. Port Royal, etc. R. Co.*, 47 S. C. 324, 25 S. E. Rep. 153, 58 Am. St. 880; *contra*, s. c., 38 S. C. 78, 21 L. R. A. 123, 16 S. E. Rep. 339); and so may an action for conversion. *Railroad Co. v. Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. 579.

causes for which he was not answerable. Proof of the delivery of the goods and their loss or injury to them while in the carrier's hands makes a *prima facie* case against him.¹ But when it appears in a suit against him that the loss or injury proceeded from one of the excepted causes, then the burden is on the plaintiff to show that it resulted, nevertheless, from the negligence or fault of the carrier.² It has, however, [237] been held by respectable authorities that the burden is on the carrier not only to show that the loss happened by one of the excepted causes, but also that it proceeded from that cause without negligence on his part.³ Where the exemption

¹ *South & N. A. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749; *Merchants' Despatch Transportation Co. v. Bloch*, 86 Tenn. 392, 6 S. W. Rep. 881, 6 Am. St. 847; *Western Manuf. Co. v. The Guiding Star*, 37 Fed. Rep. 641; *Winne v. Illinois Central R. Co.*, 31 Iowa, 583; *Mitchell v. United States Exp. Co.*, 46 Iowa, 214; *Ewart v. Street*, 2 Bailey, 157; *Jackson v. Sacramento, etc. R. Co.*, 23 Cal. 268; *Davidson v. Graham*, 2 Ohio St. 131; *Western Transportation Co. v. Newhall*, 24 Ill. 466; *Westcott v. Fargo*, 63 Barb. 349; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Drew v. Red Line Transportation Co.*, 3 Mo. App. 495; *Grey v. Mobile Transportation Co.*, 55 Ala. 387, 28 Am. Rep. 729; *Choate v. Crowninshield*, 3 Cliff. 184; *The Mollie Mohler*, 2 Biss. 505; *Charlotte, etc. R. Co. v. Wooten*, 87 Ga. 203, 13 S. E. Rep. 509; *Lachner v. Adams Exp. Co.*, 72 Mo. App. 13.

Nothing to the contrary appearing, it is presumed that goods were delivered to the carrier in good order. *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. Rep. 757.

² *Lamb v. Camden, etc. R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Read v. St. Louis, etc. R.*, 60 Mo. 199; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. 394, 8 Am. Rep. 268; *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. 14, 3 Am. Rep. 515; *New*

Brunswick S. & C. Transportation Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; *The Pereire*, 8 Bene. 301; *Six Hundred and Thirty Casks*, 14 Blatch. 517; *Forbes v. Dallett*, 9 Phila. 515; *The Invincible*, 1 Low. 225; *Van Schaack v. Northern Transportation Co.*, 3 Biss. 394; *Alden v. Pearson*, 3 Gray, 342; *Brauer v. The Almoner*, 18 La. Ann. 266; *French v. Buffalo, etc. R. Co.*, 4 Keyes, 108; *Hays v. Millar*, 77 Pa. 238, 18 Am. Rep. 445; *Hubbard v. Harnden Exp. Co.*, 10 R. I. 251; *Clark v. St. Louis, etc. R. Co.*, 64 Mo. 440; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129; *Lawrence v. New York, etc. R. Co.*, 36 Conn. 63.

³ *Texas & Pacific R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. Rep. 366; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 id. 362, 62 Am. Dec. 285; *United States Exp. Co. v. Backman*, 2 Cin. Super. Ct. 251, 28 Ohio St. 144; *Erie R. Co. v. Lockwood*, id. 358; *Union Exp. Co. v. Graham*, 26 id. 595; *Berry v. Cooper*, 28 Ga. 543; *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Swindler v. Hilliard*, 2 Rich. 286; *Baker v. Brinson*, 9 id. 201, 67 Am. Dec. 548; *Cameron v. Rich*, 4 Strobb. 168; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Gray v. Mobile Trade Co.*, 55 Ala. 387, 28 Am.

from liability contracted for is not for loss or damage from a particular cause, but as to the amount of loss only, and the carrier does not account for the non-delivery of the property, the jury may infer negligence on his part.¹

§ 918. **Damages if goods have a market value; recovery by bailee.** In case of injury to or loss of property by the carrier's fault he is required to make compensation on the basis of its market value at the place of destination. In the former event the measure of damages is the difference between the value of the goods as, or in the condition when, delivered, and what their value would have been if they had not been damaged,² and for goods lost, their market value at the place of destination.³ The owner is entitled to have the equivalent of

Rep. 729; *Shea v. Minneapolis, etc. R. Co.*, 63 Minn. 228, 65 N. W. Rep. 458; *Wallingford v. Columbia & G. R. Co.*, 26 S. C. 258, 2 S. E. Rep. 19; *Johnstone v. Richmond, etc. R. Co.*, 39 S. C. 55, 17 S. E. Rep. 512; *International, etc. R. Co. v. Foltz*, 3 Tex. Civ. App. 644, 22 S. W. Rep. 541.

¹ *Louisville, etc. R. Co. v. Nicholai*, 4 Ind. App. 119, 126, 30 N. E. Rep. 424, citing numerous cases.

² *East Tennessee, etc. R. Co. v. Johnston*, 75 Ala. 597, 51 Am. Rep. 489; *South & N. A. R. Co. v. Wood*, 72 Ala. 451; *St. L. etc. R. Co. v. Phelps*, 46 Ark. 485; *Heil v. St. Louis, etc. R. Co.*, 16 Mo. App. 363; *Lindley v. Richmond & D. R. Co.*, 88 N. C. 547; *Wallingford v. Columbia & G. R. Co.*, 26 S. C. 258, 2 S. E. Rep. 19; *Louisville & N. R. Co. v. Mason*, 11 Lea, 116; *Missouri Pacific R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. Rep. 749, 2 L. R. A. 75; *In re Petersen*, 21 Fed. Rep. 885; *Magdeburg General Ins. Co. v. Paulson*, 29 id. 580; *Western Manuf. Co. v. The Guiding Star*, 37 id. 641; *Missouri Pacific R. Co. v. Nevin*, 31 Kan. 385, 2 Pac. Rep. 795; *Smith v. New Haven & N. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166; *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *McGregor v. Kilgore*, 6 Ohio, 359, 27 Am. Dec. 260; *The Colonel Ledyard*, 1

Sprague, 530; *Henderson v. Maid of Orleans*, 12 La. Ann. 352; *Black v. Camden, etc. R. Co.*, 45 Barb. 40; *Ingledew v. Northern R. Co.*, 7 Gray, 86; *Lewis v. Ship Success*, 18 La. Ann. 1; *Illinois Central Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. Rep. 511; *La Motte v. Angel*, 1 Hawaii, 237; *Wells, Fargo Exp. Co. v. Williams*, 71 S. W. Rep. 314 (Tex. Ct. of Civ. App.); *Cleveland, etc. R. Co. v. Patton*, 104 Ill. App. 550; *Silverman v. St. Louis, etc. R. Co.*, 51 La. Ann. 1785, 26 So. Rep. 447; *Gray v. St. Louis, etc. R. Co.*, 54 Mo. App. 666; *Matney v. Chicago, etc. R. Co.*, 75 Mo. App. 233; *Atchison, etc. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. Rep. 968; *King v. Sherwood*, 22 App. Div. 548, 48 N. Y. Supp. 34, 17 N. Y. Supp. 459; *Atchison, etc. R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. Rep. 286; *St. Louis Southwestern R. Co. v. Smith*, 11 Tex. Civ. App. 550, 32 S. W. Rep. 828; *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 616, 13 Sup. Ct. Rep. 444; *Missouri, etc. R. Co. v. Webb*, 20 Tex. Civ. App. 431, 439, 49 S. W. Rep. 526, quoting the text; *Texas & P. R. Co. v. Berchfield*, 12 Tex. Civ. App. 145, 33 S. W. Rep. 1022. See *Marquette, etc. R. Co. v. Langton*, 32 Mich. 251.

³ An instruction permitting the recovery of the highest market value

the goods at that place, in the condition in which the carrier undertook to deliver them, less the charges for transportation and delivery.¹ This measure of liability applies where there has been a conversion of the property, although the bill of lading stipulates that its value at the place of shipment shall be the measure in case it is lost. The carrier cannot claim any advantage or protection from its wrong-doing by virtue of such a condition, even though it is valid as to a loss occurring otherwise than through its negligence.² Where the loss is at-

of goods at their destination, less freight charges, permits a recovery at their retail price, and is erroneous. *Texas & P. R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. Rep. 366. See § 1098.

¹ *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. Rep. 654; *Same v. Kelsey*, 89 Ala. 287, 7 So. Rep. 648; *Wabash, etc. R. Co. v. Lynch*, 12 Ill. App. 365; *Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co.*, 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566; *Rodocanachi v. Milburn*, 18 Q. B. Div. 67; *Prettyman v. Oregon R. & N. Co.*, 13 Ore. 341, 10 Pac. Rep. 634; *Gray v. Missouri Pacific R. Co.*, 64 Mo. 47; *Sturges v. Bissell*, 46 N. Y. 462; *Marshall v. New York Central R. Co.*, 45 Barb. 502; *Spring v. Haskell*, 4 Allen, 112; *Whitney v. Chicago & N. R. Co.*, 27 Wis. 327; *Chapman v. Chicago & N. R. Co.*, 26 id. 295, 7 Am. Rep. 81; *McGregor v. Kilgore*, 6 Ohio, 358, 27 Am. Dec. 260; *Laurent v. Vaughn*, 30 Vt. 90; *Gillingham v. Dempsey*, 12 S. & R. 183; *Louis v. S. B. Buckeye*, 1 Handy (Cincinnati Super. Ct.), 150; *Warden v. Green*, 6 Watts, 424; *Rice v. Indianapolis & St. L. R. Co.*, 3 Mo. App. 27; *Farwell v. Price*, 30 Mo. 587; *Nourse v. Snow*, 6 Me. 208; *Shaw v. South Carolina R. Co.*, 5 Rich. 462, 57 Am. Dec. 768; *Union R. & T. Co. v. Traube*, 59 Mo. 355; *Atkisson v. S. B. Castle Garden*, 28 Mo. 124; *Michigan Southern, etc. R. Co. v. Caster*,

13 Ind. 164; *Taylor v. Collier*, 26 Ga. 122; *Arthur v. Ship Cassius*, 2 Story, 81; *Wallis v. Cook*, 10 Mass. 510; *Winchester v. Patterson*, 17 Mass. 62; *Harris v. Panama R. Co.*, 5 Bosw. 312; *Sherman v. Wells*, 28 Barb. 403; *Van Winkle v. United States Mail Steamship Co.*, 37 Barb. 122; *Northern Transportation Co. v. McClary*, 66 Ill. 233; *Little v. Boston, etc. R. Co.*, 66 Me. 239; *Cushing v. Wells, Fargo & Co.*, 98 Mass. 550; *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241; *Ringgold v. Haven*, 1 Cal. 108; *Hart v. Spalding*, id. 213; *Wolf's Adm'r v. Lacy*, 30 Tex. 349; *Richmond v. Bronson*, 5 Denio, 55; *S. B. Emily v. Carney*, 5 Kan. 645; *Dean v. Vaccaro*, 2 Head, 488, 75 Am. Dec. 744; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Ward's Central & P. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544; *Railroad v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312, 30 Am. St. 902; *Atchison, etc. R. Co. v. Grant*, 6 Tex. Civ. App. 674, 26 S. W. Rep. 286; *Gulf, etc. R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. Rep. 161; *Texas & Pacific R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. Rep. 366; *Missouri, etc. R. Co. v. De Bord*, 21 Tex. Civ. App. 691, 53 S. W. Rep. 587; *Illinois Central R. Co. v. Bogard*, 73 Miss. 11, 27 So. Rep. 879; *The Arctic Bird*, 109 Fed. Rep. 167, quoting the text.

² *Erie Dispatch v. Johnson*, 87 Tenn. 490, 11 S. W. Rep. 441; *Ruppel v. Allegheny Valley R.*, 167 Pa. 166, 31

tributable to mere negligence and there is such a stipulation the consignor may recover freight paid by him.¹ But otherwise there can be no recovery of prepaid freight, even though there has been a total loss of property,² unless the owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance and they are lost by the carrier's negligence. In such a case the former may, as against the latter, be allowed an amount equal to the freight advanced, and if the carrier happens to be indemnified against that loss by an insurance of the amount of the advanced freight, the insurer of it may sue in his own name for it as part of the damages which the cargo-owner, but for the insurance, would have sustained by the defendant's negligence.³ If the amount of freight charges is not otherwise shown, the carrier must prove it or there will be no reversible error in not deducting them.⁴ The right to recover damages measured by the depreciation in market value of injured animals is not affected by the purpose of their owner to keep them for breeding.⁵

The rule as to the measure of damages permits the plaintiff, up to the time of the trial, to show the condition of the injured animal, as a means of ascertaining the result of the injury inflicted, so as to better enable the jury to fix the damages at the time and place of delivery. If an injured cow did so subsequently abort, the fact is proof only of the extent of the injury inflicted, as much so as if she had subsequently died from the effect of the injury. The only known limit to the inquiry up to the trial is whether or not the subsequent development in the condition of the animal is traceable directly to the injury inflicted by the carrier.⁶ Where injured heifers were with calf

Atl. Rep. 478, 46 Am. St. 666. See § 904.

¹ Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; Davis v. New York, etc. R. Co., 70 Minn. 37, 45, 72 N. W. Rep. 823, citing the text; The Arctic Bird, 109 Fed. Rep. 167.

² Rodocanachi v. Milburn, 18 Q. B. Div. 67.

³ Dufourcet v. Bishop, 18 Q. B. Div. 373.

⁴ International, etc. R. Co. v. Nicholson, 61 Tex. 550.

⁵ New York, etc. R. Co. v. Estill, 147 U. S. 591, 617, 13 Sup. Ct. Rep. 444.

In Gulf, etc. R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. Rep. 777, it was held that the measure of damages where injured cattle were not destined for market and were not sold on arrival at their destination is the actual damage caused by their injuries and any extra expense incurred by the owner in caring for them.

⁶ Per Philips, J., in Estill v. New York, etc. R. Co., 41 Fed. Rep. 849,

at the time the injury occurred, and aborted in consequence of the injury, the carrier could not escape liability for the general measure of damages because notice had not been given it of that fact at the time they were shipped, it not being claimed that any special care was required to be given the heifers because of their condition, and the suit not being brought on account of the absence of such care.¹ Where the injury was to a part of a collection of birds, animals, etc., constituting a museum which was exhibited for profit, it was decided that the depreciation in value of the articles not injured, caused by the damage done to other articles, involved an element of damages which was too speculative and uncertain, "because such injury or depreciation could only result from a general lessening of interest in the museum by reason of the loss of certain specimens, there being no evidence to show any other dependence of the articles on each other for value than such as would go to make up a whole collection."² The owner of horses which have been injured and rendered unfit for training cannot recover damages because of the obligations he was under to men employed to train them.³ Where the damages for the loss of cattle were estimated in the same manner as upon the total destruction of a cargo at sea in collision cases—their market value at the place of shipment with interest and expenses of transportation,⁴ the libelants were entitled to recover, in addition to such price, the advance freight on the cattle lost, and the *pro rata* proportion of insurance premiums paid, and the cost of feed, with interest.⁵ If the injury done property may be repaired the carrier is liable for the reasonable expense incurred in putting it in as good condition as when it was received, and also for its rental value during the time its owner

853, 856, citing *Kain v. Kansas City, etc. R. Co.*, 29 Mo. App. 53, 61, 62; *Sorenson v. Northern Pacific R. Co.*, 36 Fed. Rep. 166. *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 616, 13 Sup. Ct. Rep. 444, quotes the substance of Judge Philips' statement with approval, and refers to *Missouri Pacific R. v. Edwards*, 14 S. W. Rep. 607, and *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

¹ *New York, etc. R. Co. v. Estill*,

147 U. S. 591, 617, 13 Sup. Ct. Rep. 444.

² *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

³ *Atkinson v. Wabash R. Co.*, 143 Ind. 501, 41 N. E. Rep. 947.

⁴ *The Ocean Queen*, 5 Blatch. 493, Fed. Cas. No. 10,410.

⁵ *The Hugo*, 61 Fed. Rep. 860, citing *The Scotland*, 105 U. S. 24, 35; *The Aleppo*, 7 Bene. 121, Fed. Cas. No. 158.

is deprived of the use of it.¹ If the contract limits the carrier's liability in case of total loss, the shipper cannot recover for a partial loss on the basis of the value of the goods, but only the proportionate value fixed by the contract.²

Where goods are negligently lost on the last part of [238] the route, the owner is allowed to recover their value at the place of destination, less the freight. He cannot, however, recover, in addition, the freight paid to another carrier who carried them over the first part of the route.³ Nor is the carrier entitled to an abatement from the value of cotton consigned to a factor equal to his commissions.⁴ If a debt is lost by the carrier's default in the performance of his undertaking, the amount of it is *prima facie* the measure of damages.⁵ Where the carrier delivers goods contrary to the instructions of the consignee as to place at the destination, he is liable for their value if the consignee does not obtain them; but the amount of freight for transportation from the place of shipment should be deducted, though not earned. And if the consignee obtains the goods by means of a replevin, it has been held he cannot include in his damages the counsel fees incurred in the replevin suit.⁶ If the shipper procures a rebate on the customs duties on imported goods which have been damaged the carrier is entitled to the benefit of it,⁷ but not if the duty has not been paid, because no judgment can relieve him from the obligation to pay it;⁸ nor can any benefit be claimed by the carrier on account of deduction made otherwise than because of the condition of the goods.⁹ A carrier is not liable for expenses incurred by the consignor in going to the place where property has been shipped and arrived in damaged condition to investigate the reason for its rejection by the consignee.¹⁰

¹ Gray v. St. Louis, etc. R. Co., 54 Mo. App. 666, 672; Priestly v. Northern Indiana & C. R. Co., 26 Ill. 205, 79 Am. Dec. 369.

² Goodman v. Missouri, etc. R. Co., 71 Mo. App. 460; St. Louis, etc. R. v. Lesser, 46 Ark. 236; Pearse v. Quebec Steamship Co., 24 Fed. Rep. 285.

³ Northern Transportation Co. v. McClary, 66 Ill. 233.

⁴ Kyle v. Laurens R. Co., 10 Rich. 382, 70 Am. Dec. 231.

⁵ Zeigler v. Wells, Fargo & Co., 23 Cal. 179, 83 Am. Dec. 87; Knapp v. United States & C. Exp. Co., 55 N. H. 348; Whitney v. Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207.

⁶ The Boston, 1 Low. 464.

⁷ The Mangalore, 23 Fed. Rep. 463.

⁸ The Surrey, 30 Fed. Rep. 223.

⁹ Morrison v. I. & V. Florio S. S. Co., 36 Fed. Rep. 569.

¹⁰ Western Manuf. Co. v. The Guiding Star, 37 Fed. Rep. 641.

The English court of appeal has recently dealt with the question of the extent of the recovery by a bailee who was under no liability to his bailor for the loss of the property in question. The case arose out of a collision between two vessels which resulted in the loss of a portion of the mails carried by one of them. The claim was made by the postmaster-general on behalf of himself and the postmasters-general of Cape Colony and Natal to recover out of the sums paid into court on behalf of the vessel at fault the value of letters, parcels, etc., in his custody as bailee and so lost. The court took the position that possession is good against a wrong-doer, and that the latter cannot set up the *jus tertii* unless he claims under it; that is established in a long series of actions of trover and trespass at the suit of possessor. "And the principle being the same, it follows that he can equally recover the value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrong-doer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor."¹

§ 919. Damages for injury to or loss of non-marketable property. It is not essential to the recovery of damages for injury to or the loss of property that it shall have a market value at the place to which it is shipped. This consideration only affects the mode of proving the amount of the loss and the elements by which it is to be ascertained, not the right to recover.² Where wearing apparel was lost, its value, it was said, might be arrived at by considerations of the cost and actual worth, without reference to what it would sell for in a particular market.³ Where such property and second-hand

¹ The Winkfield, [1902] Prob. 42, 54, overruling *Clarridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

² *Prettyman v. Oregon & N. R. Co.*, 13 Ore. 341, 10 Pac. Rep. 634; *Lachner v. Adams Exp. Co.*, 72 Mo. App. 13.

³ *Denver, etc. R. Co. v. Frame*, 6

Colo. 382. Personal apparel has no market value. "The actual value of the thing lost and, therefore, the actual damage occasioned by the loss is the value of the garment in its worn condition, as compared with its value if were new, excluding considerations of inconvenience resulting from being deprived of its use."

books, table furniture, etc., which had no market value, was lost the court said their value to their owner, "not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family," constituted the measure of the carrier's liability.¹ Where building plans were lost the cost of obtaining new ones and the expenses reasonably incurred in doing so measured the recovery. In the absence of the carrier's knowledge of the contents of the parcel or the use to which they were to be put, there was no liability for resulting delay in the erection of the building pursuant to the plans.² In a case where there was negligent delay in delivering property and it was also injured, its original cost, the freight paid on it and the difference between the sum and amount received on its sale, less the expense of selling and the value of the time required to sell, was the measure of redress.³ In a recent Texas case and also in a late case in Massachusetts the question as to the measure of damages where family portraits have been lost has been considered. In the latter state the contention was that the general principle applied, and that the fair market value of the article lost measured the plaintiff's rights. This, the court said, was delusive, because it had no such value. "The just rule of damages is the actual value to him who owns" the portrait, "taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."⁴ In the Texas case⁵ the trial court directed that in determining the value of the family portraits the jury might look to their orig-

C. O. & S. W. R. Co. v. Webb, 8 Ky. L. Rep. 44 (Ky. Super. Ct.).

¹ International, etc. R. Co. v. Nicholson, 61 Tex. 550; Wall v. Platt, 169 Mass. 398, 406, 48 N. E. Rep. 274; Wells, Fargo Exp. Co. v. Williams, 71 S. W. Rep. 314 (Tex. Ct. of Civ. App.).

² Mather v. American Exp. Co., 138 Mass. 55. Where maps prepared for a geological survey were lost the

cost of preparing them measured the recovery. Adams Exp. Co. v. Hoening, 9 Ky. L. Rep. 814 (Ky. Super. Ct.).

³ Wabash, etc. R. Co. v. Lynch, 12 Ill. App. 365.

⁴ Green v. Boston & L. R. Co., 128 Mass. 221, 35 Am. Rep. 370; Louisville & N. R. Co. v. Stewart, 78 Miss. 600, 29 So. Rep. 394.

⁵ Houston, etc. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808.

inal cost and to the probable cost of reproducing and replacing the same as shown by the testimony. In passing upon an exception to this instruction the court said: In regard to a family portrait which might be reproduced, the artist and the subject both being still accessible, it is not perceived why the owner would not be entitled to supply the lost portrait, and to recover of the carrier the cost. This is said to be the owner's right in case of lost articles generally.¹ But when it is impracticable to replace the painting, and where the original cost was incurred at a long time past, and under circumstances differing widely from those affecting the present value, the charge given would be of doubtful applicability, and at all events should be better qualified or explained so as to guard the jury against making the first cost and the cost of replacing the exclusive measure of value.

§ 920. Interest on damages. Interest is generally added in this country to the amount allowed as damages, and on the accepted principle which governs its allowance it should be added as a necessary part of the indemnity the shipper or owner is entitled to for the loss of or injury to his goods.² It has also been allowed in England under some circumstances.³

¹ O'Hanlan v. Great Western R. Co., 6 B. & S. 493, 118 Eng. C. L. 491; Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

² Texas & P. R. Co. v. Payne, 15 Tex. Civ. App. 58, 33 S. W. Rep. 366; Missouri, etc. R. Co. v. Truskett, 104 Fed. Rep. 728, 44 C. C. A. 179, 2 Indian Ty. 633, 53 S. W. Rep. 444; New York, etc. R. Co. v. Estill, 147 U. S. 591, 622, 13 Sup. Ct. Rep. 444; § 355; St. L. etc. R. v. Phelps, 46 Ark. 485; Houston, etc. R. Co. v. Jackson, 63 Tex. 209; T. & P. R. Co. v. Tankersley, id. 57; Thomas, etc. Manuf. Co. v. Wabash, etc. R. Co., 62 Wis. 642, 22 N. W. Rep. 827, 51 Am. Rep. 725; The Nith, 36 Fed. Rep. 86; Western Manuf. Co. v. The Guiding Star, 37 id. 641; East Tennessee, etc. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. Rep. 809; Mote v. Chicago, etc. R. Co., 27 Iowa, 22, 1 Am. Rep. 212; Spring v. Allen, 4 Allen, 112; Cowley v. Da-

vidson, 13 Minn. 92; Woodward v. Illinois Central R. Co., 1 Biss. 403; Blumenthal v. Brainerd, 38 Vt. 403; Ludwig v. Meyre, 5 W. & S. 435; Hand v. Baynes, 4 Whart. 204; Whitney v. Chicago & N. R. Co., 27 Wis. 327; Kellogg v. Same, 26 Wis. 223, 7 Am. Rep. 69; Robinson v. Merchants' Despatch Transportation Co., 45 Iowa, 470; Barton v. Steamship Co., 3 Wall. Jr. 229; Erie R. Co. v. Lockwood, 28 Ohio St. 358; Chapman v. Chicago, etc. R. Co., 26 Wis. 295, 7 Am. Rep. 81; Southern Pacific Co. v. Anderson, 26 Tex. Civ. App. 518, 63 S. W. Rep. 1023, and local cases cited; Cushing v. Wells, Fargo & Co., 98 Mass. 550; Sherman v. Wells, 28 Barb. 403. See Magnin v. Dinsmore, 62 N. Y. 35, 45, 20 Am. Rep. 442.

³ British Columbia Saw Mill Co. v. Nettleship, L. R. 3 C. P. 499.

But in some instances, under the influence of early de- [239] cisions and the reasons upon which they proceeded, the allowance or withholding of interest was left to the discretion of the jury.¹ The rate of interest is governed by the law of the

¹ *Railroad Co. v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St., 933 (under a statute). See *Wolf's Adm'r v. Lacy*, 30 Tex. 349.

In Illinois interest cannot be recovered. *Chicago & A. R. Co. v. Davis*, 54 Ill. App. 130.

In the early case of *Smith v. Richardson*, 3 Caine's, 221, the court said, without qualification, that interest ought not to be allowed. In subsequent cases the question of interest is treated as one for the jury; they to be guided in their discretion by the circumstances, allowing it where the carrier has been guilty of fraud or other improper conduct, and denying it when he becomes liable without actual fault. *Watkinson v. Laughton*, 8 Johns. 213; *Amory v. McGregor*, 15 id. 24, 8 Am. Dec. 205; *Richmond v. Bronson*, 5 Denio, 55.

In *Lakeman v. Grinnell*, 5 Bosw. 625, the court say: "In most cases interest, when allowed, is given in part at least upon some idea of an equivalent already received by the defendant in the use of the money or property withholden. Hence, it is allowable even in trover; but as against a carrier, in whose hands goods have been lost, or . . . wholly destroyed without any fault whatever on his part, no such principle can be invoked. It is impossible that he should have received any advantage whatever from the possession of the goods."

It is to be observed that in trover the consideration of the defendant's benefit from the conversion does not control the right to interest. It is allowed as part of the compensation due the plaintiff.

The decision in *Van Rensselaer v.*

Jewett, 2 N. Y. 135, has been adhered to: "Whenever a debtor is in default for not paying money, *delivering property*, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered with interest from the time of the default until the obligation is discharged."

In *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130, an action for the non-delivery of property, the court said: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives as the measure of compensation then due the difference between the contract and the market prices. If he is not also entitled to interest from that time as a matter of law this contradictory result follows, that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer the party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury.

place where the property is delivered.¹ If the action is for breach of the contract interest is due from the time it occurred; if it is in tort, from the date of the injury.²

[240] § 921. **Shipper's efforts to lessen loss.** The owner of property, being bound to exert himself to prevent damage, and to render the injury as light as possible, where he is so situated in respect to the subject in question as to raise that duty, may recover for his reasonable and necessary labor or

. . . The case of *Van Rensselaer v. Jewett* establishes a principle broad enough to include this case, and has freed the law from this as well as other apparent inconsistencies in which it was supposed to be involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."

Andrews v. Durant, 18 N. Y. 496, was *trover*. The court said: Interest "is as necessary a part of complete indemnity as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value." In *McCormick v. Pennsylvania Central R. Co.*, 49 N. Y. 303, the plaintiff's baggage was retained and carried off on defendant's train after he decided not to become a passenger, and he had demanded that such baggage be delivered to him. If liable for conversion the court held that interest on the value was recoverable, and as necessary a part of a complete indemnity as the value itself; and that in fixing the damages it was no more in the discretion of the jury than the value.

In *Woodward v. Illinois Central R. Co.*, 1 Biss. 403, an action against a carrier for goods which had been lost by fire, Judge Davis charged the jury to add interest to the value.

The jury failing to agree the case was tried a second time (1 Biss. 447), and Judge Drummond instructed the jury that they might, if they chose, allow additional damages by way of interest.

¹ *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

² *Illinois Central R. Co. v. Haynes*, 64 Miss. 604; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. Rep. 529; *International, etc. R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S. W. Rep. 754; *Texas & Pacific R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. Rep. 272.

The action for delay is on the breach of contract, and interest is recoverable from the time compensation was demanded. *Missouri, etc. R. Co. v. Truskett*, 104 Fed. Rep. 728, 44 C. C. A. 179, 2 Indian Ty. 633, 53 S. W. Rep. 444.

Interest may be allowed from the date of the shipment where goods are injured, the action being for breach of contract. *Goodman v. Missouri, etc. R. Co.*, 71 Mo. App. 460.

On the failure to deliver property interest is to be computed from the day it should have been delivered. *Lachner v. Adams Exp. Co.*, 72 Mo. App. 13. See *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 619, 13 Sup. Ct. Rep. 444, as to the recovery of interest under the statutes of Missouri.

expense for that object.¹ Thus, in an action against a railroad company for damages to a lot of flour, it was held that a judicious expense incurred by the plaintiff, after the flour had been delivered to him, in rendering it fit for market, might be recovered as damages, as it appeared that such expense was for the defendant's benefit, and lessened the amount for which he would otherwise have been chargeable.² So the reasonable cost of recovering mules which the carrier had suffered to escape was held recoverable.³ On the default of a carrier to transport property in accordance with his contract, the would-be shipper is not required to employ another carrier to do so.⁴ Where there was a failure to deliver feed for stock within a reasonable time, it was said that the failure of the plaintiff to use ordinary care to prevent injury to his cattle because of the lack of feed would not bar the recovery of the damages caused by the negligence of the defendant, which he could not, by ordinary diligence, have prevented.⁵ If the plaintiff shows negligence on the part of the defendant he is, *prima facie*, entitled to recover all of the damages sustained, and the *onus* rests upon the defendant to prove the negligence by which the plaintiff enhanced the amount of the damage or failed to prevent the injury, as well as the extent to which such damages were enhanced or to which they might have been lessened by the use of ordinary care on the part of the plaintiff.⁶ If horses and cattle are shipped together and the initial

¹ *Railway Co. v. Neel*, 56 Ark. 279, 19 S. W. Rep. 963; *Shelby v. Missouri Pacific R. Co.*, 77 Mo. App. 205; *Bigelow v. Chicago, etc. R. Co.*, 104 Wis. 109, 80 N. W. Rep. 95; *Wabash, etc. R. Co. v. Lynch*, 12 Ill. App. 365; *The Henry Buck*, 39 Fed. Rep. 211; *Savannah, etc. R. Co. v. Pritchard*, 77 Ga. 412, 1 S. E. Rep. 261, 4 Am. St. 92; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330.

² *Winne v. Illinois Central R. Co.*, 31 Iowa, 583. See *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. Rep. 665, 70 Am. St. 432.

³ *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183. See *King v. Shepherd*, 3 Story, 349.

⁴ *Gulf, etc. R. Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. Rep. 829. Compare *Bigelow v. Chicago, etc. R. Co.*, 104 Wis. 109, 80 N. W. Rep. 95.

⁵ *Belcher v. Missouri, etc. R. Co.*, 92 Tex. 593, 50 S. W. Rep. 559, citing *Bardwell v. Jamaica*, 15 Vt. 438; *Stebbins v. Central Vermont R. Co.*, 54 Vt. 464, 41 Am. Rep. 855; *Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. Rep. 128; *Smithwick v. Hall*, 59 Conn. 261, 21 Atl. Rep. 924, 21 Am. St. 104, 12 L. R. A. 279; *Bradford v. Downs*, 126 Pa. 622, 17 Atl. Rep. 884; *Hibbard v. Thompson*, 109 Mass. 288, and the cases cited in the next note.

⁶ *Belcher v. Missouri, etc. R. Co.*, *supra*, citing *Gould v. McKenna*, 86

carrier has exposed the cattle to splenetic fever in consequence of which the connecting carrier refused to receive or transport them, the shipper is not justified in refusing to have the horses shipped until the cattle could be shipped with them.¹

§ 922. When damages less than value of goods at destination. [241] Circumstances may have the effect to modify and lessen the liability of a carrier for the full value of lost goods delivered for transportation. Such circumstances may show that the plaintiff's real loss was less than their actual value at the place of destination; they may show a loss of compensation due for carriage by some artifice of the consignor: may show that the plaintiff has induced a want of the care necessary to the safety of the goods. Where the plaintiffs sent by an express company from New York to Memphis a package of watches and watch keys, giving the consignees the option to take and pay for them at a price fixed or return them, the carrier was held liable for that price on their loss, though it was largely below the market price at the place of destination.² Folger, J., said: "It seems clear that the plaintiffs could not demand from the defendant more than would have resulted to them had the defendant made safe carriage and prompt and correct delivery. In that case the plaintiffs would at the farthest have had from their consignees payment for all the goods sent at the price to the consignees fixed upon them by the plaintiffs. The sum of that price, with interest thereon from the day when the goods should in the usual course of carriage have reached the consignees and been accepted by them, will make the damage which would naturally and proximately result to the plaintiffs. Though a [the] rule is sometimes stated thus: that the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery,—that rule is but a branch of the more general one that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract."³ When the owner and shipper of the

Pa. 304, 27 Am. Rep. 705; *Goshen v. England*, 119 Ind. 377, 5 L. R. A. 253, 21 N. E. Rep. 977; *Bardwell v. Jamaica*, *supra*.

¹ *Missouri, etc. R. Co. v. Wells*, 23 Tex. Civ. App. 255, 54 S. W. Rep. 939.

² *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

³ *Sturges v. Bissell*, 46 N. Y. 462.

goods is himself to take the goods at the place of destination, and there sell them for his own account for what they will there bring, the market value there is the measure of his damages because that would have been his benefit from performance of the contract. But every case is governed by its own facts; and here the price of the goods at the place of destination was fixed by the plaintiffs before they were [242] committed to the carrier. Either that price was to be paid by the consignees, or the goods were to have been returned to the plaintiffs at New York, where they would have been worth to them the market price of them there. No other value to the plaintiffs could have been in the contemplation of both the contracting parties, nor any other damages than such as would result from a failure to obtain that value."

§ 923. Same subject; criticism of the rule stated. This opinion is open to some criticism. It is true, as a general rule, that "the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of the contract;" that is, the benefit which would result independently of any special use of which the defaulting party had no notice. This rule does not apply to the benefit in excess of market price derivable from another contract not known to the carrier when his contract was made.¹ The performance of the carrier's contract will give the consignee, whether he be the consignor or not, the benefit of the property at the place of destination after paying the cost of transportation. The carrier can be charged with no more than the market value there unless he has contracted to carry it there to fulfill a contract of sale at a greater price. Why, then, should he be entitled to reduce damages below the market value when the subcontract, of which he had no notice, happens to provide for a sale for less than the true value? Besides, the consignor's

¹ *Rodocanachi v. Milburn*, 18 Q. B. Div. 67; *The Ship Compta*, 5 Sawyer, 137; *Caledonian R. Co. v. Colt*, 3 L. T. (N. S.) 252; *Chicago, etc. R. Co. v. Hale*, 83 Ill. 360, 25 Am. Rep. 403; *Houston, etc. R. Co. v. Jackson*, 62 Tex. 209.

It is held in West Virginia that where the consignor of lost property

had sold it at the place it was destined for, the difference between the price he was to receive and that paid by him was the measure of his claim. It does not appear that the carrier had any knowledge of the sale. *Tompkins v. Kanawha Board*, 21 W. Va. 224.

action exhausts also the remedy of the consignee, and the damages are in effect measured by the price at the place of shipment.¹ Looking at the possibility of the consignee exercising the option not to purchase, the consignor could have countermanded the direction to return the goods and offered them for sale at the place of destination.²

Since the publication of the foregoing observations in the original edition of this work the question passed upon in *Magnin v. Dinsmore* has been considered by the English courts in *Rodocanachi v. Milburn*.³ In that case the action was brought by the shipper and vendor of goods sold "to arrive" at a fixed price. The trial court followed *Magnin v. Dinsmore*, and held that the measure for the loss of the goods was to be determined by the price at which the sale had been made. The court of appeal differed. Lord Esher, M. R., said: "I think that the rule as to measure of damages in a case of this kind must be this—the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them he must pay freight in respect of which there is a lien on them. If there were no lien he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of

¹ *Thompson v. Fargo*, 58 Barb. 575; ² See *Smith v. Griffith*, 3 Hill, 333, *Blanchard v. Page*, 8 Gray, 281; 38 Am. Dec. 639.

Fenn v. Western R. Co., 112 Mass. ³ 17 Q. B. Div. 316, 18 id. 67.
524, 17 Am. Rep. 128.

goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had sold the goods at a higher price would be an accidental circumstance as between themselves and the ship-owners; but it is said that as they have sold for a price less than the market price the market price is not to govern, but the contract price. I think that if the law were so it would be very unjust. I adopt the rule laid down in *Mayne on Damages*, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods."

If the contract price is less at the place of destination than the market value, the carrier is liable for the difference between the former and the value of the property at the place of shipment, less the cost of carriage if the shipper was to pay it, regardless of the carrier's knowledge of the contract of sale. Under such circumstances the shipper's recovery cannot exceed that difference.¹ If, by an actual cash sale, the consignee has protected himself against any loss resulting from injury to the goods *in transitu*, his recovery cannot exceed nominal damages and costs, notwithstanding he may be liable, on account of warranty or fraud in making the sale, to refund a part of the purchase price, at least so long as that liability remains contingent. If part of the consignment has not thus been sold the consignee may recover actual damages as to it.² Where the invoice price at the place of shipment is stipulated to be the measure of the carrier's liability, and no such price is shown, the actual value of the goods at the place of shipment, when loaded and ready for carriage, will govern, to which will be

¹ *Missouri, etc. R. Co. v. Wither-* ² *Henry v. Central R. & B. Co.*, 89
spoon, 18 Tex. Civ. App. 615, 45 S. W. Ga. 815, 15 S. E. Rep. 757.
Rep. 424.

added, in addition to the freight paid, interest on the whole sum.¹ In the absence of a market for property at the place it is destined for, the cost at the place of shipment may be recovered, and the freight paid, as well as the expenses of the consignee in going to receive the property.²

§ 924. **Same subject; loss at place of shipment.** Where the goods after delivery to the carrier are lost or injured at the port or place of shipment the value at that place governs, instead of the market price at the place of destination.³ It is otherwise if after the injury occurs the carrier makes an unauthorized sale of the property. Then the shipper may, if he has notice of the sale, claim the amount realized or demand the value of the property at the port of destination at the time the vessel arrived there.⁴ It has been decided in Minnesota that a bill of lading stipulating that the carrier should not be liable for loss or damage beyond the value of the property at the place and time of shipment was unjust, unreasonable, and contrary to public policy, because freight charges paid or incurred by the consignee had not been provided for.⁵ But on a reconsideration it was determined that there was nothing in the condition which excluded from the computation of damages such charges, and that such a condition was binding.⁶

§ 925. **Same subject; shipper's conduct may affect damages.** A shipper may estop himself from claiming the full [243] value of his property, by his conduct when he offers it for transportation, as where it amounts to a representation of value.⁷ Thus, where a sealed bag was delivered to the carrier, the servant of the latter giving a receipt for 200*l.*, which the senders stated it contained, while in fact it contained 450*l.*,

¹ *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 350.

² *The Protection*, 102 Fed. Rep. 516, 42 C. C. A. 489.

³ *Krohn v. Oechs*, 48 Barb. 127; *Lakeman v. Grinnell*, 5 Bosw. 625; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13.

⁴ *The Joshua Barker*, Abb. Adm. 215.

⁵ *Shea v. Minneapolis, etc. R. Co.*, 63 Minn. 228, 65 N. W. Rep. 458.

⁶ *Davis v. New York, etc. R. Co.*, 70 Minn. 37, 72 N. W. Rep. 823.

⁷ *Johnstone v. Richmond, etc. R. Co.*, 39 S. C. 55, 17 S. E. Rep. 512; *Zouch v. Chesapeake & O. R. Co.*, 36 W. Va. 524, 17 L. R. A. 116, 15 S. E. Rep. 185; *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. Rep. 328, 9 L. R. A. 453; *J. J. Douglas Co. v. Minnesota Transfer Co.*, 62 Minn. 288, 64 N. W. Rep. 899, 30 L. R. A. 860; *Elkins v. Empire Transportation Co.*, 81* Pa. St. 315.

the court limited the recovery for its loss to the lesser sum, and said: "There was a particular undertaking by the carrier for the carriage of 200*l.* only; and his reward was to extend no further than that sum; and 'tis the reward that makes the carrier answerable; and since the plaintiffs had taken this course to defraud the carrier of his reward they had thereby barred themselves of that remedy which is founded only on the reward."¹ The shipper is bound to deal fairly with the carrier, and if required must give true information of the value of a parcel offered for transportation; if he states the quality and value untruly, either in words or by the manner of marking it, he will be guilty of a fraud, and if entitled to recover at all, in case of an accidental loss, will be allowed to do so only according to the value he gave out at the time of shipment.² A carrier has the right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner gives an answer which is untrue in a material point, the carrier will undoubtedly be absolved on general principles from the consequences of any loss not occasioned by negligence or misconduct.³ If the carrier claims that his liability

¹ *Tyly v. Morrice*, Carthew, 485.

² *Savannah, etc. R. Co. v. Collins*, 77 Ga. 376, 3 S. E. Rep. 416, 4 Am. St. 87; *Relf v. Rapp*, 3 W. & S. 21, 37 Am. Dec. 528; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Hart v. Pennsylvania R. Co.*, 112 id. 331, 340, 5 Sup. Ct. Rep. 151; *Earnest v. Express Co.*, 1 Woods, 573; *South & N. A. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578, 56 Ala. 368; *Muser v. Holland*, 17 Blatch. 412; *Graves v. Lake Shore R. Co.*, 137 Mass. 33, 50 Am. Rep. 282; *St. Louis, etc. R. v. Lesser*, 46 Ark. 236; *Same v. Weakly*, 50 id. 397, 8 S. W. Rep. 134, 7 Am. St. 104; *Duntley v. Boston & M. R. Co.*, 66 N. H. 263, 20 Atl. Rep. 327; *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. Rep. 329, 9 L. R. A. 453; *Central R. v. Bryant*, 73 Ga. 722;

Hill v. Boston, etc. R. Co., 144 Mass. 284, 10 N. E. Rep. 836; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Hayes v. Wells, Fargo & Co.*, 23 Cal. 185, 83 Am. Dec. 89; *Magnin v. Dinsmore*, 62 N. Y. 55, 20 Am. Rep. 442. See *Rice v. Indianapolis, etc. R. Co.*, 3 Mo. App. 27; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Bene. 271; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. Rep. 244, 42 Am. Rep. 713; *Chicago, etc. R. Co. v. Abel*, 60 Miss. 1017; *Kansas City, etc. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. Rep. 821; *Moulton v. St. Paul, etc. R. Co.*, 31 Minn. 85, 16 N. W. Rep. 497, 47 Am. Rep. 781, as to the validity of contracts limiting the carrier's liability.

³ *Scammon v. Wells, Fargo & Co.*,

is limited either by a contract made with the shipper or by the latter's misconduct the burden is upon him to clearly show it.¹

§ 926. **Qualification of carrier's liability by notice.** A carrier may qualify his liability by a general notice to all who [244] employ him to the effect that he will not be responsible for goods above the value of a certain sum unless they are entered as such and paid for accordingly.² To affect the employer by such notice it must be brought home to him;³ but, according to numerous decisions, only slight evidence beyond its publication is necessary to warrant the inference that it was known.⁴ The English courts and the supreme court of the

84 Cal. 311, 24 Pac. Rep. 284; Hollister v. Nowlen, 19 Wend. 234; Orange County Bank v. Brown, 9 Wend. 116; Gibbon v. Paynton, 4 Burr. 2298; Pardee v. Drew, 25 Wend. 459; Batson v. Donovan, 4 B. & Ald. 21; Everett v. Southern Exp. Co., 36 Ga. 303; Earnest v. Express Co., 1 Woods, 573; Cincinnati, etc. R. Co. v. Marcus, 38 Ill. 219; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Phillips v. Earle, 8 Pick. 182; Little v. Boston, etc. R. Co., 66 Me. 239.

¹ St. Louis, etc. R. Co. v. Smuck, 49 Ind. 302; Rosenfeld v. Peoria, etc. R. Co., 103 id. 121, 2 N. E. Rep. 344, 53 Am. Rep. 500.

² Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151; Pierce v. Southern Pacific Co., 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 250; Michalitschke v. Wells, Fargo & Co., 118 Cal. 683, 50 Pac. Rep. 847; Graves v. Adams Exp. Co., 176 Mass. 280, 57 N. E. Rep. 462; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. Rep. 479; Alair v. Northern Pacific R. Co., 53 Minn. 160, 54 N. W. Rep. 1072, 39 Am. St. 588, 19 L. R. A. 764; Primrose v. Western U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. Rep. 1098; J. J. Douglas Co. v. Minnesota Transfer R. Co., 62 Minn. 288, 64 N. W. Rep. 899, 30 L. R. A. 860; Gillespie v. Platt, 19 N. Y. Misc. 43, 42 N. Y. Supp. 876; Ballou v. Earle, 17 R. I. 441, 22 Atl. Rep.

1113, 33 Am. St. 881, 14 L. R. A. 433; Calderon v. Atlas Steamship Co., 64 Fed. Rep. 874; McMillan v. Michigan, etc. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Moses v. Boston, etc. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Ullman v. Chicago, etc. R. Co., 112 Wis. 150, 88 N. W. Rep. 41, 88 Am. St. 949, 56 L. R. A. 246; Judson v. Western R. Corp., 6 Allen. 486, 83 Am. Dec. 646; Cole v. Goodwin, 19 Wend. 251.

³ Id.

⁴ Graves v. Adams Exp. Co., 176 Mass. 280, 57 N. E. Rep. 462; Cox v. Central Vermont R. Co., 170 Mass. 129, 49 N. E. Rep. 97; Smith v. American Exp. Co., 108 Mich. 572, 66 N. W. Rep. 479; Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Durgin v. American Exp. Co., 66 N. H. 277, 20 Atl. Rep. 328, 9 L. R. A. 453. See Chicago, etc. R. Co. v. Harmon, 12 Ill. App. 54; Louisville, etc. R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. 206.

"The well-settled rule now is that in the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting the common-law liability of common carriers, contained in a receipt given by them for freight, were known and assented to by the party

United States hold that mere conditions attached to a passenger's ticket are, in effect, notices, and that they are not, as matter of law, whether regulations for the conduct of the carrier's business or limitations upon its common-law obligations, parts of the contract.¹ The defendant company received at New York for transportation to plaintiffs at St. Louis one package, containing three gross of cases of "Shallenberger Pills," worth \$113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than \$50 for any loss or damage, at which "the article forwarded" is valued, and which shall constitute the limit of the liability of the company. The three cases were each separately addressed to plaintiffs, and were then wrapped up with a cover in a single package similarly addressed. But one of the cases reached them. In an action to recover for the loss it was held that the "article forwarded" was the single package, and that plaintiffs were not entitled to recover \$50 upon each of the missing cases.²

Stipulations of this character are clearly distinguishable from those which attempt to exonerate carriers from liability for their negligence or that of their servants. The language used

receiving it." *Ballou v. Earle*, 17 R. L. 441, 22 Atl. Rep. 1113, 33 Am. St. 881, 14 L. R. A. 433, citing "*Belger v. Dinsmore*, 15 N. Y. 166; *Steers v. Liverpool, etc. Steamship Co.*, 57 N. Y. 1; *Harris v. Great Western R. Co.*, 1 Q. B. Div. 515; *Germania F. Ins. Co. v. Memphis, etc. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 23 N. E. Rep. 205, 5 L. R. A. 846; *Burke v. South Eastern R. Co.*, 5 C. P. Div. 1; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Grace v. Adams*, 100 Mass. 343; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343; *Hill v. Syracuse, etc. R. Co.*, 73 N. Y. 351. For a full discussion of the contrary doctrine, see *Hollister v. Nowlen*, 19 Wend. 234, and cases cited." *Boorman v. American Exp. Co.*, 21 Wis. 152, is to the same effect as the Rhode Island case.

If the paper relied on as limiting the carrier's liability is not given the passenger until he has begun a sea voyage and is powerless to repudiate the terms thereof, he will not be bound by it. *Lechowitzer v. Hamburg-American Packet Co.*, 59 N. Y. St. Rep. 486, 28 N. Y. Supp. 577, approved in *Jenkins v. Brooklyn Heights R. Co.*, 29 App. Div. 8, 15, 51 N. Y. Supp. 216.

¹ *Richardson v. Rowntree*, [1894] 7 App. Cas. 217; *Parker v. South Eastern R. Co.*, 2 C. P. Div. 416, 1 id. 618; *Henderson v. Stevenson*, L. R. 2 H. of L., Scotch App. 470; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. Rep. 597, reversing 60 Fed. Rep. 624, 9 C. C. A. 161. See *The Kensington*, 94 Fed. Rep. 885, 36 C. C. A. 533.

² *Wetzell v. Dinsmore*, 54 N. Y. 496.

by Blatchford, J.,¹ has been often quoted on this point: The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of due care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond to that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

There are limitations on the power thus to contract. If the liability of the carrier is limited to an arbitrary sum, not fixed with reference to the agreed or actual maximum value of the property, the limitation is void.² Some nice distinctions have been made in passing upon contracts of this character; for obvious reasons, they cannot be treated of here. The opinion of Justice Marshall in the Wisconsin case cited may be consulted with profit on this point. There is a disagreement in the courts concerning the effect to be given a contract made in one state stipulating for a limited liability of the initial carrier and any connecting carrier, where the goods are carried beyond the limits of the state in which the contract is made, and where it was valid, and the injury to them occurs in another state, the courts of which declare such contracts void. The Pennsylvania court, two members dissenting, has held that the con-

¹ In *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 340, 5 Sup. Ct. Rep. 151. See *Jennings v. Smith*, 106 Fed. Rep. 139, 45 C. C. A. 249. Compare *Pennsylvania R. v. Miller*, 87 Pa. 395.

² *Ullman v. Chicago, etc. R. Co.*, 112 Wis. 150, 88 N. W. Rep. 41, 88 Am. St. 949, 56 L. R. A. 246. See *O'Malley v. Great Northern R. Co.*, 86 Minn. 380, 90 N. W. Rep. 974.

tract will not be enforced there.¹ In Texas one of the courts of civil appeals has laid down the rule that, in the absence of federal legislation, the validity and effect of a contract between a shipper and carrier for transportation from one state to another is determinable by the law of the state in which the contract is made and where the transportation begins.² A contract limiting the carrier's liability, if invalid where made, will not be enforced in the courts of Massachusetts.³ It is also the rule in Texas that the provision of the statutes thereof prohibiting carriers from limiting their common-law liability by stipulations in bills of lading is valid as applied to contracts for interstate transportation.⁴

§ 927. **Liability for partial loss when value limited.** The federal courts have differed respecting the construction of a clause limiting the liability of the carrier to the invoice or declared value of the goods, whichever shall be the least. Some district courts have taken this to mean that in any settlement of loss or damage the invoice value, and not the actual value, of the goods should be taken as a basis, and therefore found the damage from loss of market to be the difference between such invoice value and the price the goods actually brought.⁵ The circuit court of appeals, second circuit, has held that such clause fixes a final limit of liability beyond which the carrier shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit.⁶ This is in harmony with the rule declared in Massachusetts. The bill of lading there passed upon expressed: "Ship not accountable for any sum exceeding £100 per package for goods of whatever description, unless the value is declared and freight as may be agreed paid thereon, and in event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice or the declared value for the United States customs

¹ Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 Atl. Rep. 990, and local cases cited.

² Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595, 59 S. W. Rep. 949. See § 958.

³ Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. Rep. 87.

⁴ Pittman v. Pacific Exp. Co., *supra*.

⁵ The Hadji, 18 Fed. Rep. 459; The Lydian Monarch, 23 Fed. Rep. 298; Pearse v. Quebec Steamship Co., 24 Fed. Rep. 285.

⁶ The Styria, 101 Fed. Rep. 728, 41 C. C. A. 639.

duty." Referring to two of the cases first cited to this section Holmes, J., said: "We shall not criticise these decisions further than to say that, if they are not distinguishable from the case at bar, we cannot follow them." Considering the language of the bill he observed: "It is plain that these words fix alternative limits of liability — £100 per package if the value is not declared, the declared value when it is declared. In the former case we do not suppose that it would be contended that, if a package brought £100, no damage could be recovered; yet, unless the argument is carried to that extent, we see no reason why, in the latter alternative, the ship-owners should escape if the goods bring their invoice value. Looking at the words of the latter branch of the sentence alone, it will be seen that they refer to the event of 'loss or damage for which the ship is responsible,' and therefore in terms presuppose that something is to be recovered in the case for which they provide. The following words: 'the liability shall not exceed,' etc., are apt words to express the outside limit of the sum to be recovered; but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that if the goods are still equal to the invoice value there shall be no recovery at all. . . . As we read the contract the damages are to be ascertained in the usual way, by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding £100 when the value is not declared, or in this case up to but not exceeding the invoice value."¹

§ 928. Apportionment of damage in case of mutual fault. It is well settled that if property is damaged while in the carrier's possession or under his control he has the burden of proving that the injury was occasioned by a cause for which he is not responsible.² In a case in which it was alleged that the cargo was improperly stowed and the defendant claimed that the injury for which recovery was sought was the result of the perils of the sea, the court thought that the last mentioned cause was responsible for but a small amount of the damage

¹ *Brown v. Cunard Steamship Co.*, *Starnes v. Railroad*, 91 Tenn. 516, 19 147 Mass. 58. 16 N. E. Rep. 717; *S. W. Rep.* 675.

² § 917.

done, and as the carrier did not offer proof of the extent of it for which it was not responsible the shipper was awarded compensation for his whole loss.¹ Where the loss resulted from the negligence or misfortune of both parties and it was not practicable to ascertain for how much of it one or the other was responsible, the court adopted the rule applied by courts of admiralty in collision cases when there is mutual fault, and divided the damages equally.² But neither of these rules will be applied where the injury or loss results from a cause for which the carrier is only in part responsible, except as a last resort. If it is practicable to make an approximate apportionment of it to the several causes of damage that will be done.³

§ 929. Liability not mitigated by insurance. A shipper who has received from his insurer part compensation for property lost by a carrier may sue the latter on his contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid him by the insurer in ease of the carrier,⁴ and in the trial of such a case the court will restrain the latter from setting up the insurer's payment of his part of the loss as partial satisfaction.⁵ The rule that the liability of one who has destroyed or injured insured property is not mitigated by the receipt of the insurance money by the owner is of general application.⁶

§ 930. Exemplary damages. The principles upon which such damages are allowed are elsewhere considered.⁷ If a carrier wantonly and in gross neglect of his duty and reckless disregard of a consignee's rights wilfully refuses to carry or deliver property, he becomes liable for exemplary damages, including all actual, though remote, losses sustained.⁸

§ 931. For what losses carrier responsible. The carrier is liable for goods which he delivers by mistake to the wrong

¹ *The Mary Belle Roberts*, 2 Sawyer, 1.

² *Snow v. Carruth*, 1 Sprague, 324.

³ *The Shand*, 16 Fed. Rep. 520.

⁴ *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566; *Merrick v. Brainard*, 38 Barb. 574; *Gails v. Hailman*, 11 Pa. 515.

⁵ *Gails v. Hailman*, *supra*.

⁶ *Lindsay v. Bridgewater Gas Co.*, 3 Pa. Dist. Ct. 717; *Perrott v. Shearer*, 17 Mich. 48; *Anderson v. Miller*, 96 Tenn. 55, 33 S. W. Rep. 615, 31 L. R. A. 604; *Brown v. McRae*, 17 Ont. 712.

⁷ Ch. 9, and §§ 937, 950.

⁸ *Silver v. Kent*, 60 Miss. 124; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 7 S. E. Rep. 493, 13 Am. St. 716.

person,¹ and for any damages resulting from a departure from the contract, or from the consignor's instructions as to the route, mode of conveyance, or the condition of delivery (in the absence of any exigency); in other words, when a carrier [245] accepts goods to be carried with a direction on the part of the owner to carry them in a particular way or by a particular route he is bound to obey it; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.² But if it should be shown in such a case that the loss must certainly have occurred from the same causes if there had been no default or deviation the carrier should be excused. The burden of proof of this fact, however, is on him.³ Where the carrier was instructed to collect money from the consignee before delivery, and delivered the goods without exacting a compliance with this condition, he was held liable for the amount he was directed to collect.⁴ A

¹Price v. Oswego, etc. R. Co., 50 N. Y. 213, 10 Am. Rep. 475, 58 Barb. 599; Adams v. Blankinstein, 2 Cal. 413, 56 Am. Dec. 350; Winslow v. Vermont, etc. R. Co., 42 Vt. 700, 1 Am. Rep. 365; McCulloch v. McDonald, 91 Ind. 240; Merchants' Despatch & T. Co. v. Merriam, 111 id. 5, 11 N. E. Rep. 954; Foy v. Chicago, etc. R. Co., 63 Minn. 255, 65 N. W. Rep. 627; Merriman v. Great Northern Exp. Co., 63 Minn. 543, 65 N. W. Rep. 1080.

If the person to whom the property is delivered accounts for it to the consignee the carrier is liable for only nominal damages. Rosenfeld v. Express Co., 1 Woods, 131; Jellett v. St. Paul, etc. R. Co., 30 Minn. 265, 15 N. W. Rep. 237.

²Wallace v. Swift, 31 Up. Can. Q. B. 523; Acklèy v. Kellogg, 8 Cow. 223; Forrestier v. Bordman, 1 Story, 45; In re Petersen, 21 Fed. Rep. 885; Maghee v. Camden, etc. R. Co., 45 N. Y. 514, 6 Am. Rep. 124; Hinckley v. New York Central R. Co., 56 N. Y. 429; Goddard v. Mallory, 52 Barb. 87; Hastings v. Pepper, 11 Pick. 41;

Persse v. Cole, 1 Cal. 369; Steamboat John Owen v. Johnson, 2 Ohio St. 142; The Boston, 1 Low. 464; American Exp. Co. v. Lesem, 39 Ill. 312; United States Exp. Co. v. Keefer, 59 Ind. 263; Merrick v. Webster, 3 Mich. 268; Johnson v. New York Central R. Co., 33 N. Y. 610, 88 Am. Dec. 416; Wilcox v. Parmalee, 3 Sandf. 610; Whitney v. Merchants' Union Exp. Co., 104 Mass. 152, 6 Am. Rep. 207; Calderon v. Atlas Steamship Co., 64 Fed. Rep. 874; Louisville & N. R. Co. v. Hartwell, 99 Ky. 436, 36 S. W. Rep. 183; S. D. Seavey Co. v. Union Transit Co., 106 Wis. 394, 82 N. W. Rep. 285; Pierce v. Southern Pacific Co., 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 350; Railroad v. Odil, 91 Tenn. 61, 83 S. W. Rep. 611; Leduc v. Ward, 20 Q. B. Div. 475; Robertson v. National Steamship Co., 60 N. Y. Super. Ct. 132, 47 N. Y. Supp. 459. See Bills v. New York Central R. Co., 84 N. Y. 5.

³Maghee v. Camden, etc. R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

⁴Id.

carrier was instructed to deliver to a factor at a certain market who had been directed not to sell until he received an order to do so; the carrier delivered to a factor at a different market, who had no instructions concerning the article and who sold it immediately. It appearing that the article rose in price from that day until suit was brought against the carrier, it was held that the plaintiff was entitled to recover the highest price reached within that period, the suit having been brought within a reasonable time; and receipt of the proceeds from the factor who made the sale was held not to be a bar.¹ A carrier who so handles cattle delivered to it for shipment as to expose them to splenetic fever, in consequence of which a connecting carrier refuses to carry them, must answer for the damages.² A shipper who directs a carrier to transport his goods in bond has a remedy for the violation of his directions. Taking the goods out of bond was an interference with the plaintiff's rights, and entitled him to recover actual damages. The initial carrier and the carrier who continued the transportation was each liable.³

§ 932. **Damages where there are successive carriers.** If goods are marked and known to the carrier to be des- [246] tined to a point beyond the terminus of his route and he becomes liable for a loss of them, or for damages for a negligent delay, there is some diversity as to whether the damages should be estimated with reference to the market value at the end of his route or at the ultimate destination. On principle, the value at the latter place should be the criterion. The value in one place and the depreciation in the other, according to the market at the ultimate destination, less the cost of transportation, is the actual loss to the owner; and it is as direct and proximate where there are several carriers as where the whole transportation is let to one. The intermediate carrier who is liable has undertaken the carriage of the goods with a knowledge of their intended destination; therefore the benefit to the shipper of their delivery at that place, and the disadvantage to him of a failure to so deliver them, are within the contemplation of

¹ Arrington v. Willimington, etc. R. Co., 6 Jones, 68, 72 Am. Dec. 69. ³ Smith Bros. & Co. v. New Orleans & N. E. R. Co., 106 La. 11, 30 So.

² Missouri, etc. R. Co. v. Wells, 22 Rep. 265.

Tex. Civ. App. 255, 59 S. W. Rep. 939.

both parties. The damages recoverable from such a carrier should be estimated on the basis of the net value at the place where he knows the owner of the goods intends them to go, for the same reason that in other cases damages are recoverable with reference to the value for any special use which was known to both parties at the time of making the contract. In this view it is immaterial whether the through transportation is undertaken by one carrier, or the goods will be carried by several in a connected line, or by several not connected.¹ In a well-considered Michigan case² the contract of the defendant was to transport cattle from Toledo to Buffalo. Their ultimate destination was Albany or New York, but this fact was not stated in the contract. The trial court charged that the plaintiffs could not recover damages for loss by depreciation on account of negligent delay except by reference to the market at Buffalo. Cooley, J., delivering the opinion of the appellate court, said: "If the judge meant the jury to understand by this charge that the damages which the plaintiffs could recover must be confined to the fall in the market at Buffalo, between the time when the cattle should have reached that point and [247] that of their actual arrival, we think he erred. The defendants were informed when they entered into the contract that the ultimate destination was to an Albany or a New York market; and they must be held to have assumed their obligations in reference to that fact. If in fact there was no fall of prices before the cattle had reached Buffalo, but afterwards, and before they could be delivered at Albany, a loss had occurred as the direct consequence of defendants' delay, it would be both illogical and unjust to hold that defendants shall be discharged because the injurious consequence of their act did not result until the cattle were out of their hands. The consequences of delay would attend the cattle to their final destination, just as the consequences of a fatal injury to one of them

¹ The text is quoted in *Missouri, etc. R. Co. v. Webb*, 20 Tex. Civ. App. 431, 49 S. W. Rep. 526.

² *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489. In accord: *East Tennessee, etc. R. Co. v. Johnston*, 75 Ala. 597, 51 Am. Rep. 439; *Atlanta, etc. R.*

Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. Rep. 600; *In re Petersen*, 21 Fed. Rep. 885; *St. Louis, etc. R. Co. v. Deshong*, 63 Ark. 443, 448, 39 S. W. Rep. 260, citing the text; *Fox v. Boston & M. R. Co.*, 148 Mass. 220, 19 N. E. Rep. 222.

would attend the animal until his death; and in neither case could the party responsible excuse himself by showing that the actual loss or death did not occur while the property was retained in his possession."

It has been held in some cases that the destination as regards the carrier on one of the several routes over which the goods are successively carried is the terminus of his particular route; that if he is liable for a loss the value is to be taken at that point and not at the ultimate place of destination.¹ If a special contract is made for the delivery of property to a connecting carrier so that it may reach its destination by a stipulated time, and it is made for the known purpose of avoiding injury to it by the elements, the first carrier is liable for damages resulting from freezing on the connecting carrier's line as a result of its own negligent delay in transporting the property.² If the liability assumed by each of several connecting carriers is limited to the damage done to the property on its own road, the initial carrier, if the loss resulted from the negligent manner in which the property was loaded, and it was carried to its destination in that manner, is liable for the total damage. The deterioration in the quality of the property, though continuous and progressive from one end of the journey to the other, was the result of such wrongful act.³ Where the initial carrier's liability is limited to an agreed valuation and the through bill of lading expresses that such carrier's responsibility is to cease upon delivery of the property in good order to a connecting carrier, the latter may avail itself of the limitation where the property sustains injury while in its control.⁴ Where it is shown that part of the injury was sustained on the line of the last carrier, it does not acquit itself of liability for the whole by showing that part of it occurred on the line of a preceding carrier; but must show

¹ See *Lewis v. Steamboat Buckeye*, 1 Handy, 150; *Harris v. Panama R. Co.*, 6 Bosw. 312; *Marshall v. New York Central R. Co.*, 45 Barb. 502.

² *Fox v. Boston & M. R. Co.*, *supra*; *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 47 Pac. Rep. 874, 40 L. R. A. 350; *Popham v. Barnard*, 77 Mo. App. 619.

³ *Davis v. New York, etc. R. Co.*, 70 Minn. 37, 45, 72 N. W. Rep. 823. See *Railroad v. Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. 933; *Popham v. Barnard*, 77 Mo. App. 619.

⁴ *Fairchild v. Philadelphia, etc. R. Co.*, 148 Pa. 527, 24 Atl. Rep. 79.

how much of the injury so occurred.¹ On its being shown that freight transported by successive carriers has been damaged in transit and it does not appear on what line the injury occurred, it is presumed that it was through the fault of the last carrier.² Each successive carrier is liable only for delays occurring on its own line.³

§ 933. Proof of value. The value of property lost or the extent of its depreciation by injury must be ascertained by a money standard from evidence, and cannot be taken upon conjecture.⁴ If by the acts of the carrier the plaintiff is prevented from showing it the jury may allow the value of the best quality of such goods.⁵ It has been held presumable, in the absence of positive evidence, that a commodity is worth as much at the place of destination as at that of shipment.⁶ In the absence of a market for damaged property at the place to which it was shipped, its value at the nearest place where it could be sold may be shown.⁷ If there be no market for the goods in question at the place of delivery, the jury, it is said, must ascertain their value by taking the price at the place of [248] shipment, adding the cost of carriage, and allowing a reasonable sum for the importer's profit.⁸ In cases where the

¹ *Gulf, etc. R. Co. v. Edloff*, 89 Tex. 458, 34 S. W. Rep. 414, 35 id. 144.

² *Texas & P. R. Co. v. Adams*, 78 Tex. 373, 14 S. W. Rep. 666.

³ *Gulf, etc. R. Co. v. Cushney*, 95 Tex. 309, 67 S. W. Rep. 77.

⁴ *Birney v. Wabash, etc. R. Co.*, 20 Mo. App. 470; *Traloff v. New York, etc. R. Co.*, 10 Blatch. 16.

It has been held that where animals are killed or injured the jury may determine the damages from their ages and qualities and the nature of their injuries, although there is no testimony to their value or the extent they were damaged with reference to the place of delivery, there being evidence of their value in a neighboring state. *Louisville & N. R. Co. v. Mason*, 11 Lea, 116.

The value of a trotting horse may be proved by the opinions of witnesses who testify to its speed and

value, if it was capable of making the speed testified to. *Reed v. Rome, etc. R. Co.*, 48 Hun, 231, affirmed without opinion, 125 N. Y. 708.

⁵ *Clark v. Miller*, 4 Wend. 625; *Van Winkle v. United States Steamship Co.*, 37 Barb. 122; *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241.

⁶ *Rome R. Co. v. Sloan*, 39 Ga. 636; *St. L. etc. R. v. Phelps*, 46 Ark. 455; *South & N. A. R. Co. v. Wood*, 72 Ala. 451; *The Arctic Bird*, 109 Fed. Rep. 167, 175, citing the text.

In the absence of proof of the value of a new article the plaintiff may recover its cost price. *Mitchell v. Weir*, 19 App. Div. 183, 45 N. Y. Supp. 1085.

⁷ *Yoakum v. Dunn*, 1 Tex. Civ. App. 524, 21 S. W. Rep. 411.

⁸ *O'Hanlan v. Great Western R. Co.*, 6 B. & S. 484; *Richmond v. Bronson*, 5 Denio, 55; *Vroman v. American*,

market value of goods is the test of damages the law contemplates a range of the entire market and the average of prices as thus found running through a reasonable period of time; not any sudden and transient inflation or depression of prices resulting from causes independent of the operations of lawful commerce.¹

The injured party is entitled to recover with reference to the market value at the time of the injury, though subsequent experiments in the use of such goods have resulted in showing that the price was not based on intrinsic worth. Accordingly, in an action against a carrier for a negligent injury to a quantity of mulberry trees which had been delivered for transportation, after the plaintiff had given evidence of their market value at the time the injury occurred, the defendants offered to prove that trees of the same species have since been ascertained by actual experiment to be of no real value; that their market value at the time of the injury was factitious; that they were not worth cultivating with a view to the raising of the silk worm; that those in question were purchased by the plaintiff for the purpose of growing seedlings for sale, and that they were of no value for such purpose the next year after the purchase. It was held that such evidence was inadmissible.² The purpose of the plaintiff in purchasing the trees to reproduce the article for the market the next year was but an unexecuted intention; it bound nobody; and he had a right to change it and to turn the property to better account if in his judgment the opportunity offered.³ Where goods damaged in the course of transportation were received by the consignee with the understanding that the depreciation should be made good to him, and were sold at auction with the consent of the carrier, it was held that, for the purpose of ascertaining the sum due for such damages, the amount realized from their sale should be treated as their value in their damaged state.⁴

etc. Exp. Co., 2 Hun, 512; Wabash, etc. R. Co. v. Lynch, 12 Ill. App. 365; Rodocanachi v. Milburn, 18 Q. B. Div. 67, *arguendo*.

¹Smith v. Griffith, 3 Hill, 333, 38 Am. Dec. 639. But see § 914.

²Id.

³Id.

⁴The Columbus, Abb. Adm. 97; Jellinghaus v. New York Ins. Co., 4 Sandf. 18; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. Rep. 180, 36 C. C. A. 135; Bancroft-Whitney Co. v. The Queen, 78 Fed. Rep. 155.

Where a cargo of sugar was de-

The price at which damaged goods sold for at auction is competent evidence as tending to show value, and upon the question of damages, although the defendant had no notice of the sale.¹ The price at which property sold for on the market is not conclusive evidence of its value at the time it was sold;² though it has been held to be better evidence than the testimony of experts.³ But the court refused to so hold where the quantity of damaged property was large, and the proof did [249] not clearly show that the whole of it was injured.⁴ In an action against a railway company for damages arising from failure to deliver a certain quantity of whisky as it had undertaken to do the defendants were held entitled to prove that the whisky had been shipped by the plaintiffs in fraud of the United States revenue laws, and no tax had been paid thereon, for the purpose of determining its value; if the tax of two dollars per gallon had been paid it was said the value of the raw material would be enhanced to that extent, and if not paid it would be decreased that amount.⁵ The pedigree of a horse may be shown, as may the fact that some of his blood relations have a record for speed.⁶ In an action for the conversion of goods the plaintiff may show the value put upon them by himself and the defendant when they were shipped previously.⁷

SECTION 3.

CARRIERS OF PASSENGERS.

§ 934. Nature of their obligation. The obligations or responsibilities of public carriers do not arise altogether nor mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger with-

livered March 12, and the damaged portion was sold April 3, the sale was made within a reasonable time, and intermediate fluctuations in the price of sound sugar were not to be considered. *Franklin Sugar Refining Co. v. The Earnwood*, 83 Fed. Rep. 315.

¹ *Guterman v. Liverpool, etc. Steamship Co.*, 83 N. Y. 358.

² *Ayres v. Chicago & N. R. Co.*, 75 Wis. 215, 43 N. W. Rep. 1123.

³ *Hamilton v. Bark Kate Irving*, 5 Fed. Rep. 630; *Magdeburg General Ins. Co. v. Paulson*, 29 id. 530.

⁴ *The Marinn S.*, 28 Fed. Rep. 664.

⁵ *Toledo, etc. R. Co. v. Kichler*, 48 Ill. 438.

⁶ *Pittsburgh, etc. R. Co. v. Shepard*, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. 732.

⁷ *Girardeau v. Southern Exp. Co.*, 48 S. C. 421, 26 S. E. Rep. 711.

out excuse, or when actionable, is merely a violation of a carrier's duty; he has refused to contract; so his duty to carry with care, though it may, to some extent, be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away; hence actions against these carriers are generally in tort for negligence, or for misconduct involving a breach of duty.¹ Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations,² the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same.³

The better reason and the weight of authority are to the effect that when a passenger is wrongfully ejected he may recover damages as for a tort, for though the relation of the parties had its origin in contract, the ejection is in the nature of a tort, and he is not limited to such damages as would be proper on a mere breach of contract. In such cases it can make no difference to the passenger, so far as his injury is concerned, whether the wrong resulted from the breach of an obligation imposed by contract, or from tort; the loss, inconvenience, delay and humiliation will be the same to him, and his damages should be measured by a like rule in either case.⁴ This doctrine does not apply to the refusal of a carrier to transport a person in pursuance of an executory contract which it was not bound to enter into, as where the contract to carry was made as part of a contract of employment. The breach of such a contract does not give rise to an action *ex delicto*, but to an action for the breach of the contract. The damages are

¹ *Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; *Jones v. Steamship Cortez*, 17 Cal. 487, 79 Am. Dec. 142; *Head v. Georgia, etc. R. Co.*, 79 Ga. 358, 7 S. E. Rep. 217, 11 Am. St. 434; *Carsten v. Northern Pacific R. Co.*, 44 Minn. 454, 47 N. W. Rep. 49, 20 Am. St. 589, 9 L. R. A. 688.

9 N. Y. Misc. 410, 29 N. Y. Supp. 1066.

³ *Hansley v. Jamesville & W. R. Co.*, 115 N. C. 602, 20 S. E. Rep. 528, 44 Am. St. 474, 32 L. R. A. 543, citing the text.

⁴ *P. C. C. etc. R. Co. v. Reynolds*, 55 Ohio St. 370, 383, 60 Am. St. 706, 45 N. E. Rep. 712. See § 36; *Central R. & B. Co. v. Roberts*, 91 Ga. 513, 18 S. E. Rep. 315.

² *Bussman v. Western Transit Co.*,

measured by the value of the time lost, the cost of transportation, and any other loss or expense legitimately resulting from the breach. Physical pain and injuries caused by walking to the place of destination are not to be considered.¹ And it has been so ruled where there is a breach of the carrier's contract to furnish a return ticket to a passenger. The action is not changed to one of tort because the passenger is ejected from the train, and the recovery cannot exceed the sum he expended to reach his destination, no special damages being pleaded.² But it may be open to question whether this is the law. In a recent case in the New Jersey court of errors and appeals it is held that when a person has purchased the legal right to enter as a passenger the train of a carrier, but is notified by its agent that his right is denied, he may make reasonable efforts *bona fide* to exercise his right, and that physical resistance interposed by the carrier's agents to such efforts constitute a tort, in an action for which the indignity as well as the personal violence is an element of compensatory damages.³ The usual contract to carry is not breached by the refusal of the carrier to issue a ticket of the character required by the contract so as to bar the recovery of damages subsequently resulting. "When one acquires a right by a valid contract and undertakes to enjoy its benefits in a lawful and orderly manner, a former notice to him that he will not be permitted to enjoy the right purchased will not end the contract and deprive him of its benefits. And when, in the pursuit of his rights and privileges in the premises, he is prevented from partaking of its benefits by the conduct of the violator of the agreement, such one so creating the breach cannot urge as a defense that the breach he was guilty of shall be a bar to recovery for the subsequent consequences that resulted by reason of his wrongful interference."⁴

[250] § 935. **Damages for refusing to carry.** The refusal to take a party who applies in accordance with a carrier's regulations, and who is willing and offers to pay or has done so in compliance with his rates, or a refusal, after a passenger has

¹ Louisville & N. R. Co. v. Spinks, 104 Ga. 692, 30 S. E. Rep. 968.

² Wilt v. Wabash R. Co., 21 Ohio Ct. Ct. 579.

³ Runyan v. Central R. Co., 65 N. J. L. 228, 47 Atl. Rep. 222.

⁴ Gulf, etc. R. Co. v. Halbrook, 12 Tex. Civ. App. 475, 33 S. W. Rep. 1028.

been carried over a part of the stipulated voyage or route, to carry him to the end, may entitle him to general, exemplary, special or consequential damages for a great variety of losses and injuries. A passenger who either produces a ticket which, as between the conductor and himself, entitles him to passage, or is ready to pay the legal rate of fare, may recover substantial damages for being evicted on refusing to pay an unauthorized demand.¹ He is not bound to pay the sum illegally demanded, and thus avoid being ejected, and then sue to recover such sum.²

§ 936. Same subject; loss of time, expense, exposure, humiliation. If the journey is delayed there will be a loss of time, and the passenger is entitled to compensation for it,³ and also for any increased expense reasonably incurred during the delay⁴ or to procure other conveyance when necessary.⁵

¹ *Zagelmeyer v. Cincinnati, etc. R. Co.*, 102 Mich. 214, 60 N. W. Rep. 436, 47 Am. St. 514; *Chamberlain v. Lake Shore, etc. R. Co.*, 122 Mich. 477, 81 N. W. Rep. 339.

² *Chamberlain v. Lake Shore, etc. R. Co.*, 111 Mich. 614, 68 N. W. Rep. 423.

³ *Northern Central R. Co. v. O'Conner*, 76 Md. 207, 217, 16 L. R. A. 449, 24 Atl. Rep. 449, 35 Am. St. 422; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052; *International, etc. R. Co. v. Campbell*, 1 Tex. Civ. App. 509, 20 S. W. Rep. 845; *Gisleson v. Minneapolis & St. L. R. Co.*, 85 Minn. 329, 88 N. W. Rep. 970; *Ransberry v. North American Transportation & T. Co.*, 22 Wash. 476, 61 Pac. Rep. 154, citing the text; *Hansley v. Jamesville & W. R. Co.*, 115 N. C. 602, 20 S. E. Rep. 528, 44 Am. St. 474, 32 L. R. A. 543; *Pullman's Palace Car Co. v. King*, 99 Fed. Rep. 380, 39 C. C. A. 573; *The Mormannia*, 62 Fed. Rep. 469; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229; *Schmidt v. Cleveland, etc. R. Co.*, 74 S. W. Rep. 674 (Ky. Ct. of App.).

⁴ *International, etc. R. Co. v. Camp-*

bell, supra, and cases cited in next note.

⁵ *Turner v. Great Northern R. Co.*, 15 Wash. 213, 220, 46 Pac. Rep. 243, 55 Am. St. 883, citing the text; *Ransberry v. North America Transportation & T. Co.*, 22 Wash. 476, 61 Pac. Rep. 154; *Procter v. Southern California R. Co.*, 130 Cal. 20, 62 Pac. Rep. 306; *Hansley v. Jamesville & W. R. Co.*, *supra*; *Miller v. King*, 88 Hun, 181, 34 N. Y. Supp. 425; *Pullman's Palace Car Co. v. King*, *supra*.

A passenger who hires a special train cannot recover the cost from the defaulting carrier unless he shows that he would have incurred the expenditure if he had missed the train on which he was to go through his own fault. *Bright v. Peninsular & Oriental Steam Navigation Co.*, 2 Com. Cas. 106 (1897); *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408.

A passenger who has been refused transportation may recover as special damages for expense necessarily incurred for telegrams informing his family and business associates of his whereabouts, if such damages

Where a book-keeper was detained by the fault of the carrier for an unreasonable time, it was admissible to prove the rate of wages at the place of destination for the consideration of the jury in fixing the damages, but not as their measure; and it was proper that the jury should weigh the probabilities that he would have immediate and continued employment had he arrived without such detention.¹ And it has been held in such an action that the fact that there is no evidence of the value of the plaintiff's time does not prevent the jury giving him such compensation as they think reasonable.² The value of the time lost by an attorney is best measured by his earnings as such either before or after the particular time in question; the value of the time of practicing attorneys of his capacity is not a safe basis for awarding damages.³ The rate of compensation for lost time should be, where a passenger is carried only a part of the way to his destination, the sum paid at the place of destination for the character of labor he was adapted to and usually followed as a vocation, allowance being made for what length of time he could probably have obtained employment and at what compensation, less the necessary expenses of his living.⁴

In an action against a carrier for failure to carry the plaintiff from New York to San Francisco *via* Nicaragua, according to his agreement, to furnish suitable accommodations, and for negligent detention on the way, and consequent unnecessary exposure to an unhealthy climate, it was held proper to receive evidence as to how much he was exposed to the sun and rains while crossing the isthmus, and to show that the climate there was bad, so that the jury could determine whether his sickness was caused by the defendant's negligence or breach of duty; and that the time he lost by reason of his detention on the isthmus, his expenses there and on his return to New York, [251] the time he lost by reason of his sickness after he re-

are well pleaded. Alabama, etc. R. Co. v. Tapia, 94 Ala. 226, 10 So. Rep. 236.

¹ Yonge v. Pacific M. S. S. Co., 1 Cal. 353. See Kleven v. Great Northern R. Co., 70 Minn. 79, 72 N. W. Rep. 828.

² Ward v. Vanderbilt, 34 How. Pr. 144, 4 Abb. App. Dec. 521.

³ Turner v. Great Northern R. Co., 15 Wash. 213, 223, 46 Pac. Rep. 243, 55 Am. St. 883.

⁴ Ransberry v. North American Transportation & T. Co., 22 Wash. 476, 61 Pac. Rep. 154.

turned, and the expenses of such sickness, so far as it was occasioned by the defendant's negligence or breach of duty, were legitimate and legal damages which he was entitled to recover; and the defendant having refused to convey him from the isthmus to his destination, he was entitled also to recover the money he had paid for his passage on the stipulated voyage.¹ Damages for "worriment" and disappointment by one who is not carried according to the carrier's contract because he is obliged to pay out more money than he had contemplated, his means being limited; because he could not hear from home owing to the interruption of telegraphic communication, and because of the sickness of his wife and inability to make her comfortable, are too remote.² But it is otherwise as to the humiliation suffered by one who is wrongfully refused admission to the carrier's conveyance, or is wrongfully put off the same.³

§ 937. **Same subject; exemplary damages.** In one case the plaintiff was allowed to show, in aggravation of damages, that his physical condition unfitted him to bear the exposure to which he was subjected in consequence of the carrier's neglect to stop his boat according to his advertisement and take him on board; and it was held that exemplary damages might be recovered if such conduct was wilful or capricious.⁴ Such damages have been allowed where there was a wilful, reckless or capricious neglect to stop a train at a station where it should have stopped on being signaled to do so, independently of the health of the person who desired to become a passenger,⁵ and where there was such neglect to stop a street car, the employee having insulted the person who desired the car stopped, on his thereafter becoming a passenger.⁶ In South Carolina a carrier

¹ Williams v. Vanderbilt, 28 N. Y. 217; Bonsteel v. Vanderbilt, 21 Barb. 26; Schmidt v. Cleveland, etc. R. Co., 74 S. W. Rep. 674 (Ky. Ct. of App.).

² Turner v. Great Northern R. Co., *supra*.

³ Cleveland, etc. R. Co. v. Kinsley, 27 Ind. App. 135, 60 N. E. Rep. 169; Gisleson v. Minneapolis & St. L. R. Co., 85 Minn. 329, 88 N. W. Rep. 970; Runyan v. Central R. Co., 65 N. J. L. 228, 47 Atl. Rep. 222.

⁴ Heirn v. McCaughan, 32 Miss. 17.

⁵ *Id.*; Wilson v. New Orleans & N. R. Co., 63 Miss. 352; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9, 9 So. Rep. 375, 30 Am. St. 17; Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. Rep. 343, and local cases cited. Compare Martin v. Columbia & G. R. Co., 32 S. C. 592, 10 S. E. Rep. 960.

⁶ Jackson Electric R. L. & P. Co. v. Lowry, 79 Miss. 431, 30 So. Rep. 634.

whose conductor breaks his promise to a prospective passenger that he will hold the train for him until he can buy a ticket is liable for punitive damages,¹ and so whenever the refusal to carry is wilful, wrongful and intentional.² Where the general passenger agent of a carrier repudiated a large number of tickets issued and sold by his authority, and the plaintiff, holding such a ticket in good faith, was ejected from a train, the court said such contemptuous disregard for the rights of innocent holders of such tickets constituted that degree of reckless disregard for public and contractual obligations as to justify the imposition of exemplary damages.³ And where the sale of a return ticket was made with knowledge that the defendant would cease to operate the road during the life of the ticket, the jury was warranted in inferring wilfulness on its part in failing to provide the plaintiff with suitable transportation, and in awarding exemplary damages for that wrong. In fixing the amount to be so awarded the jury properly considered causes even remotely contributing to the injury, not for the purpose of giving damages for the injury thus caused, but that they might have in view all the facts and circumstances in awarding exemplary damages.⁴ In opposition to some of the cases noticed, and in accordance with the general principle governing the imposition of punitive damages, it has been ruled that the mere refusal to carry a person who has bought a ticket does not show such malice or wantonness as subjects the carrier to liability for such damages.⁵ They cannot be recovered where the failure to carry results from the carrier's defective equipments, the only injuries alleged being inconvenience, delay and disappointment, and no proof of bad motive on the part of the defendant being shown.⁶

¹ Gillman v. Florida Central & P. Mo. App. 446; Thomas v. Southern R. Co., 53 S. C. 210, 31 S. E. Rep. 224. R. Co., 132 N. C. 1005, 30 S. E. Rep.

² Kibler v. Southern R., 64 S. C. 242, 343; Illinois Central R. Co. v. Moore, 41 S. E. Rep. 977. See Myers v. — Miss. —, 31 So. Rep. 436; Same v. Southern R., 64 S. C. 514, 42 S. E. Rep. v. Pearson, — Miss. —, 31 So. Rep. 598. 435. See § 950.

³ Cowen v. Winters, 96 Fed. Rep. ⁶ Hansley v. Jamesville & W. R. 929, 37 C. C. A. 628. Co., 115 N. C. 602, 20 S. E. Rep. 528,

⁴ Pickens v. South Carolina & G. 44 Am. St. 474, 32 L. R. A. 543; Judice R. Co., 54 S. C. 498, 32 S. E. Rep. 567. v. Southern Pacific Co., 47 La. Ann.

Barnett v. Chicago & A. Co., 75 255, 16 So. Rep. 816.

§ 938. **Removal of passenger at wrong place.** The right to recover the passage money or fare paid in advance, where, by the carrier's fault, the plaintiff is not carried; his right to be compensated for loss of time while delayed by such fault; to have refunded any personal expenses reasonably incurred during such detention, and any extra expense prudently paid to procure other conveyance to make or continue the journey, or to return when it has been interrupted and must be abandoned, is clear, and rests upon the most obvious principles of justice.¹ If a carrier engages to put a person down at a given place and does not do so, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to his destination or to his starting place somehow or other. If there are means of conveyance for getting there he may take them and the carrier is responsible for the expense; but if there are no means the carrier must compensate him for personal inconvenience and the other actual injurious concomitants of such a [252] predicament, and of any available method of extrication.²

¹ § 936 and cases cited; *Jacobs v. Third Avenue R. Co.*, 71 App. Div. 199, 75 N. Y. Supp. 679; *Railway Co. v. Davis*, 56 Ark. 51, 19 S. W. Rep. 107; *Butler v. Manchester, etc. R. Co.*, 21 Q. B. Div. 207; *The Zenobia*, Abb. Adm. 80; *Le Blanche v. London, etc. R. Co.*, 1 C. P. Div. 286; *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Porter v. The New England*, 17 Mo. 290; *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *Denton v. Great Northern R. Co.*, 5 El. & B. 860; *Cranston v. Marshall*, 5 Ex. 395; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911; *Kansas City, etc. R. Co. v. Foster*, 134 Ala. 244, 32 So. Rep. 773; *Railway Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Chicago, etc. R. Co. v. Brisbane*, 24 Ill. App. 463; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 16 Pac. Rep. 817, 5 Am. St. 766; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052; *Patterson v. Detroit, etc. R.*

Co., 56 Mich. 172, 22 N. W. Rep. 260; *Dorrah v. Illinois Central R. Co.*, 65 Miss. 14, 3 So. Rep. 36, 7 Am. St. 729; *Willson v. Northern Pacific R. Co.*, 5 Wash. 621, 32 Pac. Rep. 468; *Pennsylvania R. Co. v. Spicker*, 105 Pa. 142.

² *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. Rep. 351, 67 Am. St. 913; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. Rep. 1112, 33 Am. St. 157; *Pullman's Palace Car Co. v. King*, 99 Fed. Rep. 380, 39 C. C. A. 573; *The President*, 92 Fed. Rep. 673; *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. Rep. 588; *Miller v. King*, 21 App. Div. 192, 47 N. Y. Supp. 534; *Pittsburgh, etc. R. Co. v. Hannigh*, 39 Ind. 509; *P. C. C. etc. R. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. Rep. 712, 60 Am. St. 706; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439; *Northern Pacific R. Co. v. Pauson*, 70 Fed. Rep. 585, 17 C. C. A. 287, 30 L. R. A. 730; *Pullman Palace Car Co. v. McDonald*, 2 Tex. Civ. App. 322, 21 S. W.

Where a passenger has bought a ticket and is carried beyond the station for which he is ticketed, without any fault on his part, he has a right of action for at least nominal damages though he suffers no actual injury, and for such actual injury as he may in fact suffer.¹ The rights of a passenger who is wrongfully set down at an improper place are not affected by

Rep. 945; Norfolk, etc. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367; Brown v. Chicago, etc. R. Co., 54 Wis. 342, 11 N. W. Rep. 356, 911; Evans v. St. Louis, etc. R. Co., 11 Mo. App. 463; Winkler v. Same, 21 id. 99; Lake Shore, etc. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. Rep. 545; I. & G. N. R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529; H. & T. C. R. Co. v. Rand, W. & W. (Tex.) 100; Paddock v. Atchison, etc. R. Co., 37 Fed. Rep. 841; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. Rep. 559; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9, 9 So. Rep. 375, 30 Am. St. 17; Cleveland, etc. R. Co. v. Quillen, 22 Ind. App. 496, 53 N. E. Rep. 1024; Duggan v. Baltimore & O. R. Co., 159 Pa. 248, 28 Atl. Rep. 182, 39 Am. St. 672; Louisville & N. R. Co. v. Hine, 121 Ala. 234, 25 So. Rep. 857; Rose v. King, 76 App. Div. 308, 78 N. Y. Supp. 419; Guthrie v. Minneapolis & St. L. R. Co., — Minn. —, 91 N. W. Rep. 1096; Bullock v. White Star Steamship Co., 30 Wash. 448, 70 Pac. Rep. 1106.

A passenger wrongfully removed may prove the fact of his arrest, his transportation in a patrol wagon and his subsequent discharge from arrest, the arrest being made upon the order of the conductor and being a part of the act of ejection. Jenkins v. Brooklyn Heights R. Co., 29 App. Div. 8, 51 N. Y. Supp. 216. See Murdock v. Boston & A. R. Co., 137 Mass. 293, 50 Am. Rep. 307.

A passenger ejected from a street car may recover substantial damages though no actual injury was sustained, and the circumstances

did not justify the recovery of punitive damages. Lawshe v. Tacoma R. & P. Co., 29 Wash. 681, 70 Pac. Rep. 118.

In such a case the damages are not limited to compensation for the trouble and expense caused the passenger. A judgment for \$143 was affirmed. Laird v. Pittsburg Traction Co., 166 Pa. 4, 31 Atl. Rep. 51.

The fact that a passenger from whom illegal fare is exacted is obliged to borrow money to pay it is too remote to be a basis for awarding damages; and so is the fact that comments were made on the transaction by other passengers. Hoffman v. Northern Pacific R. Co., 45 Minn. 53, 47 N. W. Rep. 312.

¹ Kentucky Central R. Co. v. Bidle, 17 Ky. L. Rep. 1363, 34 S. W. Rep. 904; Judice v. Southern Pacific Co., 47 La. Ann. 255, 16 So. Rep. 816; Book v. Chicago, etc. R. Co., 85 Mo. App. 76; The President, 92 Fed. Rep. 673; East Tennessee, etc. R. Co. v. Lockhart, 79 Ala. 315; Alabama, etc. R. v. Wilkinson, 77 Ga. 75; Louisville, etc. R. Co. v. Mask, 64 Miss. 738, 2 So. Rep. 360; Kansas City, etc. R. Co. v. Fite, 67 Miss. 373, 7 So. Rep. 223; Trigg v. St. Louis, etc. R. Co., 74 Mo. 147, 41 Am. Rep. 305; Brown v. Memphis & C. R. Co., 7 Fed. Rep. 51; Thompson v. New Orleans, etc. R. Co., 50 Miss. 315, 19 Am. Rep. 12; New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Porter v. The New England, 17 Mo. 290; Sunday v. Gordon, Blatch. & H. 569; Pittsburgh, etc. R. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Fordyce v. Nix, 58 Ark. 136, 23 S. W. Rep. 967.

the state of his health or the ignorance of the carrier concerning it, though the consequent injuries may be greater than they would otherwise have been.¹ A female passenger who is carried beyond her destination and obliged to alight some distance therefrom and walk back through a rain may show that she had an infant in her arms. Such testimony tends to prove the wilfulness of the wrong in ejecting her where there was no shelter; and this, whether regard is had to the infant *per se* or the mother's natural solicitude for it, or whether it be regarded only as one of the impediments which disabled her from sheltering herself from the rain.²

The immediate purpose of a traveler is to reach some given destination; but a journey is generally taken for some ulterior object. The carrier undertakes that the former shall be accomplished so far as his route is concerned; and if he is advised of the latter when his contract is made he is held to engage with reference to it, and damages for a violation of his agreement or duty will be given accordingly. The same tests apply which govern generally, and by which remote, uncertain and speculative consequences are excluded from consideration. Each case must, therefore, be determined on its peculiar facts. An exceptional case was finally decided by the federal supreme court on appeal from a decree in admiralty.³ The libellant

¹Sloane v. Southern California R. Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; Chicago, etc. R. Co. v. Spirk, 51 Neb. 167, 179, 70 N. W. Rep. 926; Brown v. Chicago, etc. R. Co., 54 Wis. 342, 11 N. W. Rep. 396, 911; Paddock v. Atchison, etc. R. Co., 37 Fed. Rep. 841, 4 L. R. A. 231; Fell v. Northern Pacific R. Co., 44 Fed. Rep. 248; Louisville, etc. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. Rep. 389, 4 id. 908; Same v. Snyder, 117 Ind. 435, 20 N. E. Rep. 284, 3 L. R. A. 434; Louisville, etc. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Spade v. Lynn & B. R. Co., 172 Mass. 488, 52 N. E. Rep. 747, 43 L. R. A. 832. *Contra*, Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89. This case has been justly and severely criti-

cised. See Brown v. R. Co., Louisville, etc. R. Co. v. Falvey, *supra*.

²Alabama, etc. R. Co. v. Sellers, 93 Ala. 9, 9 So. Rep. 375, 30 Am. St. 17.

The North Carolina court mistakenly understanding the text as countenancing the doctrine that punitive damages may be recovered notwithstanding the absence of recklessness, wilfulness or malice, says that "it is an error that will lead to endless confusion to hold that smart-money, which is allowed as a punishment to the wrong-doer, may be recovered in every case where, under the common law practice an action *ex delicto* would lie." Hansley v. Jamesville & W. R. Co., 115 N. C. 602, 611, 20 S. E. Rep. 528, 44 Am. St. 474, 32 L. R. A. 543.

³Pearson v. Duane, 4 Wall. 605.

took passage in 1856 on the respondent's vessel at Acapulco for San Francisco; he tendered his fare, and while on board demeaned himself properly. On the voyage the respondent transferred him against his will to another vessel which took him back to Acapulco. The libellant was unable to obtain passage on any other vessel from that place to his intended destination. He went thence to Aspinwall, New Grenada, to try and get a passage thence to San Francisco; but a line of steamers previously existing there, and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival. Finally, through charity, he obtained a passage to New York, where he was without means and dependent on charity for subsistence. He was confined in a hospital there for several months, and physically unable to attempt a voyage to San Francisco until 1860. The special circumstances which induced the respondent to put him off his [253] vessel and send him back, and which made it impossible for him to get other transportation to his intended destination, were not known to the respondent when he received him as a passenger, but were made known on the voyage. Those circumstances were the previous forcible expulsion of the libellant from San Francisco by the vigilance committee, and a certainty that if he returned by the respondent's vessel, or any other, while that committee held control of San Francisco, he would be killed. Four thousand dollars damages had been awarded to him in the court below, and on the basis and amount of damages the supreme court said the award was excessive, bearing no proportion to the injury received; that he was entitled to compensation for the injury done him by being put on board the other vessel, so far as that injury arose from the act of the respondent in putting him there. But the outrages which he suffered at the hands of the vigilance committee; his forcible abduction from California and transportation to Acapulco; the difficulties experienced in getting to New York and his inability to procure a passage from either Acapulco or Panama to San Francisco cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by the respondent. Every one, doubtless, to whom he applied for passage knew the power

of the vigilance committee, and was afraid to encounter it by returning an exile against whom the sentence of death had been pronounced. The respondent had no malice or ill will towards the libellant, and, as the evidence clearly shows, excluded him from his boat in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for the libellant to seek to go there. Common prudence required that he should wait until the violence of the storm blew over and law and order were restored. The court reduced the recovery to \$50. It is too plain for argument that a carrier may employ a colored servant and require of him the performance of all duties within the scope of his employment. Hence the damage sustained by a passenger in being ejected from a train is not enhanced because a colored train man assisted in making the ejection.¹

§ 939. **Same subject; consequential damages.** If the object of a passenger's journey is known to the carrier when he undertakes his transportation, damages for delay or defeat of it by the latter's fault may be recovered. The master of a schooner, who had taken passage on a steamer to rejoin his vessel and was carried past his destination, was held entitled to recover not only his personal expenses and for loss of [254] time, but damages in the nature of demurrage for the detention of his vessel which was awaiting his return.² Such damages must be shown with certainty to have resulted necessarily and solely from the carrier's default. Thus, a carrier who failed to carry a passenger within the appointed time to the place for which he had taken passage was held not liable for his consequent inability to do an errand there, nor his expenses and the injury to his business because of his absence during a sojourn of several days, without some evidence that if he had seasonably arrived he might have performed his errand, and thereupon would have promptly returned, and that he could not with proper effort accomplish his errand by reason of such delay.³ A traveler who sustains damages because of circumstances peculiar to himself cannot recover therefor unless he has given the carrier notice of the facts. Thus, a theatrical manager who is prevented from reaching his destination in

¹ *Central R. & B. Co. v. Strickland*,
90 Ga. 562, 16 S. E. Rep. 352.

² *The Canadian*, 1 Brown, Adm. 11.

³ *Benson v. New Jersey R. & T. Co.*,

9 Bosw. 412.

time to give a performance for which tickets have been sold cannot recover from the carrier money refunded to the persons who purchased them.¹ If a carrier advertises to leave and to arrive at given places at stated times, or so as to make specified connections with carriers beyond, such advertisements are guaranties to persons acting upon them, and on failure to fulfill he is liable for personal expenses at hotels, the cost of substituted conveyances when necessary to the passengers' purposes, and loss of time consequent on not leaving or arriving in accordance with the advertisement.² Mere inconvenience will be ground of damages if it is capable of being stated in tangible form; the difference between what a passenger ought to have and did have; between the contracted conveyance and the necessity to go on foot or by such other means as were available.³ And where the action is in tort for the breach of duty, and sickness is the natural and proximate result, damages therefor may be recovered;⁴ as may those resulting from the death of a helpless passenger whose condition was known to the carrier's servants when he was ejected.⁵

The separation of a passenger from his baggage is an element of damage, and he may show that it necessitated the purchase of additional clothing, though the price paid for it is not the measure of the carrier's liability. "The fact that a woman

¹ *Georgia R. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274. See *Carsten v. Northern Pacific R. Co.*, 44 Minn. 454, 27 N. W. Rep. 49, 20 Am. St. 589, 9 L. R. A. 688. But see § 947 as to recovery in such a case on breach of guaranty to transport in time.

² *Cranston v. Marshall*, 5 Ex. 395; *Denton v. Great Northern R. Co.*, 5 El. & B. 860; *Hamlin v. Same*, 1 H. & N. 408; *Le Blanche v. London, etc. R. Co.*, 1 C. P. Div. 286; *Heirn v. McCaughan*, 32 Miss. 17.

³ *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Central R. & B. Co. v. Strickland*, 90 Ga. 562, 16 S. E. Rep. 352; *Alabama & V. R. Co.*

v. Hanes, 69 Miss. 160, 13 So. Rep. 246; *Houston, etc. R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. Rep. 201.

⁴ *Id.*; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Brown v. Same*, 54 Wis. 342, 11 N. W. Rep. 356, 911; *Serwe v. Northern Pacific R. Co.*, 50 N. W. Rep. 1021, 48 Minn. 78; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; *Malone v. Pittsburgh, etc. R.*, 152 Pa. 390, 25 Atl. Rep. 638; *Pullman Palace Car Co. v. McDonald*, 2 Tex. Civ. App. 322, 21 S. W. Rep. 945.

⁵ *Hany v. Great Northern R. Co.*, 8 N. D. 23, 77 N. W. Rep. 97, 73 Am. St. 727, 42 L. R. A. 664, and numerous cases cited in the opinion.

was separated from her baggage, several thousand miles from her home, is no inconsiderable trifle in estimating the amount of damage resulting from the mental and physical distress that she suffered.”¹ A passenger whose ticket is taken from him and who is ejected from the train cannot recover for injury to his good name.² A conductor who has carried a passenger beyond her destination is not authorized to constitute the proprietor of a hotel the agent of the carrier for the purpose of caring for such passenger until she can return on a train to her destination; hence, the negligence of such proprietor in respect to the passenger while she was his guest is not a ground of recovery against the carrier, and its negligence in so carrying her was not the natural and proximate cause of her injury; there was the interposition of a separate, independent agency.³

“If a passenger, instead of being discharged at the place called for in the contract of carriage, is discharged in the night time at another place, so that, in getting to his place of destination, it becomes necessary to walk along a path containing a dangerous obstruction, it is not too much to say that the danger of his being injured by such obstruction is a danger which the carrier ought to foresee, and that it is not an unnatural, improbable or remote consequence of the act of discharging the passenger in such a place.”⁴ Where a female was carried beyond her station and was put off near the next station, the carrier was not liable for the fright she sustained, while she walked alone to the house of a friend, by reason of hearing the voices of negro men who walked behind her, the carrier not having notice of the likelihood of such an occurrence.⁵

§ 940. Passenger's indiscreet acts not ground of damages. It has been held that where the damages are produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing it, they can-

¹ *Procter v. Southern California R. Co.*, 130 Cal. 20, 62 Pac. Rep. 306.

Georgia R. Co., 110 Ga. 280, 34 S. E. Rep. 847.

² *Id.*; *Schmitt v. Milwaukee Street R. Co.*, 89 Wis. 195, 61 N. W. Rep. 834.

⁴ *Winkler v. St. Louis, etc. R. Co.*, 21 Mo. App. 99; *Yazoo, etc. R. Co. v. Aden*, 77 Miss. 382, 27 So. Rep. 385.

³ *Central R. Co. v. Price*, 106 Ga. 176, 32 S. E. Rep. 77, 71 Am. St. 246, 43 L. R. A. 402; *Price v. Central of*

Central of Georgia R. Co. v. Dorsey, — Ga. —, 42 S. E. Rep. 1024.

not be regarded as proximate or proper for compensation, but [255] only where the injury flows from the wrongful act as its natural concomitant, or as the direct result. Where speculation or conjecture has to be resorted to for the purpose of determining whether the damages result from the wrongful act or from some other cause, the law rejects them for that reason.¹ This was declared in a case where a train failed to stop at a station where a passenger was waiting for it to be carried to another station; he thereupon walked to his place of destination in very cold weather, and in consequence became sick; it was held that the sickness, and loss which it caused him, did not result directly from the defendant's breach of duty. If his business required it he was at liberty to hire another conveyance, and the company would have been liable for such loss or injury as he suffered in waiting for or procuring it, and such as his business might suffer on account of the delay, but he had no right to inflict injury on himself to enhance the amount of his damages.² One who enters a car knowing that he has not such a ticket as is required cannot recover for being ejected though the carrier's negligence prevented such person from having the proper ticket. Such negligence was not the proximate cause of the expulsion, but the voluntary act of boarding the train and refusing to pay fare.³

There is an obvious difference between the predicaments in

¹ *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

² *Chicago, etc. R. Co. v. Brisbane*, 24 Ill. App. 463; *Louisville, etc. R. Co. v. Fleming*, 14 Lea, 128; *Wright v. Central R. Co.*, 78 Cal. 360, 20 Pac. Rep. 740; *Gulf, etc. R. Co. v. Head*, 4 Tex. Civ. Cas. 313, 15 S. W. Rep. 504; *Texas & P. R. Co. v. Cole*, 66 Tex. 562; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Judice v. Southern Pacific Co.*, 47 La. Ann. 255, 16 So. Rep. 816; *Bader v. Same*, 52 La. Ann. 1060, 27 So. Rep. 584; *Spry v. Missouri, etc. R. Co.*, 73 Mo. App. 203; *Childs v. New York, etc. R. Co.*, 77 Hun, 539, 28 N. Y. Supp. 894; *Houston, etc. R. Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. Rep. 201; *Clarry v. Grand Trunk R. Co.*, 29 Ont. 18;

Louisville & N. R. Co. v. Hine, 121 Ala. 234, 25 So. Rep. 857. Compare *I. & G. N. R. Co. v. Gilbert*, 64 Tex. 536.

In the Alabama case after plaintiff left the train and had gone but a short distance he was invited by the conductor to board it and resume his journey; he refused to do so unless the train should be backed to where he was. Such refusal did not forfeit his right of action for the ejection, but it prevented the recovery of damage sustained by the abandonment of his journey.

³ *Robb v. Railway Co.*, 14 Pa. Super. Ct. 282; *Russell v. Missouri, etc. R. Co.*, 12 Tex. Civ. App. 627, 35 S. W. Rep. 724.

which a carrier's breach of duty or contract may leave his customer; in one, the carrier refuses to receive him at a home, or at an intermediate station where he can remain to choose between other modes of conveyance to pursue his journey or return; in another, he may be set down where there is no shelter and, consequently, where he cannot remain, whence there is no conveyance, and he is obliged to pursue his journey or seek the nearest shelter on foot in such weather as may happen at the time. In the former, there is no warrant to incur any personal hazard on the carrier's responsibility. In the latter, he has placed the passenger in a situation where he cannot remain and from which there is but one mode of escape. The ills incident to that situation, and the dangers connected with that mode of extrication, whether inevitable or fortuitous, the carrier is responsible for; if injury happens without the contributory negligence of the plaintiff, it results from the carrier's fault and breach of contract by natural and necessary sequence.¹ Where there was a refusal to carry and the passenger was exposed to a storm, the court said that leaving the defendant's depot was a natural consequence of its failure to provide transportation, and that, in view of the frequency and suddenness with which storms arise, it could not be said that the injury from the storm was the intervention of any such extraordinary result that the usual course of nature should seem to have been departed from.² One who is put off a train at a wrong place and who has friends within a reasonable distance thereof is not bound to seek shelter among strangers, and if he goes on foot to his friends, being unable to obtain a conveyance to take him to them, he may recover for the injuries resulting from so doing, including mental suffering and physical pain. These are the proximate results of the failure to put him off at the right place.³

¹ *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 32 N. E. Rep. 588; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Kentucky Central R. Co. v. Biddle*, 17 Ky. L. Rep. 1363, 34 S. W. Rep. 904; *East Tennessee, etc. R. Co. v. Lockhart*, 79 Ala. 315; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Louisville, etc. R. Co. v. Mask*, 64 Miss. 738, 2 So. Rep.

360; *Serwe v. Northern Pacific R. Co.*, 50 N. W. Rep. 1021, 48 Minn. 78; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Brown v. Chicago, etc. R. Co.*, 54 Wis. 342, 11 N. W. Rep. 356, 911.

² *Pickens v. South Carolina G. R. Co.*, 54 S. C. 498, 32 S. E. Rep. 567.

³ *Kentucky Central R. Co. v. Biddle*, 17 Ky. L. Rep. 1363, 34 S. W. Rep.

According to the weight of authority a passenger whose right to be carried is disputed may either pay the fare asked of him or comply with the request of the conductor to leave

904 (compare *St. Louis, etc. R. Co. v. Thomas*, 27 S. W. Rep. 419, Tex. Ct. of Civ. App.); *Sloane v. Southern Pacific R. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320; *Malone v. Pittsburgh, etc. R.*, 152 Pa. 390, 25 Atl. Rep. 638.

An item of damage in *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111, was rejected, which, on the principle stated in the text, should have been allowed, unless the form of the action was such as to exclude it. The facts are stated in § 57. The item disallowed was for the sickness of a passenger who was obliged to walk in consequence of being put down at a wrong place. In regard to it *Cockburn, C. J.*, said: "With regard to the second head of damage the case assumes a very different aspect. I see very great difficulty, indeed, in coming to any other conclusion than that the 20*l.* is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my brother *Blackburn* in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: that to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a

series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that, I cannot take a better case than the one before us. Suppose that a passenger is put out at a wrong station on a wet night, and obliged to walk a considerable distance in the rain, catching a violent cold, which ends in a fever, and the passenger is laid up for a couple of months, and loses through his illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. . . . The wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it. . . . The party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of these causes, it might be said, 'If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or go from *Esher* to *Hampton*

the car; if he refuses to do so, and is injured while resisting ejection, he cannot recover for his injury unless more force than was necessary was used in ejecting him.¹ This doctrine

in a carriage, and should not have met with the accident in the walk or the carriage. In either of these cases the injury is too remote, and I think that is the case here. It is not the necessary consequence, it is not even the probable consequence, of a person being put down at an improper place, and having to walk home, that he should sustain either a personal injury or catch a cold. That cannot be said to be within the contemplation of the parties, so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences." See Thompson's Carr. Pass. 566-7.

In a similar case in Wisconsin, where the action was for the tortious breach of duty, the injuries of the wife from the exposure were held to be the natural and proximate consequence of leaving her three miles short of her destination at night, under such circumstances that she had to walk that distance. She was made sick and had a miscarriage by reason of it. A verdict for \$2,500 was sustained. *Brown v. Chicago, etc. R. Co.*, 54 Wis. 343, 11 N. W. Rep. 356, 911. This case has been often cited and generally followed in recent cases. See §§ 36, 48.

The plaintiffs were left by the defendant at another station than that to which they were ticketed at about 1:30 o'clock Sunday morning. They learned early that morning that there would not be a train from that station to the one for which they were destined until during the following night. They waited where they were until 1 o'clock Sunday afternoon, and then started with horses and a vehicle, not to the sta-

tion where they should have been left, but across the prairie some forty-five or fifty miles from there to a tract of land which it was the purpose of their journey to inspect. As a consequence of their late start night came on before the trip was completed, and the plaintiffs were compelled to spend the night on the prairie, with nothing to sleep on except such things as were appurtenant to the vehicle. The court was clear that if it had been necessary for the plaintiffs to reach the station to which they were ticketed the night they were put off the train, and, pursuant to such necessity, and to attain their purpose, they had immediately continued their journey and accomplished it, that all injuries or damages springing or directly resulting from the trip would have been recoverable; or had it been shown that it became necessary, in order to meet a business engagement or purpose at the land to go directly from where they were left to the land, and that this necessity had been immediately or reasonably attempted, the attendant directly resulting damages might have been recovered; but for the parties to wait until more than half of the succeeding day's light had expired and then start to travel the distance and under such conditions as would almost necessarily cause a part of the trip to extend into the late evening or night, with the consequent exposure and hardships, does not come within the injuries proximately resulting from the wrong done. *Chicago, etc. R. Co. v. Spirk*, 51 Neb. 167, 180, 70 N. W. Rep. 926.

¹ *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 59 N. E. Rep. 794, 90 Ill. App.

has special force where a passenger is actuated by a purpose to increase his damages.¹ On the other hand, it has been decided that a passenger may resist to the extent necessary to prevent his being ejected;² that he may make a reasonable resistance by holding on to the seats until he is forced loose and taken from the cars,³ and that he may refuse to be ejected and make a sufficient resistance to denote that he was being removed by compulsion and against his will,⁴ and may recover compensation for such damages as result from so doing. The foundation of the plaintiff's right of action in such a case is that he was rightfully a passenger. "He, therefore, had a right to defend himself, to resist force by force, and if he was injured by reason of the vigor of his resistance, that would not shield the defendant."⁵

275. The supreme court opinion refers to *Poulin v. Canadian Pacific R. Co.*, 52 Fed. Rep. 197, 3 C. C. A. 23, 17 L. R. A. 800; *New York, etc. R. Co. v. Bennett*, 50 Fed. Rep. 496; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; *Townsend v. New York, etc. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419; *Downs v. New York, etc. R. Co.*, 38 Conn. 287; *McClure v. Philadelphia, etc. R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Shelton v. Railroad Co.*, 29 Ohio St. 214; *McKay v. Ohio River R. Co.*, 34 W. Va. 65, 11 S. E. Rep. 737, 26 Am. St. 913, 9 L. R. A. 132; *Hufford v. Grand Rapids & I. R. Co.*, 53 Mich. 118, 18 N. W. Rep. 580; *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439, 56 N. W. Rep. 848; *Yorton v. Milwaukee, etc. R. Co.*, 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. Rep. 482; *Woods v. Metropolitan Street R. Co.*, 48 Mo. App. 125; *Percy v. Same*, 58 id. 75; *Atchison, etc. R. Co. v. Gants*, 38 Kan. 608, 17 Pac. Rep. 54, 5 Am. St. 780; *Peabody v. Oregon R. & N. Co.*, 21 Ore. 121, 26 Pac. Rep. 1053, 12 L. R. A. 823. *L. & N. R. Co. v. Wilsey*, 9 Ky. L. Rep. 1008 (Ky. Super. Ct.), tends to sustain the same view. In accord with the text is *Jensen v.*

Chicago, etc. R. Co., 64 Minn. 511, 67 N. W. Rep. 631. See § 949.

The syllabus of *Louisville City R. Co. v. Mercer*, 11 Ky. L. Rep. 810 (an unreported case in the Kentucky superior court) is thus: Where the driver of a street car acts maliciously in ordering a passenger to leave the car, a failure to obey the order should not preclude recovery for injuries maliciously inflicted as a means of enforcing the oppressive order.

¹ *Southern Pacific Co. v. Patterson*, 7 Tex. Civ. App. 451, 460, 27 S. W. Rep. 194; *Wilt v. Wabash R. Co.*, 21 Ohio Ct. Ct. 579.

² *English v. Delaware & H. Canal Co.*, 66 N. Y. 454, 23 Am. Rep. 69.

³ *Louisville, etc. R. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. Rep. 606, 25 Am. St. 436.

⁴ *New York, etc. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. Rep. 356; *Pittsburgh, etc. R. Co. v. Russ*, 57 Fed. Rep. 822, 6 C. C. A. 597, 67 Fed. Rep. 662, 14 C. C. A. 612; *Dancey v. Grand Trunk R. Co.*, 19 Ont. App. 664. See § 949.

⁵ *Monnier v. New York Central & H. R. Co.*, 70 App. Div. 405, 75 N. Y. Supp. 521, citing *English v. Delaware & H. Canal Co.*, 66 N. Y. 454, 23 Am.

§ 941. **Protection of passengers.** In a case¹ which [257] received very thorough consideration it was held that "the carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged [258] to protect his passenger from violence and insult, from whatever source arising.² He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable.³ He must not only protect his passenger against the violence and insults of strangers and co-passengers,⁴ but, *a fortiori*, against the violence and insults of

Rep. 69; New York, etc. R. Co. v. Winter's Adm'r, 143 U. S. 60, 73, 12 Sup. Ct. Rep. 356.

¹ Goddard v. Grand Trunk R., 57 Me. 202, 213; Birmingham R. & E. Co. v. Baird, 130 Ala. 334, 30 So. Rep. 456.

² Pittsburgh, etc. R. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Flint v. Norwich, etc. T. Co., 34 Conn. 554; Chamberlain v. Chandler, 3 Mason, 242; Nieto v. Clark, 1 Cliff. 145; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. Rep. 429, 2 L. R. A. 694; United R. & E. Co. v. Deane, 93 Md. 619, 49 Atl. Rep. 923.

³ McElroy v. Nashua, etc. R. Co., 4 Cush. 400, 50 Am. Dec. 794; Du Lurans v. First Division, etc. R. Co., 15 Minn. 49, 2 Am. Rep. 102; Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Johnson v. Winona, etc. R. Co., 11 Minn. 296, 88 Am. Dec. 83; New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Bryant v. Rich, 106 Mass. 108; Bowen v. New York Central R. Co., 18 N. Y. 408, 72 Am. Dec. 529; Craker v. Chicago & N. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Memphis, etc. R. Co.

v. Whitfield, 44 Miss. 466; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Baltimore, etc. R. Co. v. Breinig, 25 Md. 378.

⁴ King v. Ohio & M. R. Co., 22 Fed. Rep. 413; Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 17 L. R. A. 571, 16 S. E. Rep. 69 (a colored passenger being molested by white passengers); Mullan v. Wisconsin Central Co., 46 Minn. 474, 49 N. W. Rep. 249; Lucy v. Chicago, etc. R. Co., 64 Minn. 7, 65 N. W. Rep. 944, 31 L. R. A. 551; Illinois Central R. Co. v. Minor, 69 Miss. 710, 16 L. R. A. 627, 11 So. Rep. 101; Ferry Cos. v. White, 99 Tenn. 256, 41 S. W. Rep. 583; Meyer v. St. Louis, etc. R. Co., 54 Fed. Rep. 116, 4 C. C. A. 221; Houston, etc. R. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. Rep. 124; Spade v. Lynn & B. R. Co., 173 Mass. 488, 52 N. E. Rep. 747, 70 Am. St. 298, 43 L. R. A. 832; Texas & P. R. Co. v. Jones, 39 S. W. Rep. 124 (Tex. Ct. of Civ. App.); Birmingham R. & E. Co. v. Baird, 130 Ala. 334, 30 So. Rep. 456. See Louisville & N. R. Co. v. McEwan, 17 Ky. L. Rep. 406, 31 S. W. Rep. 465.

If the carrier's servants permit white men to remain in the compart-

his own servants.¹ . . . The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of to make his journey safe.² Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier, by notice or special contract even, to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in *assumpsit* or tort, at his election.³ In the one

ment 'set apart for colored people, the carrier is responsible for their conduct so long as they remain there, and must answer for any annoyance or insult sustained by a colored passenger as a result thereof, although such servants did not know what was taking place. *Wood v. L. & N. R. Co.*, 101 Ky. 703, 42 S. W. Rep. 349.

¹ *Murphy v. Western & A. R.*, 23 Fed. Rep. 637; *Trabing v. California Navigation & Imp. Co.*, 121 Cal. 137, 53 Pac. Rep. 644; *Cole v. Atlanta & W. P. R. Co.*, 102 Ga. 474, 31 S. E. Rep. 107; *Savannah, etc. R. Co. v. Quo*, 103 Ga. 125, 29 S. E. Rep. 607, 68 Am. St. 85, 40 L. R. A. 483; *Hanson v. Urbana & C. Elevated Street R. Co.*, 75 Ill. App. 474; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. Rep. 219; *Atchison, etc. R. Co. v. Henry*, 55 Kan. 715, 41 Pac. Rep. 952, 29 L. R. A. 465; *Dwinelle v. New York, etc. R. Co.*, 120 N. Y. 117, 8 L. R. A. 224, 24 N. E. Rep. 319, 17 Am. St. 611; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 16 L. R. A. 136, 30 N. E. Rep. 1001, 28 Am. St. 632; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 30 Atl. Rep. 560, 45 Am. St.

319, 26 L. R. A. 220; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 7 Sup. Ct. Rep. 1039; *Wells v. New York, etc. R. Co.*, 25 App. Div. 365, 49 N. Y. Supp. 510; *White v. Norfolk & S. R. Co.*, 115 N. C. 631, 20 S. E. Rep. 191, 44 Am. St. 489; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. Rep. 557, 46 L. R. A. 549.

² *Ferry Cos. v. White*, 99 Tenn. 256, 266, 41 S. W. Rep. 583; *Flint v. Norwich, etc. Transportation Co.*, 6 Blatch. 158; *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Simmons v. New Bedford, etc. Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Meyer v. St. Louis, etc. R. Co.*, 54 Fed. Rep. 116, 4 C. C. A. 221.

In Mississippi the rule is that reasonable care and diligence under all the circumstances is all that is required. *Illinois Central R. Co. v. Minor*, 69 Miss. 710, 11 So. Rep. 101, 16 L. R. A. 627.

³ *Kelley v. Union Pacific R. Co.*, 16 Colo. 455, 458, 27 Pac. Rep. 1058, citing the text; *Holden v. Rutland R. Co.*, 72 Vt. 156, 47 Atl. Rep. 403.

case he relies upon a breach of the carrier's common-law duty to support his action; in the other, upon the breach of his implied promise. The form of the action is important only upon the question of damages. In actions of *assumpsit* the damages are generally limited to compensation. In actions of tort the jury are allowed greater latitude, and in proper cases may give exemplary damage." A carrier must answer to a passenger for his illegal arrest and false imprisonment as the result of an order by the conductor of the train in which the passenger was, the order being given in the line of the conductor's employment.¹ But liability of the carrier for an assault committed by a train conductor on a passenger is not dependent upon the fact whether it was within the scope of the conductor's employment or not, nor upon the existence of malice or wilfulness.²

The purchase of a ticket at a station by one who is waiting to take a train constitutes him a passenger.³ The relation of carrier and passenger, unless it is terminated in a legal way, continues until the passenger is safely deposited at his destination, and until he has left, or has had a reasonable time in which to leave, the premises of the carrier. If, during the continuance of this relation, though after the passenger has left the train, he suffers injury in consequence either of the negligent, wrongful or wanton tort of one of the carrier's servants, the carrier is liable.⁴ As to street railways, the rule is somewhat different, the relation being terminated when the passenger has safely alighted at his destination.⁵ A passenger assaulted by a fellow-passenger may recover from the carrier for his mental suffering arising from the assault, the carrier having been remiss in his duty to protect the passenger assaulted.⁶ The failure of a carrier to provide seats for passengers is a breach of its contract and imposes liability for such damages

¹ Atchison, etc. R. Co. v. Henry, 55 Kan. 715, 41 Pac. Rep. 952, 29 L. R. A. 465. Houston & T. C. R. Co. v. Phillio, 69 S. W. Rep. 994 (Tex. Sup. Ct.).

² Birmingham R. & E. Co. v. Baird, 101 Pa. 684, 28 S. E. Rep. 1000. ⁴ Brunswick & W. R. Co. v. Moore, *supra*. ⁵ Hanson v. Urbana & C. Elevated

³ Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. Rep. 219; Wells v. New York, etc. R. Co., 25 App. Div. 365, 49 N. Y. Supp. 510; Street R. Co., 75 Ill. App. 474. ⁶ International, etc. R. Co. v. Giesen, 60 S. W. Rep. 653 (Tex. Ct. of Civ. App.).

as proximately result. If a woman is compelled to stand and hold a child of which she has the custody, though it is not hers, the injury she sustains thereby is not too remote to be recovered for.¹

[259] § 942. **Damages for physical and mental suffering.** The carrier must make compensation according to the nature of the injury when the proper action is brought; such injury may consist of personal inconvenience,² sickness,³ loss of time,⁴ bodily and mental suffering, loss of capacity to earn money from personal injury, pecuniary expenses, disfigurement or permanent physical or mental impairment. There is no precise rule by which the extent of recovery for pain and suffering can be measured; but it is well established they are to be compensated when they result from injuries received by the party suing from the wrongful acts or culpable negligence of the defendant. The determination of the amount is committed to the judgment and good sense of jurors, subject to practical revision by the court to correct and relieve from manifest excess;⁵ and it is now established that not only bodily pain,

¹ *Texas & P. R. Co. v. Rea*, 27 Tex. Civ. App. 549, 65 S. W. Rep. 1115.

² *Hobbs v. London, etc. R. Co.*, L. R. 10 Q. B. 111; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Northwestern Central R. Co. v. O'Conner*, 76 Md. 207, 16 L. R. A. 449, 24 Atl. Rep. 449; *Boehm v. Duluth, etc. R. Co.*, 91 Wis. 592, 65 N. W. Rep. 506, correcting a remark to the contrary in *Jenson v. Chicago, etc. R. Co.*, 86 Wis. 589, 597, 57 N. W. Rep. 359, 22 L. R. A. 680.

³ *Brown v. Chicago, etc. R. Co.*, 54 Wis. 343; § 938; *Texas & P. R. Co. v. Gott*, 20 Tex. Civ. App. 335, 50 S. W. Rep. 193; *Rosted v. Great Northern R. Co.*, 76 Minn. 123, 78 N. W. Rep. 971.

⁴ *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Ward v. Same*, 34 How. Pr. 144, 4 Abb. App. Dec. 521; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229.

⁵ *Walker v. Erie R. Co.*, 63 Barb. 269; *Ransom v. New York & E. R. Co.*, 15 N. Y. 415; *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437, 18 Q. B. 93; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Lincoln v. Saratoga, etc. R. Co.*, 23 Wend. 425; *Canning v. Williamstown*, 1 Cush. 451; *Klein v. Jewett*, 26 N. J. Eq. 474; *McKinley v. Chicago, etc. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Ohio, etc. R. Co. v. Dickerson*, 59 Ind. 317; *Whalen v. St. Louis, etc. R. Co.*, 60 Mo. 323; *Morse v. Auburn, etc. R. Co.*, 10 Barb. 621; *Curtiss v. Rochester, etc. R. Co.*, 20 Barb. 282, 18 N. Y. 534; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Illinois Central R. Co. v. Barron*, 5 Wall. 90; *Verrill v. Minot*, 31 Me. 299; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533; *Pennsylvania R. Co. v. Kelly*, 31 Pa. 379; *Same v. Allen*, 53 id. 276; *Dancey v. Grand Trunk R. Co.*, 19 Ont. App. 664; *Sloane v. Southern Cal-*

but, connected with it, mental suffering—anxiety, suspense, fright, sense of wrong from insult or indignity,—may be treated, when the facts will justify it, as an element of the injury for which compensation should be allowed.¹ The [260]

ifornia R. Co., 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320; Gorman v. Southern Pacific Co., 97 Cal. 1, 31 Pac. Rep. 1112, 33 Am. St. 157; Pittsburgh, etc. R. Co. v. Berryman, 11 Ind. App. 640, 36 N. E. Rep. 728; L. & N. R. Co. v. Wilsey, 9 Ky. L. Rep. 1008 (Ky. Super. Ct.); Warner v. Southern Pacific Co., 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. 327; Lake Shore, etc. R. Co. v. Teed, 2 Ohio Dec. 662; Texas & P. R. Co. v. Gott, 20 Tex. Civ. App. 335, 50 S. W. Rep. 193; Georgia R. Co. v. Jett, 95 Ga. 236, 22 S. E. Rep. 251; Southern R. Co. v. Bryant, 105 Ga. 316, 31 S. E. Rep. 182; Central R. & B. Co. v. Roberts, 91 Ga. 513, 519, 18 S. E. Rep. 315.

¹ Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Tennessee, etc. R. Co. v. Lockhart, id. 315; Railway v. Dean, 43 Ark. 529, 51 Am. Rep. 584; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313, modifying Illinois Central R. Co. v. Sutton, 53 Ill. 397, where it was ruled that mental suffering cannot be recovered for unless the physical injury was wilfully inflicted (but see Illinois Central R. Co. v. Sidons, 53 Ill. App. 607, 612, which cites to the contrary Joch v. Dankwardt, 85 Ill. 331); Hannibal, etc. R. Co. v. Martin, 111 Ill. 219; Pennsylvania R. Co. v. Connell, 112 id. 295; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Chicago, etc. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. Rep. 837; Shepard v. Chicago, etc. R. Co., 77 Iowa, 54, 41 N. W. Rep. 564; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. Rep. 817, 5 Am. St. 766; McGinnis v. Missouri Pacific R. Co., 21 Mo. App. 399; I. & G. N. R. Co. v. Gilbert, 64 Tex. 536; St. Louis, etc. R. Co. v. Mackie, 71 id. 491, 9 S. W. Rep. 451, 10 Am. St. 766; H. & T. C. R. Co. v. Rand, W. & W. (Tex.) 100; Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. Rep. 801, 25 Am. St. 901, 7 L. R. A. 354; Stutz v. Chicago & N. R. Co., 73 Wis. 147, 40 N. W. Rep. 653; Wightman v. Same, 73 Wis. 169, 40 N. W. Rep. 689, 9 Am. St. 778, 2 L. R. A. 185; Gallena v. Hot Springs R., 13 Fed. Rep. 116; Murphy v. Western & A. R., 23 id. 637; Fell v. Northern Pacific R. Co., 44 id. 248; Serwe v. Northern Pacific R. Co., 50 N. W. Rep. 1021, 48 Minn. 78; Missouri Pacific R. Co. v. Kaiser, 18 S. W. Rep. 305, 82 Tex. 144; Canning v. Williamstown, 1 Cush. 451; Pennsylvania & O. C. Co. v. Graham, 93 Pa. 290; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Chicago, etc. R. Co. v. Flagg, 43 Ill. 365; Muldowney v. Illinois Central R. Co., 36 Iowa, 462; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 959; Craker v. Chicago & N. R. Co., 36 Wis. 657, 17 Am. Rep. 504; Ripon v. Bittel, 30 Wis. 614; Ransom v. New York, etc. R. Co., 5 N. Y. 415; Quigley v. Central Pacific R. Co., 11 Nev. 350, 21 Am. Rep. 757; McKinley v. C. & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748; Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 Conn. 293; Lawrence v. Housatonic R. Co., 29 Conn. 390; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Cox v. Vanderkleed, 21 Ind. 164; Fairchild v. California Stage Co., 13 Cal. 599; Illinois, etc. R. Co. v. Barron, 5 Wall. 90; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Nones v. Northhouse, 46 Vt. 587; Sloane v. Southern California R. Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; Ala-

mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter.¹ Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other. The dismay and the consequent shock to the feelings which is produced by the danger attending a personal injury not only aggravate but are frequently so appalling as to suspend the reason and disable a person from warding off the avoidable consequences.² Where a conductor on the defendant's railroad, by the use of some force, kissed a female passenger, the jury assessed the damages at \$1,000, and the verdict was sustained on the ground that it was right and proper to take into consideration, and give liberal damages for, her terror and anxiety, outraged feelings and insulted virtue, mental humiliation and suffering, although exemplary damages were held not recoverable.³ A passenger who is wrongfully ejected from a train may recover for the indignity put upon him, though he was not physically injured,⁴ and so may one who is refused accom-

bama, etc. R. Co. v. Tapia, 94 Ala. 226, 232, 10 So. Rep. 236; St. Louis, etc. R. Co. v. Brown, 62 Ark. 254, 259, 35 S. W. Rep. 225; Gorman v. Southern Pacific Co., 97 Cal. 1, 31 Pac. Rep. 1112, 33 Am. St. 157; Louisville, etc. R. Co. v. Goben, 15 Ind. App. 123, 42 N. E. Rep. 1116, 43 id. 890; Dawson v. Louisville & N. R. Co., 4 Ky. L. Rep. 801 (Ky. Super. Ct.); Kentucky Central R. Co. v. Biddle, 17 Ky. L. Rep. 1363, 34 S. W. Rep. 904; Lake Shore, etc. R. Co. v. Teed, 2 Ohio Dec. 662; Curtis v. Sioux City, etc. R. Co., 87 Iowa, 622, 54 N. W. Rep. 339; Memphis & C. Packet Co. v. Nagel, 97 Ky. 9, 29 S. W. Rep. 743, 15 Ky. L. Rep. 742; The Willamette Valley, 71 Fed. Rep. 712; Cherry v. Kansas City, etc. R. Co., 61 Mo. App. 303, 316; Duggan v. Baltimore & O. R., 159 Pa. 248, 28 Atl. Rep. 182, 39 Am. St. 672; Pullman Palace Car Co. v. McDonald, 2 Tex. Civ. App. 322, 21 S. W. Rep. 945; Monnier v. New York Central & H. R. R. Co., 70 App. Div. 405, 411, 75 N. Y. Supp. 521; Jacobs

v. Third Avenue R. Co., 71 App. Div. 199, 75 N. Y. Supp. 679; Kansas City, etc. R. Co. v. Foster, 134 Ala. 244, 32 So. Rep. 773; International, etc. R. Co. v. Giesen, 69 S. W. Rep. 653 (Tex. Ct. of Civ. App.); Choctaw, etc. R. Co. v. Hill, 75 S. W. Rep. 963 (Tenn.).

If insulting or abusive words are applied to a passenger while he is being ejected from a train he may recover for the injury thereby done to his feelings, but not on the independent ground that the same words tended to bring him into ignominy and disgrace. Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507, 16 Pac. Rep. 937.

¹ Seger v. Barkhamsted, 22 Conn. 290; McKinley v. C. & N. W. R. Co., 44 Iowa, 314, 24 Am. Rep. 748.

² Id.

³ Craker v. Chicago & N. R. Co., 36 Wis. 657, 17 Am. Rep. 504.

⁴ Pennsylvania R. Co. v. Connell, 112 Ill. 297, 127 id. 419, 20 N. E. Rep. 89, 26 Ill. App. 594; Mabry v. City Electric R. Co., — Ga. —, 42 S. E. Rep.

modations of the class to which he is entitled.¹ It is immaterial, so far as liability for mental suffering is concerned, that the carrier did or did not know of the passenger's susceptibility to it.²

In an Iowa case an action was brought against a railroad company for personal injury caused by a brakeman beating the plaintiff while he was attempting to enter a car, and an instruction that the jury might allow damages, among other things, "for the outrage and indignity put upon him," was approved. The court say: "Mental anguish arising from the injury, that is, pain caused by the wound or broken arm, constitutes an element of compensatory damages, and we, on principle, are unable to see why mental pain arising from or caused by the nature and character of the assault whereby the wound was inflicted or the arm broken should not also be an element of such damages. The one is as easily estimated and determined as the other, and practically the two cannot be separated or distinguished. The party injured cannot tell

1025, 59 L. R. A. 590; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Shepard v. Chicago, etc. R. Co., 77 Iowa, 54, 41 N. W. Rep. 564; Southern Kansas R. Co. v. Rice, 33 Kan. 398, 16 Pac. Rep. 817, 5 Am. St. 766; Same v. Hinsdale, 38 Kan. 507, 16 Pac. Rep. 937; Philadelphia, etc. R. Co. v. Rice, 64 Md. 63; Carsten v. Northern Pacific R. Co., 44 Minn. 454, 47 N. W. Rep. 49, 20 Am. St. 589, 9 L. R. A. 688; McGinnis v. Missouri Pacific R. Co., 21 Mo. App. 399; Allen v. Camden & P. Steamboat Ferry Co., 46 N. J. L. 198; Delaware, etc. R. Co. v. Walsh, 47 id. 548; International, etc. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. Rep. 491, 2 Am. St. 515; Sloane v. Southern California R. Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; Pennsylvania Co. v. Bray, 125 Ind. 229, 25 N. E. Rep. 439; Hot Springs R. Co. v. Deloney, 65 Ark. 177, 45 S. W. Rep. 351, 67 Am. St. 913; L. & N. R. Co. v. Wilsey, 9 Ky. L. Rep. 1008 (Ky. Super. Ct.); Louisville & N. R. Co. v. Donaldson, 19 Ky. L. Rep. 1384, 43 S.

W. Rep. 439; Louisville & N. R. Co. v. Hine, 121 Ala. 234, 25 So. Rep. 857; Haman v. Omaha Horse R. Co., 35 Neb. 74, 52 N. W. Rep. 830; Conlon v. Metropolitan Street R. Co., 34 N. Y. Misc. 394, 69 N. Y. Supp. 653; P. C. C. etc. R. Co. v. Ensign, 3 Ohio Dec. 451; Willson v. Northern Pacific R. Co., 5 Wash. 621, 32 Pac. Rep. 468; Cowen v. Winters, 96 Fed. Rep. 929, 37 C. C. A. 628, 631; Ray v. Cortland & H. Traction Co., 19 App. Div. 530, 46 N. Y. Supp. 521; Texas & P. R. Co. v. James, 82 Tex. 306, 15 L. R. A. 347, 18 S. W. Rep. 589; Missouri, etc. R. Co. v. Tarwater, 75 S. W. Rep. 937 (Tex. Civ. App.).

¹ The Willamette Valley, 71 Fed. Rep. 719; North German Lloyd Steamship Co. v. Wood, 18 Pa. Super. Ct. 488.

² Sloane v. Southern California R. Co., 111 Cal. 666, 44 Pac. Rep. 320, 32 L. R. A. 193; Spade v. Lynn & B. R. Co., 172 Mass. 488, 52 N. E. Rep. 747, 70 Am. St. 298, 43 L. R. A. 832.

where one ends and the other begins. The . . . damage arising from either or both cannot be accurately computed, [261] and, from the nature of things, they are so blended together they cannot be separated or distinguished. The attempt, therefore, to draw a line or make a distinction between the two, and to assign one to the class of exemplary, and the other to compensatory, is futile. The distinction is too fine to serve any practical purpose in the determination of causes by courts and juries.”¹ The Massachusetts court insists upon a distinction quite as fine as was sought to be made in the Iowa case. During the removal of a drunken man from the car in which the plaintiff was a passenger the defendant’s conductor jostled another drunken man who was standing in front of the plaintiff and threw him upon her. The fright caused by that and other occurrences in the car resulted in physical injury to the plaintiff. It is strongly intimated that if such fall was the necessary consequence of the removal, it was one of the risks assumed by the plaintiff. The trial court told the jury that if there was a physical injury and accompanied by it was a fright which operated to the injury of the plaintiff in body or mind, she could recover for the damage caused by the fright, and that all that happened might be taken as one whole. Holmes, J., said: The effect of the instruction appears to have been that, when once a battery of the plaintiff was proved, the defendant became or might be found liable for all the consequences of the disturbance in the car and of the plaintiff’s fright, however caused. We do not so understand the law. By something of an anomaly, consequences of the defendant’s conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant’s conduct, but for consequences of the defendant’s wrong to the plaintiff. The wrong to the plaintiff, if any, began with the battery, and it is for the consequence of the battery only that the defendant is liable, not for all the consequences of the drunken man’s presence in the

¹ McKinley v. C. & N. W. R. Co., 53 N. Y. 25; Quigley v. 44 Iowa, 314, 24 Am. Rep. 748; Central Pacific R. Co., 11 Nev. 350, Smith v. Pittsburgh, etc. R. Co., 23 370, 21 Am. Rep. 757. Ohio St. 10; Hamilton v. Third Ave-

car or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due in substance to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark without which she would not have collapsed.¹

§ 943. Mental suffering independently of other wrong.

It has been held that, in order to make a wrong-doer liable in damages for mental suffering, it must be connected with bodily injury,² or the injury by which it is produced must be attended by circumstances of malice, insult or oppression;³ and that a simple exposure to averted danger is not a

¹ *Spade v. Lynn & B. R. Co.*, *supra*.

² *Victorian Ry. Commissioners v. Coultas*, 13 App. Cas. 222 (stated at some length and discussed in §§ 21-24, where the general subject is considered and the authorities collected); *Johnson v. Wells, Fargo Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Illinois Central R. Co. v. Sutton*, 53 Ill. 397; *Texarkana, etc. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. Rep. 673; *Judice v. Southern Pacific Co.*, 47 La. Ann. 255, 257, 16 So. Rep. 816; *Deming v. Chicago, etc. R. Co.*, 80 Mo. App. 152; *Cleveland City R. Co. v. Ebert*, 19 Ohio Ct. Ct. 725; *Spohn v. Missouri Pacific R. Co.*, 116 Mo. 617, 22 S. W. Rep. 690; *Strange v. Same*, 61 Mo. App. 586; *Smith v. Wilmington & W. R. Co.*, 130 N. C. 304, 41 S. E. Rep. 481.

It was held in *Illinois Central R. Co. v. Sutton*, *supra*, that the physical injury must be wilfully inflicted in order that mental suffering may be recovered for. That proposition appears to have been receded from. *Indianapolis, etc. R. Co. v. Stables*, 62 id. 313. But compare *Illinois Central R. Co. v. Siddons*, 53 Ill. App. 607, 612, which cites *Jock v. Dankwardt*, 85 Ill. 331, as holding in accordance with the *Sutton* case.

It is held by the circuit court of appeals, fourth circuit, that in an action against a carrier for the breach of a contract to furnish, and transport a passenger on, a special train, damages cannot be recovered for mere disappointment and mental suffering resulting from delay in starting on a journey to see a sick parent. *Wilcox v. Richmond & D. R. Co.*, 52 Fed. Rep. 264, 3 C. C. A. 73, 17 L. R. A. 804. See § 975 *et seq.*

The mental suffering which an ejected passenger sustains by being prevented from seeing a sick relative is too remotely connected with the wrong done to be an element of damage. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 182, 45 S. W. Rep. 351, 67 Am. St. 913. But see § 975 *et seq.*

³ *Dorrah v. Illinois Central R. Co.*, 65 Miss. 14, 3 So. Rep. 36; *Trigg v. St. Louis, etc. R. Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Randolph v. Hannibal, etc. R. Co.* 18 Mo. App. 609; *Dawson v. Louisville & N. R. Co.*, 4 Ky. L. Rep. 801 (Ky. Super. Ct.); *Snyder v. Wabash R. Co.*, 85 Mo. App. 495; *Kansas City, etc. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. Rep. 644.

ground of recovery unless it was wanton and produced injury.¹ We conceive the correct rule to be that mental suffering or nervous shock may be recovered for whenever it is the natural and proximate result of the wrong done, if such wrong gives the injured party a cause of action.² In a recent Irish case there was a recovery where the "nervous shock" preceded any other injury, and where there was no element of wilfulness. The court reached the conclusion that there is no distinction between "nervous shock" and physical injury.³ The recovery for mental suffering must be limited to that which re-

¹ *Trigg v. St. Louis, etc. R. Co.*, *supra*; *Central of Georgia R. Co. v. Dorsey*, — Ga. —, 42 S. E. Rep. 1024.

² *Stutz v. Chicago & N. R. Co.*, 73 Wis. 147, 40 N. W. Rep. 653; *International, etc. R. Co. v. Anchonda*, 68 S. W. Rep. 743 (Tex. Ct. of Civ. App.); *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 46 Am. Rep. 464; *Lawrence v. Latimer*, 28 Ill. App. 552; *Shepard v. Chicago, etc. R. Co.*, 77 Iowa, 54, 41 N. W. Rep. 564; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507, 16 Pac. Rep. 937; *Missouri Pacific R. Co. v. Kaiser*, 18 S. W. Rep. 305, 82 Tex. 144; *Lake Erie & W. R. Co. v. Close*, 5 Ind. App. 444, 447, 32 N. E. Rep. 588; *Chicago, etc. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. Rep. 96, 865; *Pittsburgh, etc. R. Co. v. Berryman*, 11 Ind. App. 640, 653, 36 N. E. Rep. 728, and local cases cited; *Lucas v. Michigan Central R. Co.*, 98 Mich. 1, 56 N. W. Rep. 1039, 39 Am. St. 517; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301, 308, 82 N. W. Rep. 152; *Lake Shore, etc. R. Co. v. Teed*, 2 Ohio Dec. 662; *Perry v. Pittsburgh Union Passenger R.*, 153 Pa. 236, 25 Atl. Rep. 772; *Texas & P. R. Co. v. Armstrong*, 93 Tex. 31, 51 S. W. Rep. 835; *Texas & Pacific R. Co. v. Gott*, 20 Tex. Civ. App. 335, 50 S. W. Rep. 193; *Houston, etc. R. Co. v. Perkins*, 21 Tex. Civ. App. 508, 52 S. W. Rep. 124; *Norfolk & W. R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367; *Willson v. Northern Pacific R.*

Co., 5 Wash. 621, 32 Pac. Rep. 468; *Pittsburgh, etc. R. Co. v. Russ*, 67 Fed. Rep. 662, 14 C. C. A. 612; *Atlanta Consolidated Street R. Co. v. Hardage*, 93 Ga. 457, 460, 21 S. E. Rep. 100; *Georgia R. Co. v. Jett*, 95 Ga. 236, 22 S. E. Rep. 251; *Louisville & N. R. Co. v. Donaldson*, 19 Ky. L. Rep. 1384, 43 S. W. Rep. 439; *Eddy v. Syracuse Rapid Transit Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645; *New York, etc. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 70, 12 Sup. Ct. Rep. 356; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. Rep. 557, 46 L. R. A. 549; *Pullman's Palace Car Co. v. King*, 99 Fed. Rep. 380, 39 C. C. A. 573; *The Normannia*, 62 Fed. Rep. 469; *Zion v. Southern Pacific Co.*, 67 Fed. Rep. 500.

³ *Bell v. Great Northern R. Co.*, 26 L. R. Ire. 428, quoted from *in extenso* §§ 21-24; *Sloane v. Southern Pacific Co.*, 111 Cal. 668, 680, 44 Pac. Rep. 320, 32 L. R. A. 193. See *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203; *Canning v. Williamstown*, 1 Cush. 451; *Seger v. Barkhamsted*, 22 Conn. 290; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646, 4 C. C. A. 540, 21 L. R. A. 289; *Stutz v. Chicago, etc. R. Co.*, 73 Wis. 147, 40 N. W. Rep. 653, 9 Am. St. 769, n.; *Warren v. Boston, etc. R. Co.*, 163 Mass. 484, 40 N. E. Rep. 895; *Missouri, etc. R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. Rep. 327.

sults from the wrong done to the plaintiff; he cannot be compensated for the anguish endured in contemplating the sufferings of another.¹ Suffering endured by a passenger who has been ejected from a train in apprehension of discharge from his employment and because of his inability to remit money to his employer, according to custom, cannot be recovered for.² It is conceded by the Washington court that a passenger who is wrongfully ejected from a train may recover damages for mental suffering,³ but denied that such suffering is an element of damages where the carrier, through its own fault, fails to perform its contract to carry.⁴ A recent Kentucky case negatived the right to recover for mental suffering where the dead body of the plaintiff's relative was thrown from a wagon by the negligent operation of a train, neither the body nor the coffin containing it being injured. If, said the court, the plaintiff had been in the wagon and had been thrown out, but not hurt, he could not have maintained an action for the mental suffering thereby caused, for no rule is better settled than that mental suffering in cases of this character, not connected with physical injury, cannot be recovered for; and if the child had been alive and had been thrown from the wagon, just as the corpse was, but not hurt, no action could have been maintained.⁵

§ 944. Past and prospective damages. The damages recoverable for bodily pain and suffering are not limited to that which is past, if the proof renders it reasonably certain that the party must suffer in the future. In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration, including bodily pain which is shown by the proof to be reasonably certain will necessarily result from the injury.⁶ Such

¹ Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335, 28 S. W. Rep. 96.

² Pullman Palace Car Co. v. McDonald, 2 Tex. Civ. App. 322, 20 S. W. Rep. 945.

³ Willson v. Northern Pacific R. Co., 5 Wash. 621, 32 Pac. Rep. 468.

⁴ Turner v. Great Northern R. Co., 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. 883.

⁵ Hockenhammer v. Lexington & E. R. Co., 74 S. W. Rep. 222.

⁶ Stutz v. Chicago & N. R. Co., 73 Wis. 147, 40 N. W. Rep. 653, 9 Am. St. 769, note; Curtiss v. Rochester, etc. R. Co., 18 N. Y. 534; Memphis, etc. R. Co. v. Whitfield, 44 Miss. 466; Caldwell v. Murphy, 1 Duer, 233, 11 N. Y. 416; Klein v. Jewett, 26 N. J. Eq. 474; Matteson v. New York, etc.

party is entitled to recover one compensation for all his injuries, past and prospective; these are presumed to embrace indemnity for actual nursing and medical expenses, also loss of time, or loss from inability to perform ordinary labor, or capacity to earn money; he is to have a reasonable satisfaction for loss of both bodily and mental powers.¹ Physical injuries inflicted and indignities imposed by the carrier's servants upon a passenger before his ejection may be sued for in the same action as that in which damages for the latter wrong are demanded; the wrong was a continuing one.²

§ 945. Proof of damage. Evidence of the loss sustained by the plaintiff in his business in consequence of the injury received is proper, not as furnishing the measure of damages, but to aid the jury in estimating them; and for this purpose the nature of such business, its extent, and the importance of his personal oversight and superintendence in conducting it, [262] may be shown.³ The jury are to consider what, before the injury, was the health and physical and mental ability of the plaintiff to maintain his family or to earn money as compared with his condition in these particulars afterwards and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has endured and will endure from such injury as a cause, and should allow such damages as in their judgment will fairly compensate therefor.⁴

R. Co., 62 Barb. 364; *Fink v. Schroyer*, 18 Ill. 416; *Black v. Carrollton R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586; *Holyoke v. Grand Trunk R.*, 48 N. H. 541; *Filer v. New York Central R. Co.*, 46 N. Y. 42; *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49; *Aaron v. Second Avenue R. Co.*, 2 Daly, 127. See § 1251.

¹ *Id.*; *Donaldson v. Mississippi, etc. R. Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Walker v. Erie R. Co.*, 63 Barb. 260; *Pennsylvania R. Co. v. Books*, 57 Pa. 339; *Hansley v. Jamesville & W. R. Co.*, 115 N. C. 602, 611, 20 S. E. Rep. 528, 44 Am. St. 474, 32 L. R. A. 543, citing the text.

² *Trabing v. California Navigation*

& Imp. Co., 121 Cal. 137, 53 Pac. Rep. 644.

³ *Chicago, etc. R. Co. v. Posten*, 59 Kan. 449, 53 Pac. Rep. 465, quoting the text; *Central R. v. Senn*, 73 Ga. 705; *I. & G. N. R. Co. v. Irvine*, 64 Tex. 529; *Lincoln v. Saratoga, etc. R. Co.*, 23 Wend. 425; *Hurt v. Southern R. Co.*, 40 Miss. 391; *The Oriflamme*, 3 Sawyer, 397; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 437; *Taylor v. Dustin*, 43 N. H. 493. But see *Lombardi v. California Street R. Co.*, 124 Cal. 311, 319, 57 Pac. Rep. 66, and § 1246 *et seq.*

⁴ *Malone v. Pittsburgh, etc. R.*, 153 Pa. 390, 25 Atl. Rep. 638; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138;

In a case before the supreme court of the United States [263] the declaration charged that the plaintiff was wounded on the head by a blow from a piece of iron that had been broken off the boat on which he was a passenger, and thrown against him; that in consequence of the wound his brain was injured, so that his understanding was impaired; that for some time

Curtiss v. Rochester, etc. R. Co., 20 Barb. 282; Kinney v. Crocker, 18 Wis. 74; Ripon v. Bittel, 30 Wis. 614; Pennsylvania & O. C. Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549; McLaughlin v. Corry, 77 Pa. 109, 18 Am. Rep. 432; Indianapolis v. Gaston, 58 Ind. 224; Shear. & Redf. on Neg., § 606. See Joch v. Dankwardt, 85 Ill. 331.

In *Caldwell v. Murphy*, 11 N. Y. 416, the plaintiff brought an action against a carrier of passengers for injuries received in consequence of the negligent upsetting of a stage or omnibus. The plaintiff was proved to have been considerably injured, but whether he was permanently disabled or not was a matter earnestly litigated. To show that he continued to suffer from the effects of the injury down to the time of the trial the plaintiff proved that he was a ship carpenter, and that he had not been able to work constantly more than a few weeks after the injury occurred. On cross-examination the defendant raised the question whether his being without work was not occasioned by his not attempting to procure employment. The witness was made to answer that he was never present when the plaintiff applied for work, and that what he knew about his inability to labor was founded principally on what he had told him. After several other questions, the object of which was to ascertain whether he was voluntarily idle, whether his being without work was on account of his not being able to get employment, or

whether it was, as the plaintiff contended, on account of inability to labor by reason of his injuries, the plaintiff's counsel put this question: "Had he the means of support for himself and family except his labor?" It was objected to. The objection being overruled he answered: "He had no means of support except what he got from the charity of his friends." The defendant's view of the matter was still pressed by a further cross-examination of the same witness, and then the judge put some questions to ascertain the number of persons in the plaintiff's family, and in what manner they were supported after the injury, it having been shown that before that he had constant employment. It was held on appeal that this evidence was admissible. Denio, J., said: "I think the evidence was admissible to show that the plaintiff's circumstances were such that he would probably have been engaged in laboring in his calling if he had not been disabled by his injuries, and that he was in a considerable degree unable to labor. Had he been a person of pecuniary means his being out of employment would have been slight if any evidence of disability; but having a family dependent upon him, and being without means of support except his labor and the charity of his friends, his omission to employ himself, in connection with the other evidence of his injuries, had a bearing upon the extent to which he had been disabled by the occurrence in question."

he was insensible, and his life despaired of; and before his recovery he suffered much mental and bodily pain; that he was detained in New York, at a distance from home, and subjected to much expense about his care, support and maintenance, and had been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of great gains, profits and advantages which he might and otherwise would have derived and acquired. Under this general declaration the question decided was whether the plaintiff was entitled to prove that before and up to the time of the alleged injury the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged therein; and by the physician, who attended him in New York, that when the plaintiff, after his convalescence, left there to return to North Carolina he could not safely attend to any business or occupation. The evidence was held admissible.¹

¹ *Wade v. Leroy*, 20 How. 34. Campbell, J., delivering the opinion, thus cautiously remarks upon the proof so offered: "The precise object for which this evidence was adduced is not stated in the certificate of the judges; but if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning or to ascertain its probative effect, it cannot be rejected as impertinent, or as founded upon matter that does not appear in the pleadings in the cause. The evidence objected to conduces to prove that the plaintiff was seriously injured; that he had been confined in New York at a distance from his home and had incurred expense in consequence. That before that time he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value;

or, that he had suffered a loss of some profit, and that after some detention in New York he had returned to his home in an infirm condition — so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion. This evidence would certainly assist the jury to determine that the plaintiff had sustained an injury of no slight character — an injury to his person, and which was followed by expense, suffering and loss of time which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it. This evidence may have an application without any inquiry into any remote or contingent consequences which could not have been foreseen or which were peculiar to the circumstances or condition of the plaintiff. The record does not in-

§ 946. **Same subject.** In a Massachusetts case in which the declaration alleged the plaintiff's business and impaired capacity, after the injury, to pursue it, the court held that he might introduce evidence to show the kind and amount of physical and mental labor he was accustomed to do before the injury as compared with that which he was able to do afterwards, for the purpose of aiding the jury to determine the compensation he should receive for his loss of mental and physical capacity.¹ The declaration alleged that by defendant's act he was hurt, and being before able to earn large sums by [265] his business, was rendered unable to labor in and conduct it, and deprived of the earnings which he would otherwise have made. He had been allowed to show on the trial, in order to prove his bodily and mental capacity before the accident, and the extent of his injury, that prior thereto he owned and carried on a large mill for the manufacture of fancy cassimeres; used to select the patterns and colors, which required constant attention and thought; bought part of the stock, hired the workmen and agreed with them for their wages; superintended the putting in of machinery; conducted an extensive correspondence, and twice a year took an account of stock; and that, since the accident, he had been able to do very little that required mental application or physical labor. It was contended for the defendant that the law makes no distinction between men; that evidence of the plaintiff's wealth in owning and carrying on a large mill afforded no evidence of the amount of damages sustained. Evidence that he was skilled in his occupation, and able to perform a large amount of work therein does not prove any special damages without evidence that his occupation was profitable; that damages estimated upon the ground of loss of peculiar skill and business capacity must in their nature be conjectural and uncertain; that if different passengers are entitled to different amounts of damages for similar injuries railroad companies must charge a higher rate of fare for those whose occupation or capacity

form us that the evidence was designed to aid in such irrelevant inquiries." It was insisted that damages for the injury to the particular business of the plaintiff were special,

and therefore the business and the fact of the loss should be particularly set forth in the declaration. See *Laing v. Colder*, 8 Pa. 497.

¹ *Ballou v. Farnum*, 11 Allen, 73.

will entitle them to heavy damages. Colt, J., said: "In general the profits of a future business are too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience or ability in the management of business insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth, or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had [266] been admitted for that purpose, the argument of the defendant would be entitled to further consideration. But it was offered to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards, as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.¹ In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury so that the jury may be able to award with any certainty a pecuniary equivalent therefor is at once

¹ In *Kinney v. Crocker*, 18 Wis. 74, the plaintiff was allowed to give evidence of the character and extent of his business, and of the effect of his inability to attend to it by reason of the injury; and not only was this held proper, but also this instruction to the jury, that "he would be entitled to recover, in addition to other damages sustained, for all damages to his legitimate business, but not for

speculations that he might be engaged in; but that if a man had an ordinary business, yielding ordinary receipts, he would be entitled to recover the diminution of these receipts resulting from his inability to attend to his business, occasioned by the injury." *Nebraska City v. Campbell*, 2 Black, 590; *Indianapolis v. Gaston*, 58 Ind. 224.

apparent; and in this difficulty the defendants find arguments for the support of their objection. But the answer is that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of personal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested as where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the negligence or mis- [267] conduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization,—if, indeed, for any practical purpose, in this regard, they can be considered as distinct,—the direct and mysterious sympathy whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious, upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are in a great extent to be measured by the knowledge, experience and taste which he possesses, and which are purely qualities of the mind. Take a case of injury to the right arm of a skil-

ful painter or musician, for example. To show the extent of his injury the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone could the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in those cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury to be one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury which may be called only bodily? There is a [268] class of injuries, especially those which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. In the main it must always be left to the discretion of the jury to give such reasonable damages in those cases as in their opinion will afford compensation for the entire injury which the plaintiff proves he has sustained, subject to that power which remains in the court to set aside the verdict in those cases where the damages awarded are so excessive as to warrant the inference that some passion or prejudice or other improper considerations influenced them."¹

§ 947. **Recovery for special loss.** If there be a loss of employment, a provable loss in business, or any other special loss resulting from the injury, although it occurs in consequence of the peculiar circumstances in which the injured party is placed at the time, it may be taken into consideration in the estimate

¹ *Ransom v. New York & E. R. Co.*, 15 N. Y. 415; *Collins v. Council Bluffs*, 32 Iowa, 324; *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Laing v. Colder*, 8 Pa. 497; *Pennsylvania R. Co. v. Books*, 57 Pa. 339; *McKinley v. C. & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Whalen v. St. Louis, etc. R. Co.*, 60 Mo. 323; *Pittsburg, etc. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Bell v. Gulf & C. R. Co.*, 76 Miss. 71, 23 So. Rep. 268; *Kleven v. Great Northern R. Co.*, 70 Minn. 79, 72 N. W. Rep. 828.

of damages, if specially claimed in the declaration.¹ On the breach of a guaranty that a theater troupe should arrive at their destination at a given time, the carrier is liable for the damages suffered on account of engagements actually missed

¹ *Laing v. Colder*, 8 Pa. 497; *Walker v. Erie R. Co.*, 63 Barb. 260; *Caldwell v. Murphy*, 11 N. Y. 416; *Chicago v. O'Brennan*, 65 Ill. 160; *Kinney v. Crocker*, 18 Wis. 74; *Hunter v. Stewart*, 47 Me. 419.

In the last case there is an implication that an unmarried female might recover damages on account of her prospect of marriage being impaired by the injury, if declared for specially and proved. The charge was that if the jury should be satisfied that the injury sustained would be lasting, they were at liberty to consider whether the prospects for being well married would not thereby be impaired; and if so, they were at liberty to allow such damages in this respect as they were satisfied would arise from this cause, if any. On exception to this instruction the court said: "Now, the loss of marriage may be of itself a special ground of action. In the present case it was not alleged in the declaration nor sustained by the proof. It does not necessarily arise from a bodily injury, though it might be consequent thereupon. The defendant had no notice that damages would be claimed for any such cause, and, therefore, could not be prepared to prove or disprove its existence. As damages have been given for a special injury having no necessary connection with the wrongful acts of the defendant, and neither set forth in the declaration nor established by the evidence, the exceptions must be sustained."

In *The Oriflamme*, 3 Sawyer, 397, 404, Deady, J., said of the female libellant who had been injured while a passenger on board the vessel: "I find that she is entitled to recover

for expenses of her sickness and injury to her clothing, \$100; for loss of time and labor on account of the injury, \$100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, \$300; for the physical and mental pain and suffering caused by the injury, and treatment of the libellant while on board the vessel after the accident, \$1,000; and for the permanent disfigurement of the libellant's face from the wound on the forehead, \$500. It may be that the sum of \$500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living. In manners and appearance she is a plain girl, moving in an humble walk in life, and not like many others depending upon her beauty for her dowry or support. Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. *Karr v. Parks*, 44 Cal. 49. In this country, at least, it is open to every woman, however poor or humble, to obtain a secure independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance — comeliness — is a consideration of comparative importance in the case of every daughter of Eve." See § 1241.

by the delay; but not for damages resulting from the breach of other engagements which might have been kept had the troupe not broken up because of the non-payment of its performers, although they would have been paid had not the first mentioned engagements been missed.¹

§ 948. Wrongfully placing passenger in second-class coach.

If a passenger who pays for a first-class ticket is furnished with a second-class one and compelled to ride in a car corresponding therewith, in which car the passengers are permitted to use vulgar and profane language, which the servants of the carrier might have prevented, it must respond in damages based on physical and mental injuries, which, for their measure, especially in the case of a refined and delicate woman, must necessarily largely depend upon the honest exercise of the judgment and discretion of the court or jury trying the cause. In such a case the passenger is not bound to pay the difference between the price of the ticket he holds and the ticket he is entitled to in order to mitigate the liability of the carrier.² The passenger may recover exemplary damages where they are recognized as proper.³

[269] **§ 949. Mitigation of damages.** The damages recoverable by the injured party cannot be abated or mitigated by showing that he has received money on account of the injury from an insurance company on an accident policy,⁴ nor because he has received gratuitous nursing or medical attendance or benefactions in any form from friends.⁵ And it has been held that the value of such nursing may be allowed as an item of damage.⁶ Where a passenger is injured by the violence of the carrier or his servants his liability is not subject to mitigation by proof that the injured party was suffering from a disease which aggravated his injuries and rendered

¹ *Foster v. Cleveland, etc. R. Co.*, 56 Fed. Rep. 434.

² *St. Louis, etc. R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. Rep. 451; 10 Am. St. 766, 1 L. R. A. 667; *Missouri, etc. R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. Rep. 327. See *The Willamette Valley*, 71 Fed. Rep. 712; *Southern R. Co. v. Wood*, 114 Ga. 159, 39 S. E. Rep. 894.

³ *Houck v. Southern Pacific R. Co.*, 38 Fed. Rep. 221.

⁴ *Pittsburgh, etc. R. Co. v. Thompson*, 56 Ill. 138; *Bradburn v. Great Western R. Co.*, L. R. 10 Ex. 1; §§ 158, 1255.

⁵ *Indianapolis v. Gaston*, 58 Ind. 224; *Ohio, etc. R. Co. v. Dickerson*, 59 Ind. 317; §§ 158, 1255.

⁶ *The D. S. Gregory*, 2 Bene. 226. But see §§ 158, 1255.

their cure more difficult.¹ But if the plaintiff's action is for expulsion from the carrier's vehicle any fraudulent conduct on the part of the plaintiff connected with the cause of [270] such expulsion, or the pretext therefor, may be shown as part of the *res gestæ* and in mitigation of damages.² So his declarations may be given in evidence, tending to show that his object in taking passage on the cars was to make money by suing the defendant for demanding more than the statutory rate of fare. An article published by the plaintiff subsequently to the injury was held admissible because it tended to show, as the court remarked, his *quo animo*, and that the case was not one in which he should recover damages for supposed injury to his "feelings." It tended to show that he entered the car expecting to be ejected, as he was, and for the purpose of making money out of the transaction. So far as injury to his "feelings" is concerned it tended to show that it was a fair case for the application of the maxim that to the willing mind there is no injury.³ If unnecessary resistance is made to the authority of a conductor in charge of a train by a passenger whom he proposes to eject it will excuse the use of force by the former and mitigate the damages,⁴ unless personal injuries were wilfully or maliciously inflicted.⁵

It has been declared by several courts that whenever there is reasonable ground to dispute a passenger's right to ride on the ticket he holds it is his duty to pay the additional fare demanded, if able to do so, and sue for the amount; that the damages cannot be increased by an obstinate resistance to the conductor's demand and by forcing him to resort to expulsion. If the passenger does resist his conduct can be considered in mitigation, and will reduce the damages to a nominal sum or such as were actually sustained by his delay in reaching his

¹ *Brown v. Hannibal, etc. R. Co.*, 66 Mo. 588; §§ 983, 1244.

² *N. & W. R. Co. v. Wysor*, 82 Va. 250; *Terre Haute, etc. R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96; *Southern R. Co. v. Barlow*, 104 Ga. 213, 30 S. E. Rep. 732, 69 Am. St. 166.

³ *Cincinnati, etc. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Holmes v. Carolina Central R. Co.*, 94 N. C.

318; *Murphy v. Western & A. R. Co.*, 23 Fed. Rep. 637.

⁴ *Hall v. Memphis & C. R. Co.*, 15 Fed. Rep. 57; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295.

⁵ *Chicago, etc. R. Co. v. Griffin*, 68 Ill. 499; *Pennsylvania R. Co. v. Connell*, 112 id. 305, 127 id. 419, 20 N. E. Rep. 89; *Hall v. Memphis & C. R. Co.*, 15 Fed. Rep. 57.

destination, or otherwise.¹ This varies from the rule applied in some jurisdictions, including the supreme court of the United States. There the passenger may pay or leave the train. If he does the latter he may recover full compensation for all damages proximately resulting.² The tendency of the later adjudications is in favor of this view. Injudicious resistance will not mitigate the damages which were recoverable independently of it.³ In some states the damages recoverable for an assault may be lessened by proof of provocation; in others they cannot be.⁴ An ejected passenger cannot recover for the subsequent results if he refuses the carrier's invitation to resume his journey.⁵ Where the circumstances were such that the conductor could have readily ascertained whether or not an ejected passenger had paid his fare, the fact that the latter could have prevented his ejection by giving up another ticket he had, does not bar his right to recover damages in excess of the value of the ticket.⁶

§ 950. Exemplary damages. A carrier's conduct may be so culpable in causing injury, or in connection with it, as to subject him to exemplary damages as a punishment to him and an example to others.⁷ To justify such damages, however, there must usually be fraud, malice, oppression, insult,

¹ *Western Maryland R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. Rep. 880; *Gibson v. East Tennessee, etc. R. Co.*, 30 Fed. Rep. 904; *Hall v. Memphis & C. R. Co.*, 15 id. 57. See § 940.

² *Yorton v. Milwaukee, etc. R. Co.*, 62 Wis. 367, 21 N. W. Rep. 516, 23 id. 401; *St. Louis, etc. R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. Rep. 451, 10 Am. St. 766, 1 L. R. A. 667; *Head v. Georgia Pacific R. Co.*, 79 Ga. 358, 7 S. E. Rep. 217; *Willson v. Northern Pacific R. Co.*, 5 Wash. 621, 32 Pac. Rep. 468; *Pennsylvania Co. v. Lenhart*, 120 Fed. Rep. 61; *Trice v. Chesapeake & O. R. Co.*, 40 W. Va. 271, 21 S. E. Rep. 1023; *Norfolk & W. R. Co. v. Anderson*, 90 Va. 1, 8, 17 S. E. Rep. 757, 44 Am. St. 844. See § 940.

³ *Pittsburgh, etc. R. Co. v. Russ*, 57 Fed. Rep. 823, 6 C. C. A. 597.

⁴ See § 151.

⁵ *Louisville & N. R. Co. v. Hine*, 121 Ala. 234, 25 So. Rep. 857.

⁶ *Sprenger v. Tacoma Traction Co.*, 15 Wash. 660, 47 Pac. Rep. 17, 43 L. R. A. 706.

⁷ *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Same v. Statham*, 42 Miss. 607; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Graham v. Pacific R. Co.*, 69 Mo. 536; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229; *Goddard v. Grand Trunk R. Co.*, 57 Me. 217; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Lucas v. Michigan Central R. Co.*, 98 Mich. 1, 39 Am. St. 517, 56 N. W. Rep. 1039; *Memphis & C. Packet Co. v. Nagel*, 15 Ky. L. Rep. 742 (Ky. Super. Ct.), 97 Ky. 9, 29 S. W. Rep. 743; *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; *Callaway v. Mellett*, 15 Ind. App. 366,

recklessness, or other wilful misconduct, or that entire want of care which would raise the presumption of conscious indifference to consequences.¹ In cases where the wrong done is to the public, as where regulations are made which prevent pas-

44 N. E. Rep. 198, 57 Am. St. 238; Atchison, etc. R. Co. v. Long, 5 Kan. App. 644, 47 Pac. Rep. 993; Dawson v. Louisville & N. R. Co., 4 Ky. L. Rep. 801 (Ky. Super. Ct.), 6 id. 668 (Ky. Ct. of Appeals); Louisville City R. Co. v. Mercer, 11 Ky. L. Rep. 810 (Ky. Super. Ct.); Louisville & N. R. Co. v. Wilkinson, 15 Ky. L. Rep. 92 (Ky. Super. Ct.); Baltimore, etc. R. Co. v. Kirby, 91 Md. 313, 46 Atl. Rep. 975; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 46 L. R. A. 549, 53 S. W. Rep. 557; Nashville Street R. v. Griffin, 104 Tenn. 81, 57 S. W. Rep. 153, 49 L. R. A. 451; Railway Co. v. Davis, 56 Ark. 51, 19 S. W. Rep. 107; Fordyce v. Nix, 58 Ark. 136, 23 S. W. Rep. 967, citing the text; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L. R. A. 220, 30 Atl. Rep. 560, 45 Am. St. 319; Louisville, etc. R. Co. v. Goblen, 15 Ind. App. 123, 42 N. E. Rep. 1116; Samuels v. Richmond, etc. R. Co., 35 S. C. 493, 14 S. E. Rep. 943, 28 Am. St. 883; Haehl v. Wabash R. Co., 119 Mo. 325, 24 S. W. Rep. 737; Zion v. Southern Pacific Co., 67 Fed. Rep. 500; Tomlinson v. Wilmington, etc. R. Co., 101 N. C. 327, 12 S. E. Rep. 138; Norfolk, etc. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367; Denison & S. R. Co. v. Randell, 69 S. W. Rep. 1013 (Tex. Ct. of Civ. App.); Gorman v. Southern Pacific Co., 97 Cal. 1, 33 Am. St. 157, 31 Pac. Rep. 1112; Spellman v. Richmond, etc. R. Co., 35 S. C. 475, 14 S. E. Rep. 947; Choctaw, etc. R. Co. v. Hill, 75 S. W. Rep. 963 (Tenn.).

¹ Milwaukee, etc. R. Co. v. Arms, 91 U. S. 489; Doss v. Missouri, etc. R. Co., 59 Mo. 27; McKeon v. Citizens' R. Co., 42 Mo. 79; Kentucky, etc. R. Co. v. Dills, 4 Barb. 593; Western U. Tel. Co. v. Eyser, 91 U. S. 495, note; Thompson v. New Orleans, etc. R. Co., 50 Miss. 315, 19 Am. Rep. 12; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Du Laurans v. St. Paul R. Co., 15 Minn. 49, 2 Am. Rep. 102; Pullman, etc. Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Toledo, etc. R. Co. v. Patterson, 63 Ill. 304; Paine v. Chicago, etc. R. Co., 45 Iowa, 569; Seymour v. Chicago, etc. R. Co., 3 Biss. 43; Pittsburgh, etc. R. Co. v. Slusser, 19 Ohio St. 157; Holmes v. Carolina Central R. Co., 94 N. C. 318, quoting the text; Sullivan v. Oregon R. & N. Co., 12 Ore. 392; Philadelphia Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. Rep. 816; Louisville, etc. R. Co. v. Guinan, 11 Lea, 98, 47 Am. Rep. 279; Hoffman v. Northern Pacific R. Co., 45 Minn. 53; Atchison, etc. R. Co. v. Hogue, 50 Kan. 40, 31 Pac. Rep. 698; Louisville & N. R. Co. v. Ballard, 6 Ky. L. Rep. 542 (Ky. Super. Ct.); "indecorous" conduct to a female passenger, in connection with negligence, not enough; Louisville & N. R. Co. v. Jackson, 18 Ky. L. Rep. 296, 36 S. W. Rep. 173; Judice v. Southern Pacific Co., 47 La. Ann. 255, 259, 16 So. Rep. 816; Smith v. Philadelphia, etc. R. Co., 87 Md. 48, 38 Atl. Rep. 1072; Pine v. St. Paul City R. Co., 50 Minn. 144, 52 N. W. Rep. 392, 16 L. R. A. 347; Hansley v. Jamesville, etc. R. Co., 115 N. C. 602, 20 S. E. Rep. 528, 44 Am. St. 474, 32 L. R. A. 543, 117 N. C. 565, 23 S. E. Rep. 443, 53 Am. St. 600; Norfolk & W. R. Co. v. Neeley, 91 Va. 539, 22 S. E. Rep. 367; Vicksburg R. etc. Co. v. Marlett, 78 Miss. 872, 29 So. Rep. 62; Carr v. Toledo Traction Co., 19 Ohio Ct. Ct. 281; Kentucky Central R. Co.

sengers from stopping and receiving their baggage at the places they desire, exemplary damages may be imposed without any proof of malice or ill-will to the individual whose rights are denied.¹ The same rule has been applied for a refusal to carry where discrimination has been made against individuals in pursuance of the carrier's rules.² Private business corporations may be sued in trespass for the authorized acts of their servants; and if a trespass or other wrong is committed by their authority, with circumstances of violence and outrage, such as would authorize exemplary damages against a natural person, it is now settled that the same rule applies to such corporations. If a corporation, like a railroad company, is guilty of an act or default, such as in the case of an individual would subject him to exemplary damages, it is equally liable thereto.³ Where the servants of a corporation engaged

v. Biddle, 17 Ky. L. Rep. 1363, 34 S. W. Rep. 904; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301, 82 N. W. Rep. 152.

Demanding an additional fare, no circumstances of aggravation being shown, is not ground for the recovery of punitive damages. *Carr v. Toledo Traction Co.*, 19 Ohio Ct. Ct. 281.

The Georgia code provides that "in every tort there may be aggravating circumstances, either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." The word "trespass," it has been held, embraces only that class of torts which involve a violent, unlawful, physical invasion of one's rights of person or property, and this classification necessarily excludes those acts of one person resulting in injury to another, which arise from mere omission to perform a duty imposed upon the party bound to perform by the terms of a contract entered into between them, as the mere negligent omission to stop a train at a point to

which the transportation of a passenger has been undertaken. *Southern R. Co. v. Harden*, 101 Ga. 263, 28 S. E. Rep. 847; *Southern R. Co. v. Bryant*, 105 Ga. 316, 31 S. E. Rep. 182.

¹ *Pittsburgh, etc. R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. Rep. 607, 10 Am. St. 517, 2 L. R. A. 489; *Cowen v. Winters*, 96 Fed. Rep. 929, 37 C. C. A. 628; *Winters v. Cowen*, 90 Fed. Rep. 99.

² *Brown v. Memphis & C. R. Co.*, 7 Fed. Rep. 51, 62. *Hammond, J.*, said: The rule in cases where the offense is against the individual is that the want of malice only mitigates the punishment in damages and may reduce them to zero according to circumstances. But where the offense is not only against a particular individual, but also against the public, as in most if not all the cases of wrongful exclusion of passengers, the question is one solely for the jury to say how much punishment is necessary to enforce the rights of the public against the carrier, as well as to vindicate the individual. *Houck v. Southern Pacific R. Co.*, 38 Fed. Rep. 226.

³ *Hopkins v. Atlantic, etc. R. Co.*,

in the carriage of passengers are guilty of such acts or conduct in the performance of their duties in the transportation of the injured party as a passenger as would subject them to damages of this nature, the great weight of authority holds the corporation liable to punitive damages, without proof that it directed or ratified such acts or conduct.¹ As the corporation can only act through natural persons, its officers and servants, and as it of necessity commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort *in transitu*, the whole power and authority of the corporation, *pro hac vice*, is vested in such employees, and as to such passengers they are the corporation.² In Alabama punitive damages are re-

36 N. H. 9, 72 Am. Dec. 287; Pittsburgh, etc. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic, etc. R. Co. v. Dunn, id. 162, 2 Am. Rep. 382; Graham v. Pacific R. Co., 66 Mo. 536; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 395; Same v. Hurst, 36 Miss. 660, 74 Am. Dec. 785; Vicksburgh, etc. R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552; Illinois, etc. R. Co. v. Hammer, 72 Ill. 353; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Cleghorn v. New York, etc. R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Western Union Tel. Co. v. Eyser, 2 Colo. 141.

¹ Birmingham R. & E. Co. v. Baird, 130 Ala. 334, 356, 30 So. Rep. 456; Southern R. Co. v. Wood, 114 Ga. 140, 39 S. E. Rep. 894; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Georgia R. v. Olds, 77 Ga. 673; Head v. Georgia Pacific R. Co., 79 id. 358, 7 S. E. Rep. 217, 11 Am. St. 434; Curl v. Chicago, etc. R. Co., 63 Iowa, 417, 16 N. W. Rep. 69, 19 id. 308; Springer Transportation Co. v. Smith, 16 Lea, 498, 1 S. W. Rep. 280; Gallena v. Hot Springs R., 13 Fed. Rep. 116; Louisville & N. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640; Murphy v. Western & A. R., 23 Fed. Rep. 637; Fell v. Northern Pacific R. Co., 44 id. 248; L. & N. R. Co. v. Ballard, 85 Ky.

307, 3 S. W. Rep. 530, 7 Am. St. 600; Wilson v. New Orleans, etc. R. Co., 63 Miss. 352; Louisville & N. R. Co. v. Maybin, 66 id. 83, 5 So. Rep. 401; Evans v. St. Louis, etc. R. Co., 11 Mo. App. 463; Lake Shore, etc. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. Rep. 545; Hall v. South Carolina R. Co., 28 S. C. 261, 15 S. E. Rep. 623; Denver, etc. R. v. Harris, 122 U. S. 597, 7 Sup. Ct. Rep. 1286; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 453; Quigley v. Central Pacific R. Co., 11 Nev. 350, 21 Am. Rep. 757; Goddard v. Grand Trunk R. Co., 57 Me. 202; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Sherley v. Billings, 8 Bush. 147, 8 Am. Rep. 451; Milwaukee, etc. R. Co. v. Arms, 91 U. S. 489; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Higgins v. Louisville, etc. R. Co., 64 Miss. 80, 8 So. Rep. 176; Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. Rep. 53; Lexington R. Co. v. Cozine, 23 Ky. L. Rep. 1137, 64 S. W. Rep. 848; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 46 L. R. A. 549, 53 S. W. Rep. 557; Haehl v. Wabash R. Co., 119 Mo. 325, 342, 24 S. W. Rep. 737.

² Randolph v. Hannibal, etc. R. Co.,

coverable where a passenger is carried by the place at which she had told the conductor it was her purpose to leave the train, his negligence being so gross as to evince an entire want of care, and such as to raise the inference of fact that, being cognizant of the probable consequences, he was indifferent to them.¹ In that state the infliction of actual damages is not essential to the recovery of exemplary damages.²

§ 951. Same subject; rule different in some states. It [272] cannot be denied that this view is based upon considerations of great weight, and supported by a preponderance of authority. The old doctrine was that a master was not liable for the wilful or malicious trespass of his servant;³ if the latter [273] be guilty of anything which was not a mere want of skill or care, the master was not responsible⁴ unless the act [274] was done by his command; that is, unless the particular act, or some act which comprised it, was ordered to be done by the principal.⁵ In some early cases this rule exonerated the master where the tortious act of the servant was very closely connected with his legitimate duties. In an English case⁶ where the servant in charge of and driving his master's chaise wilfully collided with another chaise, it was held the act of the servant and not of the master. Lord Kenyon, adopting the words of Holt, C. J., in a previous case, said: "No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him;" and added, that "when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for

18 Mo. App. 609; *Quinn v. South Carolina R. Co.*, 29 S. C. 381, 386, 7 S. E. Rep. 614. 1 L. R. A. 682, quoting the three preceding propositions in the text; *Bass v. Chicago, etc. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495; *Godard v. Grand Trunk R. Co.*, 57 Me. 202.

Sellers, 93 Ala. 9, 9 So. Rep. 375, 30 Am. St. 17.
² *Alabama, etc. R. Co. v. Sellers*, *supra*. See § 406.

³ *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507.

⁴ *Seymour v. Greenwood*, 6 H. & N. 363, 364.

⁵ *Sharrod v. London, etc. R. Co.*, 4 Ex. 580, 585; *Morley v. Gaisford*, 2 H. Black. 442.

⁶ *McManus v. Crickett*, 1 East, 106.

the act." The principle is sound, but its application is not in harmony with the rulings in later cases.¹ It has been followed in some cases in New York.² In a case decided in 1857³ on the assumption that the conductor had wrongfully ejected the plaintiff, a passenger, from the defendant's cars on some punctilio relating to his refusing to show a ticket or pay fare, the trial court refused to instruct that the defendant was not liable for the injuries which the plaintiff might have sustained in consequence of the assault in question by their agents and servants, but did charge "that if, in pursuance of the defendant's orders and instructions, the plaintiff was wrongfully ejected from the cars, and was wantonly treated by the conductor or agents of the defendant in so ejecting him, the [275] defendant is liable for the injuries resulting from such ejection," including in their discretion compensation for the "personal ill-treatment to which the plaintiff had been subjected in ejecting him." This refusal to charge and this instruction were held erroneous.⁴

¹ *Seymour v. Greenwood*, 7 H. & N. 355; *Huzzey v. Field*, 2 Cr., M. & R. 432, 440; *Eastern, etc. R. Co. v. Brown*, 6 Ex. 314; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 384, 53 S. W. Rep. 557, 46 L. R. A. 549.

In *Seymour v. Greenwood*, 6 H. & N. 364, Pollock, C. B., said: "At the time of the decision of *Scott v. Shepherd*, 2 W. Black. 892, and *McManus v. Crickett*, 1 East, 106, the subject had not been so thoroughly considered as it since has been."

² *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480, 2 N. Y. 479.

³ *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455.

⁴ *Brown, J.*, said: "The object of the request was that the court should discriminate between those acts of the company's agents done in the execution of its directions and those done in excess of its instructions, and without authority or approbation. This, I think, should have

been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and whatever tortious acts they commit by its direction they are responsible for and no other. This is upon the principle that what one does by another he does by himself. But for the wilful acts of the servant the master is not responsible, because such wilful acts are a departure from the master's business. *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507. In removing a passenger from the cars, who refuses to pay his fare or exhibit his ticket, the servants of the company are limited to the use of so much force as may effect that object and no more. They are not to resort to force at all, until it becomes absolutely necessary by refusal of a passenger to depart upon request; and when they do resort to it they are to

[276] This strictness has been very much relaxed by later cases. In a case decided by the court of appeals in 1871 it was held that where a conductor on a railroad, under a mistake of fact or of judgment, ejected a person from the car in which he was a passenger, the act not being justified by his misconduct, the company was liable; and so if there was justifiable cause for ejection, but excessive force was used. There was no evidence of wanton violence or malice, and the effect of

use no more than becomes sufficient, and they are to do no unnecessary injury to the party. This is the extent of their authority, and if they exceed it, they, and not the company, are responsible for the consequences." In this case Comstock, J., said: "If the plaintiff had forfeited his right to be carried as a passenger by refusing to show his ticket when requested to do so by the conductor, and if the right was not restored by subsequently complying, then his expulsion was lawful and he has nothing to complain of, unless greater force and violence were used than his own resistance rendered necessary. The verdict of the jury was for a wrongful expulsion and not for an excess of force. If, on the other hand, the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see on what principle the defendant can be made liable for the wrong. The regulation, and instructions to the conductor, as we have said, were lawful, and they did not, in their terms or construction, profess to justify the trespass and eviction. The result is that the wrong was done without any authority, and therefore that those who actually did it are alone answerable. The judge was requested to charge the jury that the plaintiff, if entitled to recover at all, could only recover such damages as he had sustained in consequence of the defendant's not

performing its contract to carry him to Scio, to wit, damages to his business. The judge refused so to charge, but did charge that the plaintiff could recover, if at all, for personal ill-treatment; in other words, for the unlawful assault and battery. It seems to me that the request was essentially right, and that the refusal and charge were erroneous. The request was made and the charge given upon the theory that the plaintiff's expulsion was unlawful. But if unlawful, then the company had not authorized it. There was, no doubt, an implied contract to carry the plaintiff to the place for which he had bought his ticket, and that contract was broken. The defendant, being bound to carry him to Scio, might be liable for the breach of the engagement, even if the plaintiff had been expelled by another passenger. The defendant was bound even to prevent an unlawful expulsion and to carry the passenger through. But this is a liability entirely different from the one enforced at the trial. The conductor, according to the plaintiff's own showing, without authority from his principal, assaulted and expelled him from the train; and, under the charge given to them, the jury rendered their verdict for the personal wrong and outrage. This, I think, is contrary to the law of the case." *Donivan v. Manhattan R. Co.*, 47 Alb. L. J. 50 (N. Y. Ct. of Com. Pleas).

such elements was not decided. The court say: "It is sufficient to make the master responsible *civiliter* if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant in doing it departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant the obligation is not changed. The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent the maxim [277] *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him."¹ Such is the established doctrine. As a general rule, the master is liable for what his servant does in the course of his employment; but in regard to matters wholly disconnected from the service to be rendered he is under no responsibility for what the servant does or neglects to do. The reason is that in respect to such matters he is not a servant.² The fact that the injurious act of the agent or servant in the course of his employment was wanton and malicious will not excuse the master,³ nor will the master be exonerated though the act was committed in violation of his instructions,⁴ but any element of wanton violence or malice will aggravate the damages.⁵

¹Higgins v. Watervliet Turnpike & R. Co., 46 N. Y. 23, 7 Am. Rep. 293. See Sandford v. Eighth Avenue R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Rounds v. Delaware, etc. R. Co., 64 id. 129, 21 Am. Rep. 597; Cohen v. Dry Dock, etc. Co., 69 N. Y. 170; Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. Rep. 261.

²Bryant v. Rich, 106 Mass. 180; Aldrich v. Boston, etc. Co., 100 Mass. 31, 1 Am. Rep. 76; Philadelphia, etc.

R. Co. v. Quigley, 21 How. 202; Moore v. Fitchburg R. Co., 4 Gray, 465, 64 Am. Dec. 83.

³Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474.

⁴Philadelphia, etc. R. Co. v. Derby, 14 How. 468; Louisville & N. R. Co. v. Whitman, 79 Ala. 328.

⁵Hawes v. Knowles, 114 Mass. 518; Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 109, 111, 13 Sup. Ct. Rep. 261; Trabing v. California Navigation & Imp. Co., 121 Cal. 137, 53 Pac. Rep. 644.

The liability of masters or employers thus recognized and exemplified, for the negligence and misfeasances of their servants, augmented in cases where the injury has been aggravated by malice, insult or excessive violence, and to which such employer was privy only by his relation of employer to the guilty actor, is founded on the legal unity and identity of employer and employee in respect to all that is done by the latter within the sphere of his employment. There are considerations of public policy to support it; the wrongs done by the servant are imputed to the master, and there is an assumption of actual culpability on his part. But in some of the states exemplary damages are not allowed against a carrier of passengers for the act of the servant without some proof of previous direction, of participation, or subsequent ratification. Thus, in Wisconsin it was ruled in a late case that although a principal is liable to [278] full compensatory damages for a malicious injury inflicted by his agent acting within the scope of his employment, yet that he was not liable to punitive damages unless he directed the injurious act or subsequently adopted or confirmed it; but that retention by the principal in his service of the guilty servant, after notice of his wrongful act, was sufficient evidence of ratification.¹ The law is so held in California,² Rhode Island,³ Georgia,⁴ Texas⁵ and in some cases in Missouri,⁶ though in later ones it appears to be otherwise.⁷ Virginia and West Virginia are also committed to that view.⁸

¹ *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 676; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301, 82 N. W. Rep. 152.

² *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Wade v. Thayer*, 40 Cal. 578; *Mendelsohn v. Anaheim Lighter Co.*, id. 657; *Warner v. Southern Pacific Co.*, 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. 327; *Trabing v. California Navigation & Imp. Co.*, 121 Cal. 137, 53 Pac. Rep. 644.

³ *Hagan v. Providence, etc. R. Co.*, 3 R. I. 88.

⁴ *Western & A. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842. But see

Georgia R. v. Olds, 77 Ga. 673; *Head v. Georgia Pacific R. Co.*, 79 id. 358, 11 Am. St. 434, 7 S. E. Rep. 217, in which cases the general rule stated in the preceding section was applied.

⁵ *Railway Co. v. Donahoe*, 56 Tex. 162.

⁶ *Perkins v. Railroad*, 55 Mo. 201; *Graham v. Pacific R. Co.*, 66 id. 536; *Rouse v. Metropolitan Street R. Co.*, 41 Mo. App. 298.

⁷ *Hicks v. Hannibal, etc. R. Co.*, 68 id. 329; *Haehl v. Wabash R. Co.*, 119 Mo. 325, 342, 24 S. W. Rep. 737, denying the doctrine and expressly disapproving *Rouse v. Metropolitan St. R. Co.*, *supra*.

⁸ *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433, 25 Am. St. 901, 10

In New York it has been ruled that "for injuries by the negligence of a servant while engaged in the business of the master within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to punitive damages unless he is himself also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or from bad habits unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to it, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages."¹ It is said in a late case that it would not be just to mulct a railroad company in exemplary damages for the first act of misconduct toward passengers by one of its conductors, of previous good character and conduct, and whom it had no reason to believe would be guilty of misconduct, his act not having been ratified.² This is substantially the rule favored by the supreme court of the United States.³

In New Jersey it has been held that where a railroad company adopts all rules and regulations needful to the safety of

S. E. Rep. 801, 7 L. R. A. 354; Norfolk & W. R. Co. v. Anderson, 90 Va. 1, 9, 17 S. E. Rep. 757, 44 Am. St. 884; Same v. Neely, 91 Va. 539, 22 S. E. Rep. 367.

¹ Cleghorn v. New York, etc. R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Murphy v. Central Park, etc. R. Co., 48 N. Y. Super. Ct. 96; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282.

This rule is approved by Thayer, J., in Sullivan v. Oregon R. & N. Co., 12 Ore. 392, 53 Am. Rep. 364, 7 Pac.

Rep. 508; but the question was not necessarily in the case. It prevails in Texas. Mays v. Railroad Co., 64 Tex. 272; Dillingham v. Russell, 73 id. 47, 15 Am. St. 753, 11 S. W. Rep. 139, 3 L. R. A. 634.

² Eddy v. Syracuse Rapid Transit Co., 50 App. Div. 109, 63 N. Y. Supp. 645, citing several local cases.

³ Lake Shore, etc. R. Co. v. Prence, 147 U. S. 101, 13 Sup. Ct. Rep. 261; Pittsburgh, etc. R. Co. v. Russ, 57 Fed. Rep. 822, 6 C. C. A. 597.

its passengers and employs competent agents, whose duty it is to see that those rules and regulations are observed, the company, in case of injury to passengers happening by reason of the failure of the agent to perform this duty, cannot be held liable for punitive damages. If, however, the company, as [279] such, is in fault a different rule applies. The company for its own carelessness may be justly held liable for smart money. This rule does not prevail when the carelessness is that of a subordinate agent. The principle is not admitted that the company is guilty of gross negligence whenever its agent is.¹

§ 952. Injury to wife, child or servant. Where a husband or parent brings an action for injury sustained by his wife or child there can be no recovery for suffering either bodily or mental, but there may be for loss of services or society, and the expenses attending the cure. For these he is entitled to recover.² If the injury, in the case of a child, is of such a nature as to make the parent's duty of caring for and nurtur-

¹ *Ackerson v. Erie R. Co.*, 32 N. J. L. 254. See *New Orleans, etc. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98.

In *Great Western R. Co. v. Miller*, 19 Mich. 314, Campbell, J., said: "It was urged on the hearing that the railroad company could not be held liable for any wrongful expulsion under this statute, because it would be the personal wrong of the conductor in violation of law, for which he must be held to have exceeded his known agency. And the same exemption was claimed for them from liability for any expulsion, unless under circumstances where they may be supposed to have authorized it by their instruction, general or special. There is, however, so far as we have seen, no authority which would exempt them from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them in the whole management of his train, and the power to do any serious mischief

is chiefly derived from their investing him with the control of this large agency. He occupies the same position as the master of a ship, and his action in the case supposed must be regarded as done in the line of his employment. But it does not follow that the responsibility of his employers is the same as his. For those aggravations which may arise out of his wantonness and malice we have held that the employer is not on the same footing with the agent." *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447.

² *Union Pacific R. Co. v. Jones*, 21 Colo. 340, 346, 40 Pac. Rep. 891, approving the text; *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671; *Klein v. Jewett*, 26 N. J. Eq. 474; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633; *Ransom v. New York & E. R. Co.*, 15 N. Y. 415, 419; *Ford v. Monroe*, 20 Wend. 210; *Marys' Case*, 9 Coke, 111; *Hall v. Hollander*, 7 Dowl. & R. 133.

ing it more expensive, the wrong-doer may be charged with the increased expense; this conclusion may be arrived at by the jury though there is no direct evidence that such will be the result. The amount may be estimated as the value of a life is determined.¹ A husband can maintain but one action for the same injury to his wife from a particular act or default. All the damage past, present and prospective proceeding therefrom is from one cause and indivisible. The wrong in such a case is entire and complete at once, though the injurious consequences remain for an indefinite period afterwards. The party liable is guilty of but one wrong and can be sub- [280] jected to but one action for it to the same person. The real extent of the injury received and the amount of the damages do not depend on the time when the action is brought or tried. The husband may commence his suit forthwith or delay it for years; in either case the same question would be tried and the same damages recoverable; though, if the trial be delayed, the delay will be likely to afford more satisfactory means of ascertaining the real extent of the wife's injury, and the actual amount of the husband's damages. If the condition of the wife is such at the time of the trial as to disable her for the future, and require further expenses for medical treatment and nursing, the jury may give damages for prospective expenses and loss of society and services.² These are general, not special, damages in the sense of those terms as used in the law of pleading and evidence. They are not caused by any incidental fact, or by the peculiar situation or circumstances of the party, but are the natural and uniform effects of the injury itself. And when the injury to the wife is once shown to be of such a nature, the damage to the husband from the loss of her services and society, and the expenses of her cure, follow uniformly and by legal necessity from the relation of husband and wife which entitles him to her services and society and charges him with her support.³ Where the injury is permanent, or must continue after the trial, prospective damages may be recovered. The jury will be obliged to estimate as well as they can from the condition in which they found the

¹Lang v. New York, etc. R. Co., 51 Hun, 603, 4 N. Y. Supp. 565.

²Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287.

³Id.

wife at the time of the trial, the whole ultimate loss and damage to the husband in the same way and on the same principle that they would estimate such damage for a like injury to himself.¹

In a California case, where an infant child had been wounded by a vicious animal, and had thereby been disfigured or deformed, it was held that its father could recover from the owner of the animal only for such expenses as he had incurred in healing the original wound, and not for any expense incurred in removing the deformity or disfiguration. The injury arising from the permanent deformity would be an item [281] properly allowable in the daughter's own claim for damages; but the cost of its removal, after the wound was healed, would be a voluntary expenditure by the father.² "In the absence of controlling authority," said Andrews, J., "we are of opinion that in an action by a parent, founded on loss of service of the child, only expenses actually incurred by the parent for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child."³ In New York it has been held in an action of trespass by a father for assaulting and beating his son *per quod servitium amisit*, that a jury in assessing the damages are not authorized to take into account the wounded feelings of the parents. The court remarked on the difference between such cases and those for seduction where the only remedy for the injury is the action by the parent; whereas, in case of an assault and battery the child may also maintain an action against the defendant in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the *gravamen* of the suit.⁴ In an earlier case the same court held in an action on the case for negligence in driving a carriage whereby the son of the plaintiff was run over and killed that the loss of service of the child, and expense occasioned by the sickness of the plaintiff's wife caused by the shock to her maternal feel-

¹ Id.

² Karr v. Parks, 44 Cal. 46.

³ Cuming v. Brooklyn City R. Co.,

109 N. Y. 95, 16 N. E. Rep. 65.

⁴ Cowden v. Wright, 24 Wend. 429,

35 Am. Dec. 633.

ings were proper items of damage, the same being laid as special damages in the declaration.¹ A husband's right of action for injuries to himself is independent of his right to recover for the loss of the society and services of his wife, where both are injured by the same act of negligence. Hence a recovery by him for his personal injuries does not bar a separate action to recover on account of his loss by reason of her injury.²

§ 953. **Excessive verdicts.**³ It is the exclusive province of a jury to decide facts and causes depending upon con-

¹ Ford v. Monroe, 20 Wend. 210.

² Skoglund v. Minneapolis Street R. Co., 45 Minn. 330, 47 N. W. Rep. 1071, 22 Am. St. 733, 11 L. R. A. 222; Newberry v. Connecticut, etc. R. Co., 25 Vt. 377. Compare Cincinnati, etc. R. Co. v. Chester, 57 Ind. 297.

³ *Damages for being ejected from train, without physical injury.* In Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464, a judgment for \$600 was sustained for being removed from a train at 11 o'clock P. M., several miles from a station and seven miles from home. The distinguishing fact in the case was the charge of the conductor that the plaintiff was trying to cheat the company. As a result of the walk made necessary the plaintiff suffered physical pain for some time.

In other cases in Indiana verdicts for expulsion have been sustained as follows: \$562, St. Louis, etc. R. Co. v. Myrtle, 51 Ind. 566; \$1,000, Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; \$700, Indianapolis, etc. R. Co. v. Milligan, 50 Ind. 392; \$400 for being carried beyond station. Louisville, etc. R. Co. v. Renicker, 17 Ind. App. 619, 47 N. E. Rep. 239.

The verdict found that the plaintiff lost time of the value of \$25, and incurred expenses to the value of \$5, and that the total damages sustained were \$150. The allowance of \$120 for the discomfort of a carriage ride of fourteen miles at night was con-

sidered excessive. Cleveland, etc. R. Co. v. Quillen, 22 Ind. App. 496, 53 N. E. Rep. 1024.

In Chicago, etc. R. Co. v. Holdridge, 118 Ind. 281, 20 N. E. Rep. 837, a passenger holding a ticket refused to pay fare and left the train to avoid expulsion; but immediately boarded it again, paid his fare (twenty-five cents) and was carried to his destination. A majority of the court held that \$200 was not an outrageously excessive sum to compensate for the humiliation and shame suffered.

In I. & G. N. R. Co. v. Gilbert, 64 Tex. 536, a lady was put off a train in a dark night, at an unusual place, where few people lived, and those nearly all negroes, and was insulted by the employees of the company. She and her children walked four or five miles through a swamp over the railroad track and a high bridge; a negro who had been engaged to pilot them was rude and insulting. The alleged effects of the walk were fatigue, swollen feet, bodily pain, mental anxiety from fright, etc. A verdict for \$6,500 was upheld as compensatory damages.

In International, etc. R. Co. v. Smith, referred to in Same v. Wilkes, 68 Tex. 617, 621, 2 Am. St. 515, 5 S. W. Rep. 491, a verdict for \$8,000 was sustained under circumstances quite similar.

In Wightman v. Chicago & N. R. Co., 73 Wis. 169, 40 N. W. Rep. 689, 9

troverted facts, applying thereto the law as given to them by the court. In actions for personal injuries and in cases generally where there is no fixed legal rule of compensation,

Am. St. 778, 2 L. R. A. 185. a passenger was obliged to leave the train at the depot where he boarded it, the train having been run back there for the purpose of permitting him to get off. A verdict of \$299 for injury to his feelings by being ejected and called a liar by the conductor was sustained.

An award of \$850 was regarded as excessive where the plaintiff was ejected in the outskirts of a city, no serious insult being offered, and the only damage resulting being the claim that he was robbed in a gentlemanly manner by two tramps while walking along the railroad track. *Masterson v. Chicago & N. R. Co.*, 102 Wis. 571, 78 N. W. Rep. 757.

In *Phettiplace v. Northern Pacific R. Co.*, 84 Wis. 412, 20 L. R. A. 483, 54 N. W. Rep. 1092, a verdict for \$300 was sustained because the plaintiff was ejected from a train at a point distant from any station or dwelling, in violation of a statute. Compare *Railway v. Branch*, 45 Ark. 524, *infra*.

Where punitive damages could not be recovered, and there was no evidence of financial loss, sickness or unusual inconvenience, an award of \$1,500, reduced by the remission of one-half, was required to be further reduced by \$400. *Gillen v. Minneapolis, etc. R. Co.*, 91 Wis. 633, 65 N. W. Rep. 373.

In the absence of proof of actual damages by reason of loss of time or of expenses incurred, no physical pain being inflicted, no indignity being offered, and no mental suffering or anxiety resulting, an award of \$750 was set aside. *Georgia R. & B. Co. v. Jett*, 95 Ga. 236, 22 S. E. Rep. 251. See *Charleston & S. R. Co. v.*

Varnadore, 94 Ga. 639, 21 S. E. Rep. 581.

In *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, a passenger was ejected and given, by the carrier's conductor, in charge of a police officer as one refusing to pay fare, to be locked up. He was confined until the next morning, when he was discharged by a court. A verdict for \$4,500 was not disturbed. The opinion is silent as to damages.

In *Dancey v. Grand Trunk R. Co.*, 19 Ont. App. 664, the plaintiff was carried off the train, without any additional circumstances of insult or injury, in the *bona fide* assertion of a right mistakenly believed to exist, without circumstances of wanton insult and aggravation. A verdict for \$1,000 was regarded as very unreasonable, and was reduced to the "still very large sum of \$500."

In *Cunningham v. Seattle Electric R. & P. Co.*, 3 Wash. 471, 28 Pac. Rep. 745, the passenger was forcibly ejected for alleged disorderly conduct and claimed \$25 for personal injuries. A verdict for \$1,500 was ordered to be reduced to \$500. The only proof of damage to reputation was that the newspapers had published an account of the matter, and that the plaintiff had been pointed out as the man who had been put off the street car.

A verdict of \$100 for threatening to put a passenger off a train, compelling the payment of fare and taking up a mileage book was considered excessive, the passenger not being subjected to humiliation because of the presence of other passengers. *Mueller v. Chicago, etc. R. Co.*, 75 Minn. 109, 77 N. W. Rep. 566.

Where the plaintiff, with a child

the theory of the law is that the decision of the jury is conclusive unless they have been misled, or their verdict has been influenced by corruption, passion or prejudice.¹ Unless the

in her arms, was carried beyond her destination and compelled to sit up the balance of the night in a strange city, in consequence of which she was greatly inconvenienced and became sick, \$500 was not considered excessive, a former verdict for \$580 having been set aside. *Louisville & N. R. Co. v. Cayce*, 17 Ky. L. Rep. 1389, 84 S. W. Rep. 896.

Where the ejection was by force, and the plaintiff was injured (but, probably, to a very slight extent), mortified and humiliated, a verdict for \$1,000 was sustained. *Chesapeake, etc. R. Co. v. Osborne*, 97 Ky. 112, 30 S. W. Rep. 21, 53 Am. St. 407.

In the absence of personal injury or loss as the result of an ejection, a verdict for \$500 was set aside. *Louisville & N. R. Co. v. Breckinridge*, 99 Ky. 1, 34 S. W. Rep. 702.

Where the award was for \$10 actual damages, and \$5 for loss of time, the sum of \$390 for indignities suffered, exemplary damages not being recoverable, was excessive. *Atchison, etc. R. Co. v. Hogue*, 50 Kan. 40, 31 Pac. Rep. 698.

In *Chattanooga, etc. R. Co. v. Lyon*, 89 Ga. 16, 15 S. E. Rep. 24, 32 Am. St. 72, 15 L. R. A. 857, a verdict for \$2,000 in favor of a female who was carried a mile and a half beyond her destination was set aside, there being no aggravating circumstances.

In *Sloane v. Southern California*

R. Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193, a verdict for \$1,400 in favor of a female passenger who was ejected was reduced to \$400.

In *Norfolk & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757, 44 Am. St. 884, a verdict for \$2,000, exemplary damages being awarded, was sustained.

In *Missouri Pacific R. Co. v. Marino*, 2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, a verdict for \$2,000 for the mental suffering of the plaintiff's wife caused by the carrier's rude and violent treatment of her, was not disturbed.

Plaintiff and his family were carried beyond their destination, and were obliged to hear profane and insulting language from the carrier's servants. A verdict for \$1,000 was sustained as punitive damages. *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. Rep. 967.

A verdict for \$5,000 was pronounced to be grossly beyond all reasonable limit where there was a slight physical injury, loss of time to the extent of \$10, and \$5 were paid a physician, the facts showing that the plaintiff was not entitled to much for humiliation or injury to his dignity. *Warner v. Southern Pacific Co.*, 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. 327.

Where the expense resulting from the expulsion was small, and exemplary damages were not recoverable,

¹ *Singleton v. Southwestern R.*, 70 Ga. 464; *I. & G. N. R. Co. v. Gilbert*, 64 Tex. 536; *Schmidt v. Milwaukee, etc. R. Co.*, 23 Wis. 186, 99 Am. Dec. 158; *Duffy v. Chicago, etc. R. Co.*, 34 Wis. 188; *Thomas v. Womack*, 13 Tex. 580; *Lambert v. Craig*, 12 Pick. 199; *Wiggin v. Coffin*, 3 Story, 1; *Nor-*

folk & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757, 37 Am. St. 848; *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. Rep. 967, citing the text; *Central R. & B. Co. v. Roberts*, 91 Ga. 513, 519, 18 S. E. Rep. 315; *Charleston & S. R. Co. v. Varnadore*, 94 Ga. 639, 21 S. E. Rep. 581.

verdict in a given case finds an amount of damages so out of proportion to the actual injury as to evince such misleading, [291] or the presence of some malign influence, it will be sus-

a verdict for \$1,700 was set aside. *Zion v. Southern Pacific Co.*, 67 Fed. Rep. 500.

A verdict for \$550 was allowed to stand where there was no loss, injury or humiliation, except such insult as followed the imputation of forgery in changing the date on a ticket. *Trice v. Chesapeake & O. R. Co.*, 40 W. Va. 271, 21 S. E. Rep. 1022.

In *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683, a colored woman was refused admission to a ladies' car. The case does not disclose any particular grounds for damages. The court instructed thus: "If you find for the plaintiff you will assess her such damages as will make her whole, considering the loss of time and inconvenience she was put to. And you may also take into consideration what the proper amount of expenses might be in the vindication of this right." A verdict for \$1,000 was returned.

In *Louisville & N. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640, an old and feeble man was ejected with some rudeness, but not with sufficient force to injure him. He was obliged to walk to his home, a distance of two miles. The case was held to be a proper one for exemplary damages, and a verdict for \$2,000 was sustained.

In *Houston, etc. R. Co. v. Ford*, 53 Tex. 364, it is held that \$250 is an excessive sum for damages where the ejection occurred not far from the starting place, and the passenger was detained but a few hours and suffered no special damage.

It is held in *Railway v. Branch*, 45 Ark. 524, that the violation of a statute which provides that a person on a train who refuses to pay his fare

shall only be put off at some usual stopping place entitles a person put off elsewhere to nothing more than nominal damages unless actual personal or pecuniary damage has been sustained. But see *Phettiplace v. Northern Pacific R. Co.*, *supra*.

In *Illinois Central R. Co. v. Latimer*, 28 Ill. App. 552, a girl six years of age was put off a train within seventeen hundred feet of the depot. She was not physically injured, but was frightened. A verdict for \$2,000 was sustained. The court admits that under ordinary circumstances the damages would be excessive, but sustained the verdict in these observations: "Had appellee been of sufficient age to justify the belief that she could have returned to the depot without harm or danger to herself, no one, we presume, would insist that she ought to recover any such sum as she did. But the circumstances of this case are so unusual that it is easy to believe that the conductor acted with a wanton disregard of the rights of the appellee. When it is remembered that appellee was a delicate little girl, only six years old, taken off the train—no matter how gently—suddenly left alone upon the track, and the train speeding away, it is a wonder that in her fright and agony she had presence of mind enough to know the way back to the depot. Just how much a railroad company ought to pay for such treatment is difficult to measure by any exact standard."

In *Boster v. Chesapeake & O. R. Co.*, 36 W. Va. 318, 15 S. E. Rep. 158, the court held that \$500 allowed as compensatory damages for ejecting a passenger from a train at a place where there was no station and from

tained, although it may materially differ from the judgment of the court.¹ But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compen-

which he had to walk nine miles was not excessive. Compare *McLean v. Chicago, etc. R. Co.*, 50 Minn. 485, 52 N. W. Rep. 966.

Where the damages claimed were on account of the publicity attendant upon the removal from the cars, the sense of wrong, and in being put under obligations to a stranger for financial aid, a verdict for \$1,900 was reduced to \$500. *Willson v. Northern Pacific R. Co.*, 5 Wash. 621, 32 Pac. Rep. 468.

Damages for being ejected from train where physical injury followed. In *Ohio, etc. R. Co. v. Judy*, 120 Ind. 397, 22 N. E. Rep. 252, \$5,500 was held not to be excessive where a passenger ejected from a freight train was injured by falling over a truck at the depot, the ejection being made in the dark. The evidence showed that the plaintiff was a business man, capable of earning \$150 to \$200 per month, and that four months after the event he was unable to use one arm, with a probability that the injury would be permanent.

In *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. Rep. 53, a verdict for \$34,666.75 was sustained in favor of a passenger who was assaulted under circumstances of great insult and outrage by a porter and seriously and permanently injured.

In *Louisville, etc. R. Co. v. Mask*, 64 Miss. 738, 2 So. Rep. 360, a passenger

was carried several hundred yards beyond the station, and in consequence missed the conveyance which was to take him home, and had to walk three-fourths of a mile over a muddy road at midnight; sickness resulted from the exposure and the walk. He was old and feeble, and thereafter unable to attend to business. Judgment for \$1,000 was sustained.

In *Lake Shore, etc. R. Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. Rep. 545, a verdict for \$48,750 for personal injuries of an unusually severe character resulting from being ejected from a train at a dangerous place was sustained.

In *Brown v. Memphis, etc. R. Co.*, 7 Fed. Rep. 51, a colored woman was ejected from a train on the ground that her general character for virtue made her unfit to ride in the ladies' car. Her conduct as a passenger was irreproachable. Some force was used in removing her, and perhaps some physical injury was done her. A verdict for \$3,000 (the case being one for punitive damages) was sustained. See *Houck v. Southern Pacific R. Co.*, 38 Fed. Rep. 226. Character as affecting damages for personal injuries is discussed in § 94.

In *Texas, etc. R. Co. v. Casey*, 52 Tex. 112, the wife of an employee of the carrier was on the train without a pass, and was put off in a "rude,

¹*Bierbauer v. New York, etc. R. Co.*, 15 Hun, 559; *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Bass v. Chicago, etc. R. Co.*, 42 W. Rep. 654, 672, 24 Am. Rep. 427; *Hammond v. Mukwa*, 40 Wis. 35; *Plath v. Braunsdorff*, 40 Wis. 107; *Davis v. Central R. Co.*, 60 Ga. 329; *Cummins v. Crawford*, 38 Ill. 312, 30 Am. Rep. 558; *Illinois*

Central R. Co. v. Parks, 88 Ill. 373; *Solen v. Virginia City, etc. R. Co.*, 13 Nev. 106; *Phettiplace v. Northern Pacific R. Co.*, 84 Wis. 412, 20 L. R. A. 483, 54 N. W. Rep. 1092; *Trice v. Chesapeake & O. R. Co.*, 40 W. Va. 271, 21 S. E. Rep. 1022, quoting the text. See § 495 *et seq.*

sation as to induce the belief that the jury have not given the case a fair and dispassionate consideration the verdict will be set aside.¹ In such actions it is within the discretion

wanton and malicious manner" in the presence of a large number of passengers. In consequence of being obliged to walk with a child in her arms, it was alleged that she suffered a miscarriage, and injured her health. Punitive damages were not allowed; but only "such actual damages" as the jury were satisfied from the evidence were suffered "pecuniarily, and in feelings, injuries and sufferings resulting" from the unlawful act of putting her off at other than a station or other usual stopping place. A verdict for \$2,500 was sustained.

A verdict for \$600 was sustained, punitive damages being allowed, where a passenger was forced by threats to jump from a rapidly running train in the dark, and was injured so that he suffered pain for three weeks and was unable to work during that time. *Fell v. Northern*

Pacific R. Co., 44 Fed. Rep. 248. See extended note to § 1256.

Damages for carrying passenger beyond station. In *Trigg v. St. Louis, etc. R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, a judgment for \$1,000 was held excessive for carrying a female passenger and two small children to the next station beyond their destination. The case was devoid of any aggravating circumstances whatever.

In *Higgins v. Louisville, etc. R. Co.*, 64 Miss. 80, 8 So. Rep. 176, a judgment for \$500 was sustained where a passenger was carried three-fourths of a mile beyond his station, and the conductor refused to run the train back. The actual damage was small.

Damages for physical injury to child. In *Hurt v. St. Louis, etc. R. Co.*, 94 Mo. 255, 7 S. W. Rep. 1, 4 Am. St. 374, a five-year old boy was injured, through mere negligence, so

¹ *Central R. v. Smith*, 76 Ga. 209, 2 Am. St. 31; *Lehman v. Louisiana W. R. Co.*, 37 La. Ann. 705 (verdict for \$12,000 for the loss of a child's left arm just above the elbow set aside and judgment given for \$5,000); *Nashville, etc. R. Co. v. Smith*, 6 Heisk. 174; *Bass v. Chicago, etc. R. Co.*, 39 Wis. 636; *Goodno v. Oshkosh*, 28 Wis. 300; *Diblin v. Murphy*, 3 Sandf. 19; *Nettles v. Harrison*, 2 McCord, 230; *Spicer v. Chicago, etc. R. Co.*, 29 Wis. 580; *Wiggin v. Coffin*, 3 Story, 1; *Price v. Severn*, 7 Bing. 316; *Armytage v. Haley*, 4 Q. B. 917; *Tinney v. New Jersey Steamboat Co.*, 5 Lans. 507; *Gains v. Western R. Co.*, 59 Ga. 426; *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Chicago, etc. R. Co. v. Hughes*, 87 Ill. 94; *Chicago, etc. R. Co. v. Payzant*, 87

Ill. 125; *Union Pacific R. Co. v. Hause*, 1 Wyo. 27; *Gulf, etc. R. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. Rep. 501; *Willson v. Northern Pacific R. Co.*, 5 Wash. 621, 32 Pac. Rep. 468; *Zion v. Southern Pacific Co.*, 67 Fed. Rep. 500; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; *Warner v. Southern Pacific Co.*, 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. 327; *Central R. & B. Co. v. Strickland*, 90 Ga. 562, 16 S. E. Rep. 352; *Comer v. Foley*, 98 Ga. 678, 25 S. E. Rep. 671; *Southern R. Co. v. Bryant*, 105 Ga. 316, 31 S. E. Rep. 182; *Cleveland, etc. R. Co. v. Quillan*, 22 Ind. App. 496, 53 N. E. Rep. 1024; *Southern R. Co. v. Humphries*, 108 Ga. 591, 34 S. E. Rep. 283. See § 459 *et seq.*

of the court, on a motion for new trial, to indicate a sum for which the verdict may be retained on remitting an excess, or adding to the deficient verdict, to make the amount suggested by the court.¹

§ 954. Loss or injury to baggage. The responsibility of common carriers of passengers for the safe transportation of their baggage is, in general, the same as that of carriers in respect to merchandise which they receive for carriage.² The

that one leg had to be amputated just below the knee, and the toes removed from his remaining foot. The testimony was to the effect that his services to his father would be worth \$100 per year from his tenth or twelfth year until he became twenty-one. A verdict of \$4,500 was set aside.

In *Lang v. New York, etc. R. Co.*, 51 Hun, 603, 4 N. Y. Supp. 565, \$1,500 was said not to be extravagant for the loss of part of a leg of a boy eleven years old.

In *Schultz v. Third Avenue R. Co.*, 46 N. Y. Super. Ct. 211, the plaintiff, a boy aged twelve years, was pushed from the platform of a car and partially run over by a car on another track. His injuries consisted of a broken collar bone, two broken ribs, right arm broken in four or five pieces near the shoulder, the small bone of the left arm broken near the wrist, a thigh joint broken between the upper and middle third, and contusions and abrasions permanently injuring and deforming him. A verdict of \$15,000 was sustained. See note to § 1256.

Damages for gross insult to a passenger. In *Goddard v. Grand Trunk R.*, 57 Me. 202, the plaintiff, a respectable citizen and a passenger in the defendant's train, surrendered his ticket to the brakeman, who soon after denied that he had received it, and in loud, coarse, profane and grossly insulting language called the plaintiff a liar, charged him with at-

tempting to avoid the payment of his fare, and with having done so before, and also threatened him with personal violence. The plaintiff was in ill-health, and did nothing to invite such conduct. The case was one for exemplary damages, and a verdict for \$4,850 was not disturbed.

¹ *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Durrell v. Carver*, 9 Ohio St. 72; *Hegeman v. Western R. Co.*, 16 Barb. 353, 13 N. Y. 9; *Peck v. New York, etc. R. Co.*, 8 Hun, 286; *Whitehead v. Kennedy*, 69 N. Y. 462-470; *Goodno v. Oshkosh*, 28 Wis. 300; *Spicer v. Chicago, etc. R. Co.*, 29 Wis. 580; *Patten v. Chicago, etc. R. Co.*, 32 Wis. 524; *Potter v. Chicago, etc. R. Co.*, 22 Wis. 615; *Lombard v. Chicago, etc. R. Co.*, 47 Iowa, 494; *Murray v. Hudson River R. Co.*, 47 Barb. 196; *Bierbauer v. New York, etc. R. Co.*, 15 Hun, 559; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 32 L. R. A. 193, 44 Pac. Rep. 320; *Kleven v. Great Northern R. Co.*, 70 Minn. 79, 72 N. W. Rep. 828; *Cunningham v. Seattle Electric R. & P. Co.*, 3 Wash. 471, 28 Pac. Rep. 745; *Gillen v. Minneapolis, etc. R. Co.*, 91 Wis. 633, 65 N. W. Rep. 373; *Dancey v. Grand Trunk R. Co.*, 19 Ont. App. 664; *Werner v. Evans*, 94 Ill. App. 328. See § 459 *et seq.*

² *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587; *Merrill v. Grinnell*, 30 N. Y. 594; *Powell v. Myers*, 26 Wend. 591; *Chamberlain v. Western Trans-*

money paid for passage is a consideration for the carrier's undertaking or duty in respect to baggage.¹

What is baggage has often been a subject of conflicting discussion and decision. The implied undertaking of safety is not unlimited, but extends only to such kinds and quantity of articles and valuables as are ordinarily taken by travelers for their personal use and convenience, varying according to the station of the party, the object and length of his journey and many other circumstances.² It is safe to say generally

portation Co., 45 Barb. 218; Hannibal, etc. R. Co. v. Swift, 12 Wall. 262; Perkins v. Wright, 37 Ind. 27; Baylis v. Lintott, L. R. 8 C. P. 345; Chicago, etc. R. Co. v. Fahey, 52 Ill. 81, 4 Am. Rep. 587; Ringwalt v. Wabash R. Co., 45 Neb. 760, 64 N. W. Rep. 219.

¹ Id.; Orange County Bank v. Brown, 9 Wend. 85, 24 Am. Dec. 129; Woods v. Devin, 13 Ill. 746; Hutchins v. Western, etc. R. Co., 25 Ga. 51.

² Hannibal, etc. R. v. Swift, 12 Wall. 262; New York, etc. R. Co. v. Fraloff, 100 U. S. 24; Hutchinson on Carriers (2d ed.), §§ 677-685; Kansas City, etc. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. Rep. 659, 53 Am. St. 111, 36 L. R. A. 781.

The responsibility of an innkeeper is not necessarily limited to such baggage as is carried for convenience of travel, but extends as well to merchandise carried by a guest when received by the innkeeper. Eden v. Drey, 75 Ill. App. 102, citing Calye's Case, 8 Coke, 32; Berkshire Woolen Co. v. Proctor, 7 Cush. 428; Wilkins v. Earle, 44 N. Y. 179, 4 Am. Rep. 655.

A steamer carrying passengers and furnishing them with rooms and entertainment is, for all practical purposes, a floating inn, and hence the duties owed to passengers are the same as those due from an innkeeper to his guest. A passenger who has lost from his stateroom, without negligence on his part, though the carrier was also free from negligence,

a sum of money reasonable and proper for him to carry on his person for the expenses of his journey may recover the same. Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. Rep. 369, 56 Am. St. 616, 34 L. R. A. 652, approving Crozier v. Boston, etc. Steamboat Co., 43 How. Pr. 466, and Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. 229, which was affirmed in the court of appeals without opinion. See Lincoln v. New York & Cuba Mail Steamship Co., 30 N. Y. Misc. 752, 62 N. Y. Supp. 1085.

Cockburn, C. J., said in *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, 621, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the wants or habits of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament,—leaving the carrier herein to the protection of the carrier's act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character,

that baggage, entitled to protection under the rule stated, embraces anything which travelers usually carry for their personal use, comfort, instruction or amusement, considering the circumstances before mentioned, the occupation of the traveler, the mode of conveyance, and any others which affect his needs, including, according to the weight of authority, a sufficient amount of money for expenses.¹ But property of other persons, not members of his family, or intended to be presented to others at the end of the journey, is not baggage;² nor are masonic regalia or engravings;³ nor samples of goods carried by a commercial traveler;⁴ nor valuable papers carried by a

the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying.

¹ *Id.*; *Duffy v. Thompson*, 4 E. D. Smith, 178; *Doyle v. Kiser*, 6 Ind. 242; *Baltimore, etc. Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Woods v. Devin*, 13 Ill. 746; *Van Horn v. Kennit*, 4 E. D. Smith, 454; *Hopkins v. Westcott*, 6 Blatch. 64; *Toledo, etc. R. Co. v. Hammond*, 23 Ind. 379, 85 Am. Dec. 462; *Porter v. Hildebrand*, 14 Pa. 129; *McCormick v. Pennsylvania, etc. R. Co.*, 4 E. D. Smith, 181, 49 N. Y. 303; *Jones v. Voorhies*, 10 Ohio, 145; *Bomar v. Maxwell*, 9 Humph. 621, 51 Am. Dec. 682; *Fraloff v. New York, etc. R. Co.*, 10 Blatch. 16; *American Contract Co. v. Cross*, 8 Bush, 472, 8 Am. Rep. 471; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Jones v. Priestester, W. & W. (Tex.)* 326; *Carpenter v. New York, etc. R. Co.*, 124 N. Y. 53, 26 N. E. Rep. 277, 21 Am. St. 644, 11 L. R. A. 759; *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. Rep. 764, 46 Am. St. 212.

² *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Chicago, etc. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Dexter v. Syracuse, etc. R. Co.*, 42 N. Y. 326, 1 Am. Rep. 527; *First Nat. Bank v. Marietta, etc. R. Co.*, 20

Ohio St. 259, 5 Am. Rep. 655; *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *The Ionic*, 5 Blatch. 538. See *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

But where a servant had a port-manteau containing his livery, which was the property of the master, checked, the latter was entitled to recover for damage done to it by the tortious act of a servant of the carrier. *Meux v. Eastern R. Co.*, [1895] 2 Q. B. 387.

³ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

⁴ *Stimson v. Connecticut R. Co.*, 98 Mass. 83, 93 Am. Dec. 140; *Alling v. Boston, etc. R. Co.*, 126 Mass. 121, 30 Am. Rep. 667; *Hawkins v. Hoffman*, 6 Hill, 586; *Mississippi Central R. Co. v. Kennedy*, 41 Miss. 671; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398, 34 Pac. Rep. 1054; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. Rep. 711; *Missouri Pacific R. Co. v. Liveright*, 7 Kan. App. 772, 53 Pac. Rep. 763; *Kansas City, etc. R. Co. v. State*, 65 Ark. 363, 41 L. R. A. 333, 46 S. W. Rep. 421, 67 Am. St. 933; *McKibbin v. Great Northern R. Co.*, 78 Minn. 232, 80 N. W. Rep. 1052; *Simpson v. New York, etc. R. Co.*, 16 N. Y. Misc. 613, 38 N. Y. Supp. 341; *Greenwich Ins. Co. v. Memphis & C. Packet Co.*, 4 Ohio Dec. 405 (Cincinnati Super.

lawyer on his way to court;¹ nor the manuscript of a work intended for publication;² nor merchandise or other valuables intended for sale;³ nor money intended to be used in purchasing a business.⁴ But it has been held that a reasonable quantity of tools is proper baggage for a mechanic,⁵ and so the record books used by a nurse in her vocation, though they had no general market value,⁶ and manuscript music used by a traveling company in its business;⁷ also, that a watch, chain and diamond pin of the value of \$1,400 were suitable baggage to be carried in a lady's trunk.⁸ "Articles treated as baggage may consist of clothing, money for defraying traveling expenses, a few books for the amusement of reading, a lady's jewelry for dressing, a watch, fishing tackle, a gun and a pair of pistols."⁹ Cloth not made into garments, but procured for that purpose, if the quantity is reasonable, may be baggage, and so are jewelry and personal ornaments, so far as appropriate to the wardrobe, rank and social position of the passenger; but bedding and bed furnishings, not intended for use on the journey, and other articles of household goods are not.¹⁰ Bicycles are not baggage, and a carrier may refuse to receive them as such.¹¹

If a passenger's baggage includes only what he is entitled [293] to have carried as such, he will not be prevented from recovering its full value, in case of loss, by having failed to inform the carrier of its nature and value unless inquiry has

Ct.); *Wunsch v. Northern Pacific R. Co.*, 62 Fed. Rep. 878.

¹ *Phelps v. London, etc. R. Co.*, 19 C. B. (N. S.) 321; *Thomas v. Great Western R. Co.*, 14 Up. Can. Q. B. 389.

² *Hannibal, etc. R. Co. v. Swift*, 12 Wall. 262.

³ *Smith v. C., H. & D. R. Co.*, 3 Ohio Dec. 193 (Cincinnati Super. Ct.).

⁴ *Levins v. New York, etc. R. Co.*, — Mass. —, 66 N. E. Rep. 803; *Illinois Central R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York Central Sleeping Car Co.*, 28 Mo. App. 199.

⁵ *Porter v. Hildebrand*, 14 Pa. 129; *Davis v. Cayuga, etc. R. Co.*, 10 How.

Pr. 330. *Contra*, *Mauritz v. New York, etc. R. Co.*, 23 Fed. Rep. 765, 771.

⁶ *Werner v. Evans*, 94 Ill. App. 328.

⁷ *Texas & P. R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144, 48 S. W. Rep. 1103.

⁸ *Coward v. East Tennessee, etc. R. Co.*, 16 Lea, 225, 57 Am. Rep. 226.

⁹ *Mississippi Central R. Co. v. Kennedy*, 41 Miss. 671, 679.

¹⁰ *Mauritz v. New York, etc. R. Co.*, 23 Fed. Rep. 765; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

¹¹ *State v. Missouri Pacific R. Co.*, 71 Mo. App. 385; *Britten v. Great Northern R. Co.*, [1899] 1 Q. B. 243.

been made of him, or he has notice of reasonable regulations requiring such disclosure and payment of extra charges, where the value is above the standard of ordinary baggage; or unless the passenger is guilty of some fraud to conceal the true value.¹ Where such inquiries are made, or regulations brought to the passenger's notice,² and he makes true disclosure and pays any extra charges demanded, either for baggage or merchandise, the carrier is bound for the safe conveyance of the property.³ Notwithstanding the rule in Massachusetts⁴ is to the contrary the Arkansas court has held that where a passenger who is ignorant of the rules or instructions of carriers forbidding their agents to receive money as transportation for baggage delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it as baggage the common-law liability of the carrier attaches.⁵ Where the passenger delivers to the carrier as baggage what is not such, there is no implied undertaking in respect to it; the undertaking of the carrier is to carry the passenger and his baggage — no more; and if articles not properly baggage are packed with others that are, in case of loss there can be no recovery, in the absence of negligence or misconduct, except for the latter, unless the carrier is informed of the true value and accepts them for carriage as baggage without objection.⁶ If a passenger knows of the regulation of a carrier

¹ *New York, etc. R. Co. v. Fraloff*, 100 U. S. 24; *Camden, etc. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Kuter v. Michigan Central R. Co.*, 1 Biss. 35; *Wasserberg v. Cunard Steamship Co.*, 8 N. Y. Misc. 78, 28 N. Y. Supp. 520.

² See *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. Rep. 915; § 926.

³ *Strouss v. Wabash, etc. R. Co.*, 17 Fed. Rep. 209; *Sloman v. Western R. Co.*, 67 N. Y. 208; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

⁴ *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, and cases cited.

⁵ *Railway Co. v. Berry*, 60 Ark. 433, 437, 30 S. W. Rep. 764, 46 Am. St. 212, citing *Camden, etc. R. Co. v. Baldauf*,

16 Pa. 67, 55 Am. Dec. 481; *Jacobs v. Tutt*, 33 Fed. Rep. 412; *New York, etc. R. Co. v. Fraloff*, 100 U. S. 24; *Humphrey v. Perry*, 148 U. S. 627, 13 Sup. Ct. Rep. 711; *Great Northern R. Co. v. Shepherd*, 8 Ex. 30; *Minter v. Pacific R. Co.*, 41 Mo. 503, 97 Am. Dec. 288.

⁶ *Ross v. Missouri, etc. R. Co.*, 4 Mo. App. 582; *Doyle v. Kiser*, 6 Ind. 242; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Michigan, etc. R. Co. v. Oehm*, 56 Ill. 293; *Hillman v. Halliday*, 1 Woolw. 365; *Cahill v. London, etc. R. Co.*, 10 C. B. (N. S.) 154, 13 id. 818; *Hollister v. Nowlen*, 19 Wend. 234; *Pardee v. Drew*, 25 id. 459; *Millard v. Missouri, etc. R. Co.*, 20 Hun, 191; *Lee v. Grand Trunk R.*

forbidding baggage men to receive jeweler's sample cases for transportation as baggage, unless a bond be given to protect the carrier from liability for their loss, no such liability exists though the carrier's agent induced its baggage man to receive the cases without the bond.¹

§ 955. **Same subject; measure of damages.** If the property lost has a value that is the measure of recovery,² including interest.³ Where the loss was valuable laces which had been [294] made by the plaintiff's ancestors, and had come to her by gift or inheritance, it was held necessary, nevertheless, to prove their value by a money standard, otherwise there could be no recovery beyond nominal damages.⁴ In a case in New York,⁵ in regard to the mode of fixing the value of lost clothing constituting part of a traveler's baggage, and which had gone into the defendants' possession by their own mistake to be carried to New York, instead of by boat as the checks on the same indicated, it was said: "The court did not err in charging the

Co., 36 Up. Can. Q. B. 350; Belfast, etc. R. Co. v. Keys, 9 H. of L. Cas. 556; Great Northern R. Co. v. Shepherd, 8 Ex. 30; Stoneman v. Erie R. Co., 52 N. Y. 429; Minter v. Pacific R. Co., 41 Mo. 503, 97 Am. Dec. 288; Strouss v. Wabash, etc. R. Co., 17 Fed. Rep. 209; Toledo & Ohio Central R. Co. v. Bowler, 63 Ohio St. 274, 58 N. E. Rep. 813; Gurney v. Grand Trunk R. Co., 37 N. Y. St. Rep. 155, 14 N. Y. Supp. 321, affirmed without opinion, 138 N. Y. 638; Chicago, etc. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. Rep. 762; Sherlock v. Chicago, etc. R. Co., 85 Mo. App. 46; Kansas City, etc. R. Co. v. McGahey, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. 111, 36 L. R. A. 781; Lake Shore, etc. R. Co. v. Hochstim, 67 Ill. App. 514; Trimble v. New York, etc. R. Co., 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115; Macrow v. Great Western R. Co., L. R. 6 Q. B. 612.

¹ Weber Co. v. Chicago, etc. R. Co., 113 Iowa, 188, 84 N. W. Rep. 1042.

² Illinois Central R. Co. v. Copeland, 24 Ill. 392; New Orleans, etc. R. Co. v. Moore, 40 Miss. 39; Strouss

v. Wabash, etc. R. Co., 17 Fed. Rep. 209.

Testimony as to the cost of wearing apparel which the carrier has lost is inadmissible because it does not tend to enlighten the jury as to the damage suffered by its loss, and it may mislead them into the belief that expenditures made in replacing it, apart from its value, are to be considered in assessing the damages. Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 Pac. Rep. 915. But compare Simpson v. New York, etc. R. Co., 16 N. Y. Misc. 613, 38 N. Y. Supp. 341.

³ Mote v. Chicago, etc. R. Co., 27 Iowa, 22, 1 Am. Rep. 212; Lake Shore, etc. R. Co. v. Hochstim, 67 Ill. App. 514 (in the discretion of the court). *Contra*, Texas & P. R. Co. v. Ferguson, W. & W. (Tex.) 724.

⁴ Fraloff v. New York Central, etc. R. Co., 10 Blatch. 16. See Illinois Central R. Co. v. Copeland, 24 Ill. 332.

⁵ Fairfax v. New York, etc. R. Co., 73 N. Y. 167, 29 Am. Rep. 119. See § 919.

jury that the plaintiff was entitled to recover the full value of the clothing for use to him in New York, and not merely what it could be sold for in money. The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little if put into market to be sold for second-hand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted because such clothing cannot be said to have a market price, and it would not sell for what it really was worth.”¹ The value of baggage is to be determined by its worth at the place of its destination.² The owner of lost baggage cannot recover for expense incurred in searching for it.³ The measure of damages for delay in the delivery of baggage is the value of the use of it to the owner, and the testimony of the owner is competent to aid the jury in fixing such value.⁴

§ 956. **Liability of sleeping-car companies.** It is settled that such companies are not insurers of passengers' baggage; their utmost liability is that of bailees for hire, and there is no liability without negligence. Their duty, so far as most of the adjudged cases seem to have gone, is to maintain in the car a reasonable watch during the night while the passenger is asleep.⁵ This duty has been extended in a comparatively late

¹ *Mauritz v. New York, etc. R. Co.*, 23 Fed. Rep. 765; *Simpson v. New York, etc. R. Co.*, 16 N. Y. Misc. 613, 38 N. Y. Supp. 341; *Parmalee v. Raymond*, 43 Ill. App. 609; *State v. Sullivan*, — Mo. App. —, 74 S. W. Rep. 417, citing the text.

² *Lake Shore, etc. R. Co. v. Warren*, 3 Wyo. 135, 6 Pac. Rep. 724.

³ *Mississippi Central R. Co. v. Kennedy*, 41 Miss. 671; *Texas & P. R. Co. v. Ferguson, W. & W. (Tex.)* 724. See § 921.

⁴ *Gulf, etc. R. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. Rep. 303, citing this section.

⁵ *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 So. Rep. 712;

Blum v. Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 9 N. E. Rep. 615, 58 Am. Rep. 135; *Pullman Palace Car Co. v. Hall*, 106 Ga. 785, 32 S. E. Rep. 923, 71 Am. St. 293, 44 L. R. A. 790; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. Rep. 814; *Sessions v. New York, etc. R. Co.*, 78 Hun, 541, 29 N. Y. Supp. 628; *Carpenter v. New York, etc. R. Co.*, 124 N. Y. 53, 26 N. E. Rep. 277, 21 Am. St. 644, 11 L. R. A. 759; *Williams v. Webb*, 27 N. Y. Misc. 508, 58 N. Y. Supp. 300; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 23 S. W. Rep. 70, 42 Am. St. 902, 21 L. R. A. 298; *Adams v. New*

case. "We now go further, and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him nor watch himself while he is absent from his berth in the washing-room preparing his toilet after arising in the morning. This duty of watchfulness extends so far as to make the sleeping-car company liable for a negligent failure to perform it to the extent of any baggage or personal belongings which the passenger may thereby lose, which are reasonably necessary to be taken by him on his journey, regard being had to his station in life and to the length, purposes and probable duration of his journey; nor does the implied undertaking include a large sum of money; it cannot cover more than a reasonable amount necessary to pay traveling expenses.¹ What is a reasonable amount of baggage or of money for traveling expenses for a traveler thus to take with him is a question of fact for a jury. . . . Beyond the amount of baggage or money which it is thus reasonably necessary for the traveler to take with him the sleeping-car company assumes no duty of watchfulness and is under no liability in case of loss or theft. It is not even a gratuitous bailee in respect of such excess of money or baggage, nor is its position even that of a warehouseman who furnishes houseroom merely without assuming any duty of watchfulness."² The conclusions arrived at in determining the case

Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. Rep. 369, 56 Am. St. 616, 34 L. R. A. 682.

In Nebraska a sleeping-car company, so far as it renders service similar in kind to an innkeeper, is subject to the same liabilities, and if an article of wearing apparel placed by a passenger in the care of the porter is stolen from the car the company will be liable. Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 44 N. W. Rep. 226, 6 L. R. A. 809. See Voss v. Wagner Palace Car Co., 16 Ind. App. 271, 43 N. E. Rep. 20.

¹ Lewis v. New York Sleeping Car

Co., 143 Mass. 267, 9 N. E. Rep. 615, 58 Am. St. 135; Cooney v. Pullman Palace Car Co., 121 Ala. 363, 25 So. Rep. 712; Blum v. Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Pullman Car Co. v. Gardner, 3 Penny. 78; Barrott v. Pullman Palace Car Co., 51 Fed. Rep. 796; Williams v. Webb, 27 N. Y. Misc. 508, 58 N. Y. Supp. 300; Illinois Central R. Co. v. Handy, 63 Miss. 609.

² Root v. New York, etc. Co., 28 Mo. App. 199, approved in Levins v.

in hand were that the company is not responsible for a sum in excess of what it was reasonable for the passenger to have, though it was stolen by its servants. It is responsible to the extent of such sum where it is stolen by such servants, though the passenger's negligence afforded the opportunity for the theft.¹ But it is not responsible if the loss was the result of the servants' negligence in guarding the property if the passenger's neglect contributed directly thereto.² If the passenger does not adduce evidence to show what was a reasonable sum for him to take on his person the recovery cannot exceed nominal damages.³ The measure of liability for property lost or stolen is the market value if it has such, otherwise the actual loss in money which the owner would sustain by being deprived of the property. In the absence of proof of market value the testimony of the owner as to the value of the property is sufficient to sustain a recovery.⁴

By refusing to furnish a berth to one who has paid for it and compelling him to sit up all night in a day coach, a sleeping-car company renders itself liable for damages,⁵ including whatever inconvenience and mortification is suffered. The cause of action rests upon both the contract and the tort; the extent of the injury proximately resulting is the matter to be determined. The damages must be commensurate with the in-

New York, etc. R. Co., — Mass. —, 66 N. E. Rep. 803.

¹ Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 57, 22 S. W. Rep. 70, 42 Am. St. 902, 21 L. R. A. 298.

² Root v. New York, etc. Co., *supra*; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 12 S. W. Rep. 744, 15 Am. St. 873.

³ Wilson v. Baltimore & O. R. Co., 32 Mo. App. 682; Illinois Central R. Co. v. Handy, 63 Miss. 609.

The sum of \$1,250, the custody of which is retained by a passenger going from Detroit to New York, and which he intended to deposit in a bank on reaching Boston, is not necessary or convenient for the reasonable expenses of his trip, and the sleeping-car company is not liable

for its loss. Williams v. Webb, 22 N. Y. Misc. 513, 49 N. Y. Supp. 1111, 27 N. Y. Misc. 508, 58 N. Y. Supp. 300.

⁴ Cooney v. Pullman Palace Car Co., 121 Ala. 368, 25 So. Rep. 712.

⁵ Braum v. Webb, 32 N. Y. Misc. 243, 65 N. Y. Supp. 668 (sustaining a verdict for \$750); Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223, 54 S. W. Rep. 624 (sustaining a verdict for \$900 in favor of a sick woman who was put in a smoking compartment, where she was annoyed by profane talk, her condition being aggravated); Pullman Palace Car Co. v. Booth, 28 S. W. Rep. 719 (Tex. Ct. of Civ. App.); Pullman Palace Car Co. v. King, 99 Fed. Rep. 380, 39 C. C. A. 573.

jury, whether in the contemplation of the parties when the contract was made or not.¹ It cannot be declared, as matter of law, that the failure to provide a properly warmed and comfortable car does not involve responsibility for a violent cold and a resulting permanent injury to the eyes of a passenger.² The denial of the alleged right of a passenger who has paid for one berth in a sleeping car to use the same as a bed during the day time involves only liability for such damages as directly, naturally and proximately result. Though physical suffering resulted because of the condition of the passenger, he cannot recover for mental suffering in the absence of proof of uncivil treatment.³

¹ Pullman Palace Car Co. v. Booth, *supra*.

² Hughes v. Pullman's Palace Car Co., 74 Fed. Rep. 499.

³ Pullman Palace Car Co. v. Fowler, 6 Tex. Civ. App. 755, 27 S. W. Rep. 268.

CHAPTER XXII.

TELEGRAPH COMPANIES.

- § 957. Nature of their duty.
- 958. Limitation of liability.
- 959. Liability for neglect where message in cipher.
- 960. Same subject; opposing view.
- 961. Liability when object of sender known.
- 962-964. Same subject; illustrations.
- 965. Same subject; loss of claim; physical pain; injury to credit.
- 966. Same subject; liability for expenses.
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- 968. When company charged with knowledge of sender's purpose.
- 969. Same subject; details need not be disclosed.
- 970. Same subject; result of the decisions.
- 971. Same subject; opposing view.
- 972. Form of action; who may sue.
- 973. Mitigation of damages by injured party.
- 974. Exemplary damages.
- 975. Damages for mental suffering.
- 976. Same subject; reasons upon which liability rested.
- 977. Same subject; opposing authorities.
- 978. Same subject; grounds upon which liability denied.
- 979. Same subject; summary of the authorities.
- 980. Same subject; conclusions of author.
- 981. Same subject; notice to the company.
- 982. Same subject; measure of damages.

§ 957. **Nature of their duty.** Telegraph companies, [295] by reason of their public employment, their contracts, and, to some extent, by force of statutes, are bound to receive, transmit and deliver messages with impartiality, care and diligence. They do not undertake this with the same absoluteness as common carriers. Though they have sometimes been regarded as such the decided weight of authority is that, independent of a statute or a provision in a constitution,¹ their liabilities are not to be measured by that standard, and no late case holds the

¹ See Kirby v. Western U. Tel. Co., 7 S. D. 623, 65 N. W. Rep. 37, 80 L. R. A. 1068; Stamey v. Western U. Tel. Co., 612; Western U. Tel. Co. v. Eubanks, 92 Ga. 613, 18 S. E. Rep. 1008, 44 Am. 100 Ky. 591, 38 S. W. Rep. 1068, 66 St. 95. Am. St. 361, 36 L. R. A. 711; Same v.

contrary.¹ They are bound to employ competent and faithful agents who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance.² The omission to send a message or to deliver one which has been transmitted, or the occurrence of an error in its tenor is *prima facie* evidence of neglect on the part of the company, and the burden of proof is upon them to show that such failure or mistake happened without their fault, as the means of doing so are peculiarly within their power.³ But this rule does not

¹ *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Ayres v. Western U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Kiley v. Same*, 109 N. Y. 236, 16 N. E. Rep. 75; *Leonard v. New York, etc. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Bartlett v. Western U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Camp v. Same*, 1 Met. (Ky.) 164; *De Rutte v. New York, etc. Tel. Co.*, 30 How. Pr. 403, 1 Daly, 547; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Passmore v. Western U. Tel. Co.*, 78 Pa. 238; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; *Wann v. Western U. Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395; *Washington Tel. Co. v. Hobson*, 15 Gratt. 122; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Aiken v. Telegraph Co.*, 5 S. C. 358, *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Marr v. Western U. Tel. Co.*, 85 Tenn. 529, 3 S. W. Rep. 496; *Western U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Same v. Edsall*, 63 Tex. 668; *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. 662, 26 N. E. Rep. 534; *Western U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. Rep. 871; *Smith v. Western U. Tel. Co.*, 57 Mo. App. 259; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. Rep. 252; *Primrose v. Western U. Tel. Co.*, 154 U. S. 1, 14, 14 Sup. Ct. Rep. 1098; *Western U. Tel. Co. v. Lawson*, — Kan. —, 72 Pac. Rep. 233.

² A higher degree of diligence is required of them than an ordinary, prudent and diligent man would exercise in the discharge of his own business under like circumstances. Considerations of public policy demand that they shall be held responsible for a very high degree of diligence. *Jones v. Telegraph Co.*, 101 Tenn. 442, 47 S. W. Rep. 699; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. Rep. 118.

³ *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Bartlett v. Western U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168; *Little Rock, etc. Tel. Co. v. Davis*, 41 Ark. 79; *Western U. Tel. Co. v. Short*, 53 id. 434, 14 S. W. Rep. 649, 9 L. R. A. 744; *Same v. Crall*, 38 Kan. 679, 17 Pac. Rep. 309; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Western U. Tel. Co. v. Edsall*, 61 Tex. 668; *Pearsall v. Western U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. 662, 26 N. E. Rep. 534; *Reed v. Western U. Tel. Co.*, 135 Mo. 661, 37 S. W. Rep. 904, 58 Am. St. 609, 34 L. R. A. 492; *Western U. Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. Rep. 627; *Smith v. Western U. Tel. Co.*, 57 Mo. App. 259; *Western U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. Rep. 656; *Same v. Chamblee*,

apply where stipulations limiting the liability of the company for error in an unrepeatd message are sustained, except where it is the result of wilful misconduct or gross neglect. The sender of such a message cannot recover damages in excess of the stipulated sum unless he shows that the neglect was gross or wilful,¹ or that the repetition of it would not have prevented the delay complained of,² as where the message is sent to the wrong place.³ Such companies are bound to accept and send messages presented, and may charge therefor. They do not escape liability for the consequences of negligence by accepting messages and assuming to transmit them without charge. In other words, a want of consideration is not a defense to an action for negligence.⁴ The sender of a message which is to be transmitted beyond the lines of the telegraph company which receives it may designate the telephone company by whose line he desires the message to be forwarded; if delay results from attempting to forward the message over the line of a different telephone company than was directed, the telegraph company must answer for the consequences.⁵

§ 958. **Limitation of liability.** According to the pre- [296] ponderance of authority such companies may make reasonable regulations for the safe and proper conduct of their business, and contract with the sender of a message so as to relieve themselves from liability for inadvertencies, but not for gross negligence, misconduct or bad faith.⁶ Regulations and contracts

122 Ala. 428, 25 So. Rep. 232, citing the text; *Curtin v. Western U. Tel. Co.*, 16 N. Y. Misc. 347, 38 N. Y. Supp. 58.

Substantially the same measure of diligence is required of telephone companies. *Telephone Co. v. Brown*, 104 Tenn. 56, 55 S. W. Rep. 155, 78 Am. St. 906.

¹ *Hart v. Western U. Tel. Co.*, 66 Cal. 579, 6 Pac. Rep. 637; *Aiken v. Same*, 69 Iowa, 31, 28 N. W. Rep. 419, 58 Am. Rep. 210; *Womack v. Same*, 58 Tex. 176, 44 Am. Rep. 614; *Redington v. Pacific Postal Tel. Co.*, 107 Cal. 317, 40 Pac. Rep. 432, 48 Am. St. 132; *Garrett v. Western U. Tel. Co.*, 88 Iowa, 257, 49 N. W. Rep. 88.

² *North Packing & P. Co. v. Western U. Tel. Co.*, 70 Ill. App. 275.

³ *Western U. Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460, 22 S. W. Rep. 656.

⁴ *Western U. Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. Rep. 308, 86 Am. St. 851.

⁵ *Western U. Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. Rep. 432.

⁶ *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *United States Tel. Co. v. Gildersleeve*, 29 Md. 248; *Western U. Tel. Co. v. Graham*, 1 Colo. 230; *Same v. Fontaine*, 58 Ga. 433; *True v. International Tel. Co.*, 60 Me. 9; *Western U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Same v. Meek*, 49 Ind. 53; *Same v. Fenton*, 52

exempting them from the payment of damages for errors in the transmission of messages, unless repeated at an extra compensation to be paid by the sender, have been sustained as reasonable. Bigelow, C. J., said: "In view of the risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delay in the performance of such service, . . . and also of the very extensive liability to damages which may be incurred by a failure to deliver a message accurately, we think it just and reasonable that the conductor of a telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received, at the request and expense of the parties interested, if they intend to hold him responsible in damages for any mistake which may have taken place in the transmission of the messages. There is nothing in this regulation which tends to embarrass or hinder the free use of the telegraph, or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty."¹ Where the sender of the message sent it

Ind. 1; *Candee v. Western U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Sweatland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Manville v. Western U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 536, 45 Barb. 274; *Grinnell v. Western U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Passmore v. Same*, 78 Pa. 238; *Western U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. Rep. 844; *American U. Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. Rep. 660; *Western U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. Rep. 309, 5 Am. St. 795; *Mowry v. Western U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666; *Lassiter v. Same*, 89 N. C. 334; *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Marr v. Western U. Tel. Co.*, 85 Tenn. 529, 3 S. W. Rep. 496; *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. Rep. 783, 4 L. R. A. 660; *Telegraph Co. v. Munford*, 87 Tenn. 190, 10 S. W. Rep. 318, 10 Am. St. 630; *Western U.*

Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; *Thompson v. Western U. Tel. Co.*, 64 Wis. 531, 25 N. W. Rep. 789, 54 Am. Rep. 644; *Western U. Tel. Co. v. Briscoe*, 18 Ind. App. 22, 47 N. E. Rep. 473; *Riley v. Western U. Tel. Co.*, 8 N. Y. Misc. 217, 28 N. Y. Supp. 581; *Ayres v. Same*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Dixon v. Same*, 3 App. Div. 60, 38 N. Y. Supp. 1056. See *Brooks v. Same*, — Utah, —, 72 Pac. Rep. 499.

¹ *Ellis v. American Tel. Co.*, 13 Allen, 226; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *United States Tel. Co. v. Gildersleeve*, 29 Md. 341; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; *Western U. Tel. Co. v. Graham*, 1 Colo. 230; *Wolf v. Western U. Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *Sweatland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Hart v. Western U. Tel. Co.*, 66 Cal. 579, 6 Pac. Rep. 637; *Becker v. Same*, 11 Neb. 87, 7 N. W. Rep. 868, 38 Am. Rep. 356 (the rule in Nebraska has

in response to a message from the plaintiff he acted as the agent of the latter, who, on receiving the message, was bound by the contract of the former with the telegraph company.¹

The doctrine that such companies may so limit their liability is strongly opposed by several courts of good standing, some of which have recently overruled cases holding in accordance with the view stated.² If the message transmitted is written

been changed by statute, *Western U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. Rep. 903; *Western U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. Western U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Western U. Tel. Co. v. Hearne*, 77 Tex. 83, 13 S. W. Rep. 970; *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. Rep. 432, 48 Am. St. 132; *Coit v. Western U. Tel. Co.*, 130 Cal. 657, 63 Pac. Rep. 83; *Birkett v. Same*, 103 Mich. 361, 61 N. W. Rep. 645, 50 Am. St. 374, 33 L. R. A. 404; *Western U. Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. Rep. 219; *Ayres v. Western U. Tel. Co.*, 65 App. Div. 149, 72 N. Y. Supp. 634; *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. Rep. 581. See as to waiver of condition requiring the message to be repeated, *Western U. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37, 27 S. W. Rep. 318.

¹ *Coit v. Western U. Tel. Co.*, 130 Cal. 657, 63 Pac. Rep. 83, citing *Ellis v. American Tel. Co.*, 95 Mass. 236; *Curtin v. Western U. Tel. Co.*, 16 N. Y. Misc. 348, 38 N. Y. Supp. 58; *De Rutte v. New York, etc. Tel. Co.*, 1 Daly, 556, 30 How. Pr. 403. *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. 303, 78 Am. Dec. 338, and *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, are referred to as favoring the opposite view.

² *Western U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. Rep. 649, 9 L. R. A. 744; *Same v. Fontaine*, 58 Ga. 433; *Same v. Blanchard*, 68 id. 299; *Same v. Shotter*, 71 id. 760; *Same v. Harris*, 19 Ill. App. 347; *Ayer v. Western U.*

Tel. Co., 79 Me. 493, 10 Atl. Rep. 495, 1 Am. St. 353; *Western U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. Rep. 232; *Same v. Eubanks*, 100 Ky. 591, 66 Am. St. 361, 36 L. R. A. 711, 38 S. W. Rep. 1068; *Reed v. Western U. Tel. Co.*, 135 Mo. 661, 671, 37 S. W. Rep. 904, 58 Am. St. 609, 34 L. R. A. 492, overruling *Wann v. Same*, 37 Mo. 472, 90 Am. Dec. 395; *Western U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. Rep. 903, 71 Am. St. 683 (holding that the rule formerly declared has been changed by statute); *Brown v. Postal Tel. Co.*, 111 N. C. 187, 16 S. E. Rep. 179, 32 Am. St. 793, 17 L. R. A. 648, overruling *Lassiter v. Western U. Tel. Co.*, 89 N. C. 334; *Western U. Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. 58, 26 S. W. Rep. 490; *Tyler v. Western U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168; *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Western U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. Rep. 309, 5 Am. St. 795; *Same v. Howell*, 38 Kan. 685, 17 Pac. Rep. 313; *Dorgan v. Telegraph Co.*, 1 Am. Law Times (N. S.), 406; *Western U. Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. Rep. 111.

The circuit court of appeals, ninth circuit, holds the view that under the California statute requiring telegraph companies to exercise great care and diligence in the transmission and delivery of messages, such a condition is void as against public policy in so far as it would relieve the company from liability for want of the degree of care and diligence required by the statute, and that, in

on paper which does not contain the regulations or stipulations which limit the company's liability, the sender is not bound by them unless it is shown that he had knowledge of them.¹ Such stipulations have no force when a telegraph company contracts to transmit a message with knowledge that, because of the condition of its wires, it could not do so, and conceals the fact from its customer, especially so if there were other means by which it could have sent the message to its destination, as by another telegraph company by which the receiving company was accustomed to send telegrams when it could not send them over its own lines.² The question of the reasonableness of regulations respecting delivery limits and the delivery of messages received after designated hours is also one upon which the courts are not in harmony.³

The practice very generally prevails of requiring messages to be written on blanks furnished by the company, on which [297] are printed terms and conditions of such nature that the message-sender not only assents to an exemption from dam-

case of a mistake in a message, the burden is on the company to show that there was no want of proper care and diligence. *Western U. Tel. Co. v. Cook*, 61 Fed. Rep. 624, 9 C. C. A. 680 (1894). The California court favors the opposing view. *Hart v. Western U. Tel. Co.*, 66 Cal. 579, 6 Pac. Rep. 637 (1885); *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. Rep. 432, 48 Am. St. 132 (1895); *Coit v. Western U. Tel. Co.*, 130 Cal. 657, 63 Pac. Rep. 83 (1900).

Under the constitution of Kentucky telegraph companies cannot limit their common-law liability as carriers. *Postal Tel. Cable Co. v. Schaeffer*, 23 Ky. L. Rep. 344, 62 S. W. Rep. 1119.

¹ *Pearsall v. Western U. Tel. Co.*, 44 Hun, 532, 124 N. Y. 256, 26 N. E. Rep. 534, 21 Am. St. 662; *Beasley v. Same*, 39 Fed. Rep. 181; *Harris v. Same*, 121 Ala. 519, 25 So. Rep. 910, 77 Am. St. 70.

Where there was delivered to a telegraph company for transmission

a message written on the blank of another company, which blank contained printed instructions that the message shall be sent subject to the terms and conditions printed on the back thereof, the delivery and acceptance of the message was, in effect, an adoption by the parties of the contract set out on the blank. *Western U. Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. Rep. 443.

² *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899, 14 C. C. A. 166. See *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246, 34 N. E. Rep. 581; *Western U. Tel. Co. v. Birge-Forbes Co.*, 69 S. W. Rep. 181 (Tex. Ct. of Civ. App.).

³ See *Brown v. Western U. Tel. Co.*, 6 Utah, 219, 21 Pac. Rep. 988; *Western U. Tel. Co. v. Robinson*, 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. Rep. 545; *Hendricks v. Western U. Tel. Co.*, 126 N. C. 304, 35 S. E. Rep. 543, 78 Am. St. 658; *Western U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 507, 29 S. W. Rep. 932.

ages because of errors or delays in the transmission of un-repeated messages, but also from delay in the delivery or the non-delivery of any such message. The repetition of a message has no legitimate effect to induce or to expedite its delivery; but it is true that the repetition will convey a warning that the message is deemed important, and implies that the company has received, or on delivery will receive, additional compensation. It is clear that if such a stipulation, assented to, is sustained as having the force of a condition or contract, the company is under no obligation to deliver any un-repeated message. For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void.¹ They are sustained, however, in Massachusetts.²

¹ *Gulf, etc. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. Rep. 653; *Western U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. Rep. 734, 13 Am. St. 843; *Garrett v. Western U. Tel. Co.*, 83 Iowa, 257, 49 N. W. Rep. 88; *Wertz v. Same*, 7 Utah, 446, 27 Pac. Rep. 172, 13 L. R. A. 510; *Tyler v. Same*, 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168; *Western U. Tel. Co. v. Graham*, 1 Colo. 230; *Birney v. New York, etc. Tel. Co.*, 18 Md. 341; *True v. International Tel. Co.*, 60 Me. 9; *Manville v. Western U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Baldwin v. United States Tel. Co.*, 45 Barb. 505, 1 Lans. 125; *Bryant v. American Tel. Co.*, 1 Daly, 575; *Sprague v. Western U. Tel. Co.*, 6 Daly, 200; *Western U. Tel. Co. v. Fenton*, 52 Ind. 1; *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Beatty Lumber Co. v. Western U. Tel. Co.*, — W. Va. —, 44 S. E. Rep. 309; *North Packing & P. Co. v. Western U. Tel. Co.*, 70 Ill. App. 275; *Francis v. Same*, 58 Minn. 252, 49 Am. St. 507, 25 L. R. A. 406, 59 N. W. Rep. 1078; *Barnes v. Same*, 24 Nev. 125, 141, 50 Pac. Rep. 438, 77 Am. St. 791, quoting the text; *Western U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 123, 30 S. W. Rep. 378; *Same v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. Rep. 707; *Primrose v. Western U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098 (two justices dissenting); *McAndrew v. Electric Tel. Co.*, 17 C. B. 3; *Baxter v. Dominion Tel. Co.*, 37 Up. Can. Q. B. 470; *Passmore v. Western U. Tel. Co.*, 9 Phila. 90, 78 Pa. 238; *Western U. Tel. Co. v. Stevenson*, 128 Pa. 442, 18 Atl. Rep. 441, 15 Am. St. 687, 5 L. R. A. 515; *Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 40 Am. St. 490,

² *Clement v. Western U. Tel. Co.*, 137 Mass. 463. The stipulation was: "It is agreed between the sender of the following message and this company that such company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any un-repeated message, whether happening by negligence of

its servants or otherwise, beyond the amount received for sending the same." The sender of an un-repeated message, the delivery of which was delayed by the gross negligence of the company's messenger, was limited in his recovery to the stipulated sum.

According to some courts the person to whom a message is sent is not bound by a contract between the sender and the company which provides that no claim against the latter shall be valid unless it is presented within sixty days,¹ nor by a

55 N. W. Rep. 1057; *Western U. Tel. Co. v. Kemp*, 44 Neb. 194, 62 N. W. Rep. 451, 48 Am. St. 723.

In *Candee v. Western U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452, Dixon, C. J., said such "regulations were intended to secure the company against liability for the injurious consequences flowing from its own negligence and omissions, and from those of its agents and operators, in and about the performance of its contract entered into with the sender of the message. The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance or attempted performance of the contract, or the entire failure to perform it, from whatsoever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them; and nobody, not even the officers and representatives of the company, assert such a

doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, whether it can, at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him." *Bartlett v. Western U. Tel. Co.*, 62 Me. 219; *Passmore v. Same*, 78 Pa. 238. But see *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Grinnell v. Western U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Schwartz v. Atlantic, etc. Tel. Co.*, 18 Hun, 157; *Hart v. Western U. Tel. Co.*, 66 Cal. 579, 6 Pac. Rep. 637.

¹ *Western U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. Rep. 894; *Tobin v. Western U. Tel. Co.*, 146 Pa. 375, 23 Atl. Rep. 324, 28 Am. St. 802. See *Herron v. Western U. Tel. Co.*, 90 Iowa, 129, 57 N. W. Rep. 696; *Conrad v. Same*, 162 Pa. 204, 29 Atl. Rep.

stipulation limiting liability if the message is not repeated.¹ The first condition will be strictly construed against the company.² But if the sendee sues upon the contract there are cogent reasons for holding that his rights are governed by the contract made with the sender, and that the claim for damages must be made within the time stipulated.³ Where the receiver of a message sues in tort he is not bound by such a condition, at least if his assent to it is not shown.⁴ A regulation, plainly printed on the blanks, expressing that if a message is sent to one of the company's transmitting offices by one of its messengers, he acts for that purpose as the agent of the sender, is valid.⁵ This view is doubted in New York, and, if the condition is valid, it was waived by the direction given the messenger by the defendant's manager to wait for an answer to the message delivered.⁶

888; *Albers v. Same*, 98 Iowa, 51, 66 N. W. Rep. 1040; *Francis v. Same*, 58 Minn. 252, 59 N. W. Rep. 1078, 49 Am. St. 507, 25 L. R. A. 406; *Findlay v. Same*, 64 Fed. Rep. 459.

In New Mexico such a contract is not binding upon the sender. *Western U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. Rep. 339. But this is clearly contrary to the weight of authority. *Beasley v. Western U. Tel. Co.*, 39 Fed. Rep. 181; *Western U. Tel. Co. v. Rains*, 63 Tex. 27; *Young v. Western U. Tel. Co.*, 65 N. Y. 163; *Wolf v. Same*, 62 Pa. 83, 1 Am. Rep. 387.

Such a condition is void in Georgia because of the statute imposing a penalty for delay in transmitting messages. *Mathis v. Western U. Tel. Co.*, 94 Ga. 338, 21 S. E. Rep. 564, 1039, 47 Am. St. 167. The Indiana court has ruled otherwise under a similar statute. *Western U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713. And so has the Kansas City court of appeals. *Montgomery v. Western U. Tel. Co.*, 50 Mo. App. 591. Such a condition is void under the constitution of Kentucky. *Western U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. Rep. 1068, 66 Am. St. 361, 36 L. R. A. 711.

¹ *Western U. Tel. Co. v. Richman*, 8 Atl. Rep. (Pa.) 171.

² *Barrett v. Western U. Tel. Co.*, 43 Mo. App. 542; *Western U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. Rep. 222, 3 L. R. A. 224; *Same v. Way*, 83 Ala. 542; *Same v. Stratemeier*, 6 Ind. App. 125, 32 N. E. Rep. 871.

The terms of such a condition being "damages in any case where the claim is not presented" as stipulated, include the money paid for the transmission of a message as well as other claims. *Lestern v. Western U. Tel. Co.*, 84 Tex. 313, 19 S. W. Rep. 256.

³ *Russell v. Western U. Tel. Co.*, 57 Kan. 230, 45 Pac. Rep. 598; *Manier v. Same*, 94 Tenn. 442, 29 S. W. Rep. 732; *Western U. Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. Rep. 443; *Same v. James*, 90 Ga. 254, 16 S. E. Rep. 83.

⁴ *Webbe v. Western U. Tel. Co.*, 169 Ill. 610, 48 N. E. Rep. 670.

⁵ *Stamey v. Western U. Tel. Co.*, 92 Ga. 613, 18 S. E. Rep. 1008, 44 Am. St. 95; *Ayres v. Same*, 65 App. Div. 149, 72 N. Y. Supp. 634.

⁶ *Will v. Postal Tel. Cable Co.*, 3 App. Div. 22, 37 N. Y. Supp. 933.

The validity of a contract requiring the payment of an additional sum to insure accuracy in the transmission of a dispatch will be determined by the laws of the state in which the contract was made.¹ The courts of other states will give effect to a statute of the state in which a message was received for transmission to a foreign state making the company liable for all mistakes in transmission.² So far as liability for mental suffering is concerned, the question is to be determined by the law of the state in which the negligence occurred and the contract was to be performed, regardless of the rule in the state in which the message was delivered for transmission.³ A cause of action given by statute for negligent delay in transmitting messages may be availed of by the sender of the message though it was sent from another state, the law of which does not permit the recovery of compensation for some of the elements of damage which may be recovered for under said statute.⁴

The analogy of connecting telegraph lines to connecting railway lines is so close that the established rules of law which determine the liability of the latter may be applied to the former. Hence, without regard to the contract by the sender of a message with the initial company concerning its own liability, the person injured by the neglect of the company receiving a message from the former may recover from the company in default. Each company is liable for its own neglect,⁵ and the receiving company may stipulate as to the terms upon which it will receive a message for delivery to another company for further transmission.⁶ But the receiving company,

¹ *Shaw v. Postal Tel. & Cable Co.*, 79 Miss. 670, 31 So. Rep. 222, 89 Am. St. 666, 56 L. R. A. 486.

² *Reed v. Western U. Tel. Co.*, 135 Mo. 661, 34 L. R. A. 492, 37 S. W. Rep. 904, 58 Am. St. 609; *Western U. Tel. Co. v. Cooper*, 69 S. W. Rep. 427 (Tex. Ct. of Civ. App.), approved by the supreme court in *Western U. Tel. Co. v. Waller*, 74 S. W. Rep. 751. See § 926.

³ *Western U. Tel. Co. v. Blake*, 68 S. W. Rep. 526 (Tex. Ct. of Civ. App.)

⁴ *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. Rep. 1063.

⁵ *Smith v. Western U. Tel. Co.*, 84 Tex. 359, 19 S. W. Rep. 441, 31 Am. St. 59; *Martin v. Same*, 1 Tex. Civ. App. 143, 20 S. W. Rep. 860.

⁶ *Western U. Tel. Co. v. Stratemier*, 6 Ind. App. 125, 32 N. E. Rep. 871; *Squire v. Western U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Telegraph Co. v. Munford*, 87 Tenn. 190, 10 S. W. Rep. 318, 10 Am. St. 630, 2 L. R. A. 190; *Western U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. Rep. 844; *Baxter v. Dominion Tel. Co.*, 37 Up. Can. Q. B. 470.

if it accepts pay for sending the message to its destination and does not limit its liability to its own line, is bound to transmit and deliver it.¹

§ 959. **Liability for neglect where message in cipher.** The consequences which telegraph companies are usually [298] called upon to make compensation for arise from neglecting altogether to transmit or to deliver, or delaying the transmission or delivery of, messages, or from delivering them changed so as to mean something different from what the sender intended. If not transmitted or not delivered at all the damages may be more serious than where there is mere delay; but if a different message is sent there is at once a failure to deliver the intended message, and also a substituted communication made which may be still more detrimental. And the transmission and delivery of a forged or spurious message may occasion great injury to the receiver. The general rule of compensatory damages stated and defined in the leading cases of *Hadley v. Baxendale*² and *Griffin v. Colver*³ applies in these telegraph cases, and affords very striking examples to illustrate its justice and comprehensiveness. In the latter case Judge Selden observed: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Under this rule, according to the weight of authority, only nominal damages or the price paid for transmitting the message can be recovered for neglecting to [299] transmit or to deliver it, if its purport is not explained to the agent of the company or its operator, or if it is written in cipher, or is wholly unintelligible to him; for no other dam-

¹ *Western U. Tel. Co. v. Shumate*, 253, 13 S. W. Rep. 169; Same v. Clifton, 68 Miss. 307, 8 So. Rep. 746; Cahn v. *Western U. Tel. Co.*, 46 Fed. Rep. 109.

² 9 Ex. 341.

³ 16 N. Y. 489. See *Bodkin v. Western U. Tel. Co.*, 31 Fed. Rep. 134; *Western U. Tel. Co. v. Smith*, 76 Tex.

253, 13 S. W. Rep. 169; Same v. Clifton, 68 Miss. 307, 8 So. Rep. 746; Cahn v. *Western U. Tel. Co.*, 46 Fed. Rep. 40; *Western U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. Rep. 109, citing the text.

ages in such a case could be within the contemplation of the parties. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be said to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damage will naturally arise in case of his failure to send it. If ignorant of its real nature and importance it cannot be said to have been in his contemplation at the time of making the contract that any particular damage or injury would be the probable result of a breach on his part.¹

Telegraph agents must take it to be true that when the telegraph is resorted to as a means of communication the message is deemed by the sender to be important enough to justify the increased expense over postage, but that fact, according to the weight of authority, implies no more; there is no standard for measuring this importance; there is no known average; no *data* to stimulate to the exercise of special care; none for the assessment of damages as upon supposed contemplation of any particular loss, direct or consequential, beyond

¹ *Candee v. Western U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Sanders v. Stuart*, 1 C. P. Div. 326; *Beaupri v. Pacific, etc. Tel. Co.*, 21 Minn. 155; *Baldwin v. United States Tel. Co.*, 44 N. Y. 744, 748; *Shields v. Washington Tel. Co.*, 9 West. L. J. 283; *Abeles v. Western U. Tel. Co.*, 37 Mo. App. 554; *Western U. Tel. Co. v. Martin*, 9 Ill. App. 587; *Behm v. Western U. Tel. Co.*, 8 Biss. 131; *Mackay v. Same*, 16 Nev. 222; *Hart v. Direct United States Cable Co.*, 86 N. Y. 633; *Cannon v. Western U. Tel. Co.*, 100 N. C. 300, 6 S. E. Rep. 731, 6 Am. St. 590; *Daniel v. Same*, 61 Tex. 452, 48 Am. Rep. 305; *McAllen v. Same*, 70 Tex. 243, 7 S. W. Rep. 715; *Primrose v. Western U. Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098; *Western U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 496, 31 Pac. Rep. 393, quoting the text; *Same v. Wilson*, 32 Fla. 527, 14 So. Rep. 1, 37 Am. St. 125, 22 L. R. A.

434, overruling *Same v. Hyer*, 22 Fla. 637, 1 So. Rep. 129, 1 Am. St. 222; *Melson v. Western U. Tel. Co.*, 72 Mo. App. 111; *Hughes v. Same*, 79 id. 133; *Ferguson v. Anglo-American Tel. Co.*, 4 Pa. Dist. Rep. 88, 178 Pa. 377, 35 Atl. Rep. 979, 56 Am. St. 770, 35 L. R. A. 554; *Western U. Tel. Co. v. Coggin*, 68 Fed. Rep. 137, 15 C. C. A. 231; *Ferebro v. Western U. Tel. Co.*, 9 D. C. App. Cas. 455, 35 L. R. A. 548.

If the delay in forwarding a cipher dispatch is not so great as to amount to a substantial failure to perform the duty the liability is for nominal damages only; but if it amounts substantially to a failure to deliver, the proper measure of liability is the sum paid for transmission, with interest thereon. *Abeles v. Western U. Tel. Co.*, 37 Mo. App. 554; *Candee v. Same*, 34 Wis. 471, 17 Am. Rep. 452.

that of the cost of telegraphing. Where, therefore, there is a studied concealment of the meaning of a telegram, whether by writing it in cipher or otherwise, there is a manifest intention on the part of the sender not to permit the subject, in any of its bearings, to come within the contemplation of the company. In the sense of the law of damages he thereby elects to employ the company in a mechanical capacity, and to take the risks of all errors and negligence upon himself.

§ 960. **Same subject; opposing view.** There are a few cases which hold that the fact that the message is in cipher does not affect the liability of the company for its non-delivery or negligently-delayed delivery, although no information is given concerning its nature or importance. Chief Justice Stone said in an Alabama case,¹ referring to the rule in *Hadley v. Baxendale*: "Can such a rule, with any propriety, be applied to transactions or dealings in which the same measure of diligence is required in each act or function without regard to the *quantum* of interest to be affected by it? Legal dogmas should rest on some principle which can be appreciated. The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communications by mail, and therefore would not be resorted to if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor by the magnitude of the interest it concerns. With few exceptions, imposed by public exigency, it is governed by the law of the mill. Messages must be sent in the order of their handing in without favor or partiality, without delay, and without reference to the value of the interests to be affected." Quoting the language of early writers on the subject² the judge continued: "'Why has the operator any right to know what the message refers to? Or why the necessity of drawing inferences or conjectures in reference thereto? What difference does it make in this respect whether the message conveyed an order to purchase or an account of sales? Would such knowledge aid him in the correct translation of the message?' We fully concur

¹ *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

² *Scott & Jarnigan on Tel.*, § 166.

with Messrs. Scott & Jarnigan, and hold that the liability of the telegraph company does not depend upon the knowledge that the operator may have of the contents of the message."¹ On substantially the same line of reasoning similar liability was formerly imposed in Florida where the message was in cipher composed of letters of the English alphabet;² and in Georgia, without such an expressed limitation as to the characters in which it is written,³ and also in Virginia, though some stress is there laid on the statutes.⁴ The Texas courts have been divided on the question, the supreme court holding the general rule, and one of the courts of appeals holding with the courts whose views are embodied in this section.⁵ The latter court has recently reversed its earlier rulings, though without being convinced that they are not proper, so as to conform to the adjudications of the supreme court.⁶ In Kentucky it is held that public policy forbids the enforcement of a contract exempting a telegraph company from damages resulting from its negligence in transmitting cipher messages.⁷ There is language in a West Virginia case favoring the view that it is immaterial to the telegraph company whether the message is in cipher or not.⁸

The same limitation applies to liability for negligence concerning cipher messages as governs in other cases — there is no responsibility for damage arising from uncommunicated special collateral circumstances.⁹ If a message is partly in cipher and the facts and circumstances known to the company

¹ This view is adhered to in *Western U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. Rep. 844; *American U. Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. Rep. 660.

² *Western U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 So. Rep. 129, 1 Am. St. 222, overruled in *Western U. Tel. Co. v. Wilson*, 32 Fla. 527, 14 So. Rep. 1, 37 Am. St. 125, 22 L. R. A. 434.

³ *Western U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. Rep. 981.

⁴ *Western U. Tel. Co. v. Reynolds*, 77 Va. 173.

⁵ *Western U. Tel. Co. v. Weiting, W. & W.*, § 801; *Same v. Bertram*, id., § 1152.

⁶ *Western U. Tel. Co. v. McKinney*, 2 Civil Cas., § 644; *Houston, etc. R. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. Rep. 605.

⁷ *Western U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. Rep. 1068, 66 Am. St. 361, 36 L. R. A. 711.

⁸ *Beatty Lumber Co. v. Western U. Tel. Co.*, — W. Va. —, 44 S. E. Rep. 309.

⁹ *American U. Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. Rep. 660.

charge it with notice that it relates to the purchase of goods, the usual rule of liability for neglect in its transmission will apply.¹ Mere notice that the message is important will not have that effect.² One who takes a letter addressed to another from the postoffice and negligently retains delivery of it for several days, in violation of the statute forbidding the obstruction of mails, is liable to the owner of property for the damages sustained by him in consequence of his failure to sell it.³

§ 961. **Liability when object of sender known.** Where the telegram offered and accepted for transmission expresses the object of the sender, and by actionable negligence in not transmitting or not delivering it, or by unreasonably delaying the transmission, or by change of its tenor so that it [300] fails to be the communication intended, then, independently of any contract or valid regulation affecting the measure of damages, the company is liable for such injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the correct message,—or such injury as so results from any negligent change in the purport of the message.⁴ Thus if it be a direction from a principal to a broker, factor or correspondent to purchase or sell stocks or property, or is an acceptance of an offer for either, and by negligent non-delivery or delay in delivery such transactions do not take place at all, or not until a later day, the company is liable for the loss which the sender sustains by not having his directions executed or his acceptance delivered. Where a sale is thus prevented and the property declines in price before the injured party, by the use of due diligence after notice of the delinquency in respect to his message, could give new directions, he is entitled to recover damages against the company measured by such de-

¹ *Western U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539, 32 S. W. Rep. 707; *Same v. Birge-Forbes Co.*, 69 S. W. Rep. 181.

² *Houston, etc. R. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334, 39 S. W. Rep. 605.

³ *Cohen v. Cohen*, 26 Tex. Civ. App. 315, 63 S. W. Rep. 544.

⁴ *Western U. Tel. Co. v. Hoffman*,

80 Tex. 420, 15 S. W. Rep. 1048, 26 Am. St. 759; *Brown v. Western U. Tel. Co.*, 6 Utah, 219, 21 Pac. Rep. 988; *McPeck v. Western U. Tel. Co.*, 107 Iowa, 356, 78 N. W. Rep. 63, 70 Am. St. 205, 43 L. R. A. 214; *Western U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. Rep. 4, 15 Am. St. 109; *Same v. Allen*, 66 Miss. 549, 6 So. Rep. 461; *Smith v. Western U. Tel. Co.*, 83 Ky.

cline,¹ and also expense incurred in caring for the property.² If the property is sold the presumption is that the market price was obtained; if less than that was received the owner cannot recover the difference.³ So if a purchase is thus defeated or delayed, and the property advances in value before he is advised of the neglect, he is entitled to recover damages to the extent of such advance,⁴ including interest from the time

104, 4 Am. St. 126; *Milliken v. Same*, 110 N. Y. 403, 18 N. E. Rep. 251; *Western U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, 16 Am. St. 920, 6 L. R. A. 844; *Western U. Tel. Co. v. Cornwell*, 2 Colo. App. 491, 498, 31 Pac. Rep. 393, quoting the text; *Herron v. Western U. Tel. Co.*, 90 Iowa, 129, 57 N. W. Rep. 696; *Blackburn v. Kentucky Central R. Co.*, 15 Ky. L. Rep. 303 (Ky. Super. Ct.).

¹ *Thompson v. Western U. Tel. Co.*, 64 Wis. 531, 25 N. W. Rep. 789, 64 Am. Rep. 644; *Hocker v. Same*, 34 So. Rep. 901 (Fla.); *Strasberger v. Same* (N. Y. Sup. Ct. 1867), *Allen's Tel. Cas.* 661; *Manville v. Same*, 37 Iowa, 414; *Western U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. Rep. 336; *Western U. Tel. Co. v. Lindley*, 89 Ga. 484, 15 S. E. Rep. 636; *Same v. North Packing & Provision Co.*, 89 Ill. App. 301; *Evans v. Western U. Tel. Co.*, 102 Iowa, 219, 71 N. W. Rep. 219; *Wallingford v. Same*, 53 S. C. 410, 31 S. E. Rep. 275; *Williford v. Western U. Tel. Co.*, 2 Tex. Civ. App. 574, 22 S. W. Rep. 244; *Brooks v. Same*, — Utah, —, 72 Pac. Rep. 499. See *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 Am. Rep. 605.

The same rule is applied in Alabama for negligence concerning cipher messages. *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Western U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. Rep. 844.

If the result of an error in transmitting a dispatch ordering goods is that they are sent to the wrong

place, the damages are not measured by the full value at the place to which they should have been sent; their value at the place where they are should be deducted. *Western U. Tel. Co. v. Reid*, 83 Ga. 401, 10 S. E. Rep. 919.

Where delay in delivering a message broke up negotiations for the sale of cotton and prevented a sale which would otherwise have been made, the damages were measurable by the difference between the price which would have been realized and the value of the cotton on the day the message should have been delivered; or, if there was no market value for the cotton where it was stored, its value at the nearest market at which it could be disposed of, with the expense of getting it there. If it had no market value anywhere on that day, the measure of damages would be the contract price less the best price which could afterwards be obtained for it the first day it could be sold, and the expense of holding it until then. *Western U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. Rep. 83.

² *Wallingford v. Western U. Tel. Co.*, *supra*.

³ *Hollis v. Western U. Tel. Co.*, 91 Ga. 801, 18 S. E. Rep. 287.

⁴ *True v. International Tel. Co.*, 60 Me. 9; *United States Tel. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Western U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 So. Rep. 129, 1 Am. St. 222, overruled in *Western U. Tel. Co. v. Wilson*, 14 So. Rep. 1, 37 Am. St. 125, 17 L. R. A. 654; *Pennington v. Western U. Tel. Co.*,

suit was begun.¹ The rights and liabilities of the parties are governed by the condition of the market at the time the default occurred.²

For like reasons if the sender's purpose in respect to such transactions is defeated by a negligent change in the wording of his message he may hold the company liable for the loss of a bargain where it occurs, and also for any other injurious consequence which ensues from such change.³ The supreme court of the United States has recently, by strong implication, approved this measure of liability where a message was erroneously transmitted; but it held that it does not apply in a case of delay where the sender gives an order to purchase in open market, unless it is shown that he did so in the expectation of realizing profits by an immediate resale, or that he would have resold at a profit on any subsequent day if the purchase had been made.⁴ If the purpose of the sender of a delayed mes-

67 Iowa, 631, 24 N. W. Rep. 45, 25 id. 838, 56 Am. Rep. 367; *Alexander v. Same*, 66 Miss. 161, 5 So. Rep. 397, 3 L. R. A. 71, 67 Miss. 386, 7 So. Rep. 280; *Mowry v. Same*, 51 Hun, 126, 4 N. Y. Supp. 666; *Marr v. Same*, 85 Tenn. 529, 3 S. W. Rep. 496; *Pearsall v. Same*, 124 N. Y. 256, 26 N. E. Rep. 534, 21 Am. St. 662; *Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. 891, 18 S. W. Rep. 221; *Western U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. Rep. 636; *Western U. Tel. Co. v. Wilhelm*, 48 Neb. 910, 67 N. W. Rep. 870; *Same v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. Rep. 1021; *Barrack v. Postal Tel. Co.*, 12 Ohio Dec. 78; *Western U. Tel. Co. v. Turner*, 94 Tex. 304, 60 S. W. Rep. 432.

¹ *Western U. Tel. Co. v. Carver*, *supra*.

² *Brewster v. Western U. Tel. Co.*, 65 Ark. 537, 47 S. W. Rep. 560.

³ *Sweatland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Western U. Tel. Co. v. Virginia Paper Co.*, 87 Va. 418, 12 S. E. Rep. 755; *Same v. Crawford*, 110 Ala. 460, 20 So. Rep. 111; *Lee v. Western U. Tel. Co.*, 51 Mo. App. 375; *Reed v. Same*, 135 Mo.

661, 37 S. W. Rep. 904, 58 Am. St. 609, 34 L. R. A. 492; *Western U. Tel. Co. v. Hart*, 62 Ill. App. 120; *Same v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. Rep. 815, 85 Am. St. 36.

⁴ *Western U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577; *Cahn v. Western U. Tel. Co.*, 48 Fed. Rep. 810 (an order to sell without having the stocks, but securities were placed with the brokers who would have sold); *Western U. Tel. Co. v. Fellner*, 58 Ark. 29, 22 S. W. Rep. 917, 41 Am. St. 81; *Brewster v. Western U. Tel. Co.*, 65 Ark. 537, 47 S. W. Rep. 560; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. Rep. 252.

In Georgia contracts for option "futures" are invalid, and the loss or gain resulting from them cannot be invoked to measure the damages sustained by the sender of a message in consequence of a mistake made in transmitting it. *Cothran v. Western U. Tel. Co.*, 83 Ga. 25, 9 S. E. Rep. 836; *Moss v. Exchange Bank*, 102 Ga. 808, 30 S. E. Rep. 267, overruling *Western U. Tel. Co. v. Blanchard*, 68 Ga. 299.

The rule is the same in Texas.

sage was to consummate a contract for the purchase and sale of property, the damages are to be estimated as though the offer would have been accepted as a whole; and if he would have realized profits from one part of it and sustained losses in consequence of the other, the damages are measured by the net profits of the whole transaction.¹ But in order that there may be a recovery something more must be shown than mere negligence in sending a proposal to sell property, or to make a contract for services. It cannot be inferred that the offer made would have been accepted.²

As has been remarked,³ the damages which may be recovered from a telegraph company must, in nearly all jurisdictions, be such as may fairly be supposed to have entered into the contemplation of the parties—such as might naturally be expected to follow the breach of contract or of duty. Many illustrations of this principle are given elsewhere,⁴ and it is only necessary to make note here of a few cases which apply it under circumstances which are peculiar to actions against telegraph companies. Where a cattle-buyer delivered a dispatch to be sent to his agent requesting information as to the state of the market on the two next following days, and there was an arrangement between them that no answer was to be sent unless there had been a change in the market since the last report, but if there was a change the agent was to advise his principal, and the message was not delivered to the agent, and the principal bought cattle believing that there was no change in the market, when there was a decline in their value, it was ruled that it was for the jury to find whether the damages sustained by so doing were such as might have been reasonably apprehended to result from the failure to send the message, and that if such purchases were made because of the absence of a reply to the message, the damages resulting were direct and not speculative,⁵ and were measured by the differ-

Western U. Tel. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. Rep. 599.

¹ Western U. Tel. Co. v. Way, 83 Ala. 542, 4 So. Rep. 844.

² Beatty Lumber Co. v. Western U. Tel. Co., — W. Va. —, 44 S. E. Rep. 309; Johnson v. Same, 79 Miss. 58, 29 So. Rep. 787, 89 Am. St. 584.

³ § 959.

⁴ Ch. 3. See Postal Tel. Cable Co. v. Barwise, 11 Colo. App. 328, 53 Pac. Rep. 252; Western U. Tel. Co. v. Simpson, 64 Kan. 309, 67 Pac. Rep. 839.

⁵ Garrett v. Western U. Tel. Co., 83 Iowa, 257, 49 N. W. Rep. 88.

ence between the price ruling when the plaintiff was last advised and that which prevailed in the market for which he bought at the time of his doing so, the defendant being advised that he bought with reference to that market.¹ A somewhat exceptional case has been ruled in Iowa on a theory which is not in harmony with the current of authority. The plaintiff had arranged with other persons for the capture of a person accused of crime and one of them sent a message asking him to "come on first train." This message was delayed, and in a suit brought to recover the amount of the reward offered for the arrest of the accused, which the plaintiff alleged was lost because of the defendant's negligence, it was held that the plaintiff was not limited to the damages which might reasonably have been within the contemplation of the parties, but might recover for all the injurious results which flowed from the negligence, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. There being evidence tending to show that immediate delivery of the message was requested, and that the defendant's agent knew that the plaintiff was expecting a message relating to the capture of an accused person, although the defendant may not have known that a reward was offered, it was bound to understand that the plaintiff was making efforts to accomplish a purpose from which he anticipated some benefit to accrue to himself. "The law authorizes the offering of such rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may be reasonably anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made [offered], and it might reasonably reckon on such a contingency in omitting its duty with reference to such a message."² On the failure to make a trade of property because of the non-delivery of a message, the sender recovered his traveling expenses in going to the place where the message should have been sent,³ but not for

¹ Garrett v. Western U. Tel. Co., 92 Iowa, 449, 58 N. W. Rep. 1064.

² McPeck v. Western U. Tel. Co., 107 Iowa, 356, 78 N. W. Rep. 63, 43 L. R. A. 214, 70 Am. St. 205. See

§ 71, and Mitchell v. Western U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. Rep. 1016.

³ See § 966.

the loss sustained because he sold his personal effects.¹ If the evidence shows that, in consequence of the failure to deliver a message sent to a veterinary surgeon who was desired to attend a sick horse, he did not see the horse until five or six hours later than he otherwise would have done, and that in all reasonable probability the horse would have recovered had it been treated promptly, there may be a recovery of its value. Such damages are not too remote where both the parties knew from the nature of the dispatch that promptness was required.² Where there was a failure to deliver a message applying for stable room for horses which were in transit from one state to another, and shelter for them could not be obtained in consequence of such delay, the telegraph company was liable for the loss of a horse which occurred by reason of the exposure. It was not a defense that the laws of the state in which shelter was sought prohibited the transportation of property by rail on Sunday, the day on which the horses reached their destination.³ Where the addressee of a message was temporarily beyond the free delivery limits, her residence being within them, and the accomplishment of the purpose which the message sought depended upon whether the persons at such residence, had the message been delivered to them, would have promptly communicated it to the addressee, the contingency was regarded as not too remote to prevent a recovery.⁴

It is not the natural or probable result of the failure to deliver a message requesting the person to whom it was addressed to telegraph the sender a railroad ticket to a particular point, that such person should walk and tramp three hundred and twenty miles and have a leg crushed by a railroad car.⁵ The failure of the plaintiff to sustain his cause of action because of the absence of a witness as the result of the negligence of a telephone company is too remote to sustain a recovery.⁶ The failure to deliver a message stating that the mother of the sender and

¹ *Western U. Tel. Co. v. Shumate*,
² *Tex. Civ. App.* 429, 21 *S. W. Rep.*
109.

² *Hendershott v. Western U. Tel.*
Co., 106 *Iowa*, 529, 76 *N. W. Rep.* 828.
See § 965.

³ *Taylor v. Western U. Tel. Co.*, 95
Iowa, 740, 64 *N. W. Rep.* 660.

⁴ *Western U. Tel. Co. v. Clark*, 14
Tex. Civ. App. 563, 38 *S. W. Rep.* 225.

⁵ *Barnes v. Western U. Tel. Co.*, 24
Nev. 125, 142, 50 *Pac. Rep.* 438, 77
Am. St. 791.

⁶ *Martin v. Sunset Telephone & Tel.*
Co., 18 *Wash.* 260, 51 *Pac. Rep.* 376.

sendee was ill and requesting the latter to meet them at a railroad station is not the proximate cause of damages resulting to the sender from searching in a strange place at night for the sendee's residence, with exposure producing illness, or of the death of the mother,¹ nor of mental distress and nervous prostration suffered by the sender.² The failure to promptly deliver money transmitted through a telegraph company does not carry with it liability for injury to the reputation of the sendee resulting from eviction from her house because of its non-receipt.³ The liability for delay in delivering a message does not extend to results produced by a new and independent force, as where the person to whom it is sent is sought to be warned that armed men are in pursuit of him and he is overtaken and killed by them.⁴

In some cases the liability for consequential damages is not more extended when the action is by the receiver of a message than when it is by the sender. Thus, it is laid down that whenever the action sounds in tort for negligence in the performance of a duty, unattended by circumstances showing evil intent, oppression or wanton disregard for another's rights, and is founded on a contract which raised the duty, though that contract was made with another person, the measure of damages must be regarded as practically the same as if the action were for the breach of the contract under the same circumstances.⁵ There seems to be some ground for measuring the liability for consequential damages by the same rule whether the action is brought by the receiver or the sender of the message; but in many cases the courts do not limit the receiver's recovery by such considerations. In the case cited the court held that the loss of business, customers, etc., was too remote to be a ground of damage because of an error in a message quoting too low a price on goods, in consequence of which their acceptance was refused. One who had executed a deed of trust on cattle and was prohibited by it from making sales, except through the plaintiff, was permitted to sell certain of

¹ *Stafford v. Western U. Tel. Co.*, 73 Fed. Rep. 273.

² *Western U. Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. Rep. 775.

³ *Stansell v. Western U. Tel. Co.*, 107 Fed. Rep. 668.

⁴ *Ross v. Western U. Tel. Co.*, 81 Fed. Rep. 676, 26 C. C. A. 564.

⁵ *Fererro v. Western U. Tel. Co.*, 9 D. C. App. Cas. 455, 35 L. R. A. 548.

the cattle on condition that he account for the proceeds to the plaintiff. After a subsequent sale by the debtor his creditor sent him a message to ship no more cattle except to him, and directed that the consignees pay the "net proceeds" of those last shipped to the plaintiff. The word "net" was changed in transmission to "no," and the debtor converted such proceeds to his own use. Such act was not the proximate cause of the defendant's error.¹

§ 962. **Same subject; illustrations.** Plaintiff's agent delivered a message stating that he had bought sheep at \$5.60 per hundred; as delivered it read \$5.06. In reliance upon the message the sheep were sold before their arrival at \$6 per hundred. Because the selling price was in advance of the purchase price it was contended that no damage had been sustained; but it was ruled that the company was liable for the loss — the difference between the selling price and the actual value of the sheep.² In consequence of the non-delivery of a message informing plaintiff of the market price of property at the place where he intended to ship it for sale, he sent it to the next nearest market, where it sold for a less price than it would have brought at the other market. The telegraph company was liable for the difference, and also for the increased freight between the place from and to which the shipment was made and that to which it would have been made but for its default.³ Where there was a like default and the plaintiff shipped property to a demoralized market, his damages were measured by the difference between its value at the place of shipment and the price realized for it in the open market, together with the cost of transportation, maintenance and sale, such cost including the transportation and maintenance of the property while it was being moved from the place to which it was first shipped to the next best market, no offer for it being obtainable at the former place, and the removal being made in good faith and upon a reasonable judgment.⁴ Where a sale

¹ Strahorn-Hutton-Evans Commission Co. v. Western U. Tel. Co., — Mo. App. —, 74 S. W. Rep. 876.

³ Western U. Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. Rep. 187, 10 L. R. A. 515.

² Western U. Tel. Co. v. Landis, 12 Atl. Rep. (Pa.) 467. See Same v. Richman, 8 id. 171.

⁴ Western U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. Rep. 989.

of cattle for future delivery, at the option of the purchaser, had been made and he wrote a message addressed to the owner notifying him that he would take them the next day, and in consequence of negligent delay in its transmission the weighing of the cattle was delayed and their weight decreased, the company was liable for the shrinkage.¹ The price at which the owner of property offered to sell it was negligently altered so that when the message was delivered a lower price was designated, and the offer was accepted at such price. The damages were measured by the difference between that price and the market value of the property at the place to which the message was sent.² In the absence of proof that the vendor could have sold for the price he designated in the message he could not recover the difference between that and the price at which the sale was made.³ But that difference may be taken as the basis of the company's liability if it does not show it to be unreasonable or unjust.⁴

§ 963. **Same subject; further illustrations.** A plaintiff's message to his broker directed him to sell his stock of a certain kind, and to buy a given amount of another named stock. By a change in the message as delivered it directed simply the purchase of an additional amount of the kind of stock directed to be sold, which was made by the broker. As soon as the plaintiff was apprised of the mistake and of this purchase he ordered the stock to be sold, which was done at a loss [301] of \$475, and repeated his order to purchase, but the price had advanced in the meantime so that it cost \$1,875 more to make the purchase than would have been required at the time the erroneous message was received; it was held that the plaintiff was entitled to recover both these sums. It was said by the court that the loss from the advance on stock ordered to be purchased would be recoverable without an actual purchase of the stock at the increased price by showing that immediately or soon after the delivery of the erroneous message the stock

¹ Hadley v. Western U. Tel. Co., 115 Ind. 191, 15 N. E. Rep. 845.

³ Western U. Tel. Co. v. Shotter, 71 Ala. 760.

² Western U. Tel. Co. v. Harris, 19 Ill. App. 347; Same v. Shotter, 71 Ala. 760; Hollis v. Western U. Tel. Co., 91 Ga. 80, 18 S. E. Rep. 287.

⁴ Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. Rep. 788, 4 L. R. A. 600.

rose in market so that the order could not have been filled for less than the advanced price.¹ In a Massachusetts case² Bigelow, C. J., after adverting to the rule of damages applicable to a carrier who had negligently delayed to transport and deliver goods intrusted to him,—namely, the difference in their market value at the time when and place where they ought to have been delivered and such value at the same place on the day when they were delivered,—said: “We can see no reason why an analogous rule is not applicable to the case before us. The defendants, as a contracting party, are liable for the injury actually caused by their breach of duty. There is nothing in the nature of the business which they undertake to carry on that should exempt them from making compensation for any neglect or default on their part.”³ The only question then is as to the effect of the application of the general rule of damages, already stated, to the contract between the parties. This necessarily depends on the subject-matter. The defendants undertook to transmit a message which on its face purported to be an acceptance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and dispatch, having reference to the ordinary mode of performing similar services by persons engaged in the same business. The natural consequence of a failure to fulfill the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the [302] merchandise in due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of his message by the defendants. The sum, therefore, which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message

¹ Rittenhouse v. Independent Line Telegraph, 44 N. Y. 263, 4 Am. Rep. 673, 1 Daly, 474; New York, etc. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; De Rutte v. New York, etc. Tel. Co., 1 Daly, 547, 30 How. Pr. 403;

Bowen v. Lake Erie Tel. Co., 1 Am. L. Reg. 685.

² Squire v. Western U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157.

³ Ellis v. American Tel. Co., 13 Allen, 226.

which the defendants undertook to transmit, if it had been duly and seasonably delivered in fulfillment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order by the use of due diligence to have purchased the like quantity and quality of the same species of merchandise.”¹

An interesting case illustrative of the principles under discussion arose in New York, and after repeated arguments and thorough consideration was finally decided in 1870. The plaintiffs' agent at Chicago telegraphed for five thousand sacks of salt to be sent immediately from Oswego, the plaintiffs' shipping port; the message came over the defendants' line; was delivered by them, and by carelessness of their servants “casks” was written for “sacks.” The order was executed accordingly. A sack was a fourteen-pound package of fine salt; a cask contained three hundred and twenty-one pounds of coarse salt. On the arrival of the salt at Chicago there was no market for it; it was stored at the expense of the plaintiffs' agent, and finally sold at less than the market price at Oswego. The plaintiffs were held entitled to recover damages for that mistake; the difference between the market value of the salt at Oswego, where but for the mistake it would have remained, and what it sold for at Chicago, together with the expense of transportation to the latter place, was not an improper measure. This rule was sustained, although there was no evidence as to what it would have cost to return the salt to Oswego, and the difference in the market price of the two cities was greater than the whole cost of the outward transporta- [303] tion. Earl, C. J., thus vindicated this ruling: “The cardinal rule (of damages) undoubtedly is that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule speculative, contingent and remote damages, which cannot be

¹True v. International Tel. Co., 60 Me. 9, 26; Manville v. Western U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; Tyler v. Same, 60 Ill. 421, 14 Am. Rep. 38.

directly traced to the breach complained of, are excluded. Under the former rule such damages only are allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract as might naturally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be *supposed* to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from the breach, if, at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts. In this case, then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt as an article of merchandise, and that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago it would be shipped there as an article of merchandise to be sold in the open market. And the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, [304] and the difference between the market price at Chicago and the market price at Oswego. . . . The damages allowed were certain, and they were the proximate, direct result of the breach.”¹ There was some contention that it was the duty of the plaintiff on being apprised of the mistake to reship the salt to Oswego, and there was some division of judicial opinion on that point. The learned judge from whom we have just quoted remarked in support of the final opinion of the court, from which only one member dissented: “For

¹ Leonard v. New York, etc. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

anything that appears in this case the cost of transportation to Oswego would have been equal to the difference in the market between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market when the salt should again be landed there. If the plaintiff had shipped, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant the salt had been placed in Chicago, one of the largest commercial centers of the country, and the plaintiffs had a right to sell it there in good faith and hold the defendant liable for the loss." The rule supported in this case was sanctioned as sufficiently favorable to the defendant. It does not decide that it was so to the plaintiffs. Nothing was allowed by the trial court for profits that might have been made on the fine salt ordered if it had been shipped, nor for the casks of salt at Oswego if it had not been sent.

§ 964. **Same subject; other illustrations.** In a Virginia case¹ the plaintiff sent over the defendant's line a message to his factor in Mobile directing him to buy five hundred bales of cotton. It was altered, and as delivered required him to buy two thousand five hundred bales. He proceeded to execute it, and bought two thousand and seventy-eight bales before the mistake was discovered. It was ruled that if the defendants were liable for the alteration the measure of damages was what was lost on the sale at Mobile of the excess of the cotton above the amount ordered; or if not sold there, what would have been the loss on the sale there in the condition and circumstances in which it was when the mistake was ascertained, including the proper costs and charges. [305] The factor's commissions upon the purchase were held to be a part of the damages. And it appearing that a part of the cotton was on board a ship to be sent to Liverpool when the mistake was ascertained, it was ruled that in the estimate of damages the whole should still be valued as if sold at Mobile, a part on shipboard and a part under contract of affreightment. The court held further that if the plaintiff intended

¹ Washington, etc. Tel. Co. v. Hobson, 15 Gratt. 122. And see Smith v. Independent Line Telegraph, Scott & J. on Tel., § 412, note.

to hold the company responsible for the excess, he should, as soon as apprised of the purchase, have made a tender of it to the company on the condition of its paying the price and all the charges incident to the purchase; giving it notice, in case of refusal of such tender, that he would proceed to sell the excess at Mobile, and after crediting the company with the net proceeds would look to it for any difference between the amount of such proceeds and the cost of such excess, including the commissions, costs and charges.

A telegraph company negligently omitted to deliver a message containing the plaintiff's direction from Denver to his agent at Nebraska City: "Ship oil as soon as possible at the best rates you can." The plaintiff alleged that by reason of the consequent delay he was obliged to pay higher rates of freight and lost great profits on the oil. Of what the lost profits consisted is not shown by the case; damages for the increase of freight were allowed; and doubtless, on the same principle, if there had been a fall in the market price of the oil, the amount of such decrease would also have been allowed.¹ One to whom a message is addressed advising that the sender can use a certain amount of cotton at a price named, can recover only nominal damages for an error in the message by which the price was raised if he could have realized a profit on the cotton purchased by selling it to the sender at the price in fact offered.² Where, in consequence of the non-delivery of a message, cattle were turned loose, the telegraph company was liable for the cost of regathering them, and if they depreciated in value in consequence of the regathering it was also liable therefor, and for the death of any caused by regathering them.³ The expense incurred in restoring animals to their former condition is not the measure of the company's liability, but their lessened value.⁴ Where the plaintiff's minor daughter eloped and his message stating the fact of her minority and forbidding the issue of a license for her marriage was negli-

¹ *Western U. Tel. Co. v. Graham*, 1 Colo. 230. See *Manville v. Western U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8.

² *Western U. Tel. Co. v. Aubrey*, 61 Ark. 613, 33 S. W. Rep. 1063.

³ *Pruett v. Western U. Tel. Co.*, 6 Tex. Civ. App. 533, 25 S. W. Rep. 794.

⁴ *Mitchell v. Western U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. Rep. 1016.

gently delayed, in consequence of which a license was issued and the marriage occurred, the damages included the loss of the services of the daughter and the mental distress of the father, but not such distress on the mother's part because the defendant had no notice respecting her.¹ If the operator of a company concocts, forges and sends a message purporting to be from a bank to another bank whereby the latter, without negligence, pays money, the company is liable for the loss of the amount paid, that being not more than the sum designated in the message.²

§ 965. Same subject; loss of claim; physical pain; injury to credit. A telegraph company negligently delayed for a day or two to forward plaintiff's message to his agent, stating amount of the debt and directing attachment if he could find property. During the delay the property was seized by other creditors. The court say: "To ascertain the damages sustained by the breach of this contract these inquiries are pertinent: if the message had been sent, was the plaintiff's agent in S. at the time, and would he have received it; next, would he have taken out an attachment on the debt; at what time could he have done this; could he have given security; could he [306] have procured attorneys to issue the writ; at what hour could and would it have been put into the hands of the sheriff; was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at 8 o'clock on the 7th the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had the sheriff is to be presumed willing to do his duty; if he did not he would be liable to the plaintiff, and thereby the plaintiff's debt would be secured." It was held that the company was liable for the cost of the dispatch and the amount of the claim, on the assumption that the latter might have been secured by a seasonable attachment, and was prevented by the defendant's default.³ The creditor

¹ *Western U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. Rep. 811. *Rep.* 315, 1 L. R. A. 143, 12 Am. St. 637; *Elwood v. Same*, 45 N. Y. 549, 6

² *Pacific Postal Tel. Cable Co. v. Bank*, 109 Fed. Rep. 369, 48 C. C. A. Am. Rep. 140. See § 972.

413, citing and discussing *Bank v. Western U. Tel. Co.*, 52 Cal. 280; *McCord v. Same*, 39 Minn. 181, 39 N. W. ³ *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Bryant v. American Tel. Co.*, 1 Daly, 575; *Western U. Tel. Co. v. Sheffield*, 71 Tex.

is not bound to bring suit to test the validity of the attachments prior to his own. The rule that in cases of tort the party injured should make reasonable exertions to render the injury as light as possible does not apply in such a case.¹ But such liability does not exist if the property attached was of sufficient value to satisfy the claims of the prior attachment creditors and also the claim of the plaintiff, where it was sold at private sale pursuant to agreement by the parties, to which agreement the telegraph company was not a party, for less than its value.²

In an Arizona case a banker made an assignment, and the assignee telegraphed the fact to the cashier of a branch bank. There was negligence in the delivery of the message. After its receipt and before delivery the telegraph company's agent withdrew from the branch bank money deposited therein by himself and the company; other sums were paid to other unpreferred creditors. Some payments were also made after the message reached the cashier. The defendant was liable for the moneys paid during the time intervening between that at which the message should have been and the time it was in fact delivered; but not for what was disbursed after its delivery.³ If an agent settles his principal's claim against a debtor pursuant to authority given him by wire the telegraph company is liable for the loss resulting because of an error made in transmitting the message.⁴

The damages resulting from the amputation of a finger in consequence of the delay in delivering a message summoning a physician are sufficiently proximate if the company has full

570, 10 S. W. Rep. 752, 10 Am. St. 790; *Redington v. Pacific Postal Tel. Co.*, 107 Cal. 317, 40 Pac. Rep. 432, 48 Am. St. 132; *Bierhaus v. Western U. Tel. Co.*, 8 Ind. App. 246, 255, 34 N. E. Rep. 581; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899, 14 C. C. A. 166; *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. Rep. 738.

As delivered for transmission, a message read: "Attach property of A. for seven hundred ninety dollars;" as received it read: "Even hundred ninety dollars." The recipient was

not negligent in interpreting it to mean \$190. *Western U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. Rep. 903, 71 Am. St. 682.

¹ *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899, 14 C. C. A. 166.

² *Manier v. Western U. Tel. Co.*, 94 Tenn. 442, 29 S. W. Rep. 732.

³ *Stiles v. Western U. Tel. Co.*, 15 Pac. Rep. 712.

⁴ *Hasbrouck v. Western U. Tel. Co.*, 107 Iowa, 160, 77 N. W. Rep. 1034, 70 Am. St. 181.

knowledge of all the facts.¹ Where the agent knew that a message addressed to a physician requested him to come at once, the damages for failure to promptly deliver it, in consequence of which the physician did not arrive until after the occasion for his services had gone by, included compensation for the increased physical and mental suffering caused a woman who gave birth to a child, her labor being unduly prolonged because of the absence of a physician.²

The principle which holds banks liable when they wrongfully refuse to cash a creditor's check³ has been held inapplicable where a telegraph company negligently delayed to transmit money to a bank to meet the note of its customer. In such a case damages for injury to credit were refused, it not appearing that any pecuniary loss resulted from the protest of the note.⁴

§ 966. Same subject; liability for expenses. A party [307] having a case in court at a distance gave a telegraph company this message addressed to his attorney: "Hold my case until Tuesday or Thursday. Please reply." Receiving no answer, and inferring, therefore, that there could be no postponement, he went with his counsel to attend the trial, found that the message had not been sent and that his case had been adjourned to a future day, so that his journey and that of his counsel were wholly useless. In an action for neglect to send the message he recovered the expenses of himself and counsel and the reasonable fee he was obliged to pay counsel for making the trip.⁵ In a case where there was an error made in transmitting a message concerning the time a case would be called for trial the company was liable for the expenses of going to the place where it was to occur and returning therefrom, and for the loss of time,⁶ but not for the damage resulting from a

¹ *Brown v. Western U. Tel. Co.*, 6 Utah, 219, 21 Pac. Rep. 988. See *Western U. Tel. Co. v. Morris*, 83 Fed. Rep. 992, 28 C. C. A. 56, and § 961.

² *Western U. Tel. Co. v. Church*, 90 N. W. Rep. 878 (Neb.); *Same v. Cooper*, 71 Tex. 507, 10 Am. St. 772, 1 L. R. A. 728, 9 S. W. Rep. 598.

³ § 77.

⁴ *Smith v. Western U. Tel. Co.*, 150 Pa. 561, 24 Atl. Rep. 1049.

⁵ *Sprague v. Western U. Tel. Co.*, 6 Daly, 200.

⁶ *Western U. Tel. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. Rep. 649; *Bliss v. Baltimore & O. Tel. Co.*, 30 Mo. App. 103. See *Western U. Tel. Co. v. Lycan*, 60 Ill. App. 124.

mill remaining idle while the owner was absent, no notice of that consequence having been given.¹ One who makes a journey earlier than he would have done but for the delay in delivering a message may recover any expense because it was then made over what would have been incurred if it had not been then made; if the journey had to be repeated, the whole expense of the first journey may be recovered.² Expenses reasonably incurred because of negligence in delivering or transmitting messages have been recovered under a considerable variety of circumstances.³ But such liability does not attach where expenses are incurred on the faith of statements made by an employee outside the line of his duty,⁴ nor unless they are the proximate result of the defendant's default.⁵ A statute declaring that the damages recoverable for a wrongful conversion shall include a fair compensation for the time and money properly expended in pursuit of the property has been held not to be applicable in an action against a telegraph company to recover money paid by a bank because of the fraudulent act of the company's agent in inducing the bank to pay money to a third person.⁶ For the breach of a contract to collect a sum of money at a distant place and immediately transmit it to the payee the latter may recover the sum paid the company, the money due him and interest thereon and the expense incurred by reason of the breach.⁷

§ 967. Same subject; loss of employment and profits of business. Where through negligent delay in delivering a message the plaintiff lost a situation, he was allowed to re-

¹ *Western U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. Rep. 649, 9 L. R. A. 744; *Rich Grain Distilling Co. v. Western U. Tel. Co.*, 13 Ky. L. Rep. 256 (Ky. Super. Ct.).

² *Western U. Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. Rep. 639.

³ *Western U. Tel. Co. v. Jump*, 8 Ky. L. Rep. 531 (Ky. Super. Ct.); *Rich Grain Distilling Co. v. Western U. Tel. Co.*, 13 Ky. L. Rep. 256 (Ky. Super. Ct.); *Lee v. Same*, 51 Mo. App. 375; *Tobin v. Same*, 146 Pa. 375, 23 Atl. Rep. 324, 28 Am. St. 802; *Western U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429,

21 S. W. Rep. 109; *Same v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. Rep. 627; *Same v. Murray*, 68 S. W. Rep. 549 (Tex. Ct. of Civ. App.).

⁴ *Western U. Tel. Co. v. Mullins*, 44 Neb. 732, 62 N. W. Rep. 880; *Same v. Foster*, 64 Tex. 220, 53 Am. Rep. 754.

⁵ *Western U. Tel. Co. v. Carter*, 85 Tex. 580, 22 S. W. Rep. 961, 34 Am. St. 826.

⁶ *Pacific Postal Tel. Cable Co. v. Bank*, 109 Fed. Rep. 369, 48 C. C. A. 413.

⁷ *Robinson v. Western U. Tel. Co.*, 24 Ky. L. Rep. 452, 68 S. W. Rep. 656.

cover substantial damages in view of the salary and the time for which he would have been employed;¹ which, in a case where the telegram, if delivered, would have consummated a contract of employment for one year, were measured by the difference between the salary that would have been received and what was made by working for other persons.² The loss of a broker's commissions may be recovered;³ a lawyer may recover a fee he would have earned,⁴ and so may a physician.⁵ Where the delay deprives the receiver of the benefit of employment at daily wages, no period for its continuance being fixed, only nominal damages can be recovered.⁶ Under a tender of employment at so much per month, there being no specific time fixed for the continuation thereof, the recovery cannot exceed the compensation fixed for one month.⁷ In a Texas case the plaintiff lost a contract for threshing thirty thousand bushels of grain under the following circumstances. His agent wired him: "Have thirty thousand bushels for you, if you can come at once." The answer, which was negligently delayed, apprised the agent that the threshing machinery would be shipped at once. In consequence of the delay some of the parties who had arranged with the agent for the threshing of grain made contracts with others for that work. The company was liable for the loss of these contracts, though there was no delay in getting the machinery to the place where the work was to have been done.⁸ While a dealer who has ordered

¹ Western U. Tel. Co. v. Fenton, 52 Ind. 1; Kemp v. Western U. Tel. Co., 28 Neb. 661, 44 N. W. Rep. 1064, 26 Am. St. 363; Western U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. Rep. 451, 48 Am. St. 723; Baldwin v. Western U. Tel. Co., 93 Ga. 692, 44 Am. St. 194, 21 S. E. Rep. 212 (*prima facie* an offer of employment at a stated sum per month covers the term of not less than one month); Western U. Tel. Co. v. Partlow, 71 S. W. Rep. 584 (Tex. Ct. of Civ. App.).

² Western U. Tel. Co. v. Valentine, 18 Ill. App. 57; Same v. McKibben, 114 Ind. 511, 14 N. E. Rep. 894; Same v. Longwill, 5 N. M. 308, 21 Pac. Rep. 339; Western U. Tel. Co. v. Hines, 96 Ga. 688, 23 S. E. Rep. 845, 51 Am. St.

159; McGregor v. Western U. Tel. Co., 85 Mo. App. 308.

³ Western U. Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Walden v. Western U. Tel. Co., 105 Ga. 275, 31 S. E. Rep. 172; Western U. Tel. Co. v. Cook, 54 Neb. 109, 74 N. W. Rep. 395.

⁴ Western U. Tel. Co. v. McLaurin, 70 Miss. 26, 13 So. Rep. 36.

⁵ Fairley v. Western U. Tel. Co., 73 Miss. 11, 18 So. Rep. 796.

⁶ Merrill v. Western U. Tel. Co., 68 Me. 97. It is not easy to understand on what theory the recovery of one day's wages was not allowed.

⁷ Mondon v. Western U. Tel. Co., 96 Ga. 499, 23 S. E. Rep. 853.

⁸ Western U. Tel. Co. v. Bowen, 84 Tex. 76, 19 S. W. Rep. 554.

goods by telegraph to fill an order received by him may recover the profits he would have made if the message he sent had been promptly delivered, he cannot recover for the loss resulting from the suspension of his business.¹ The expense attendant upon securing a new position by one who has lost employment as teacher is not recoverable unless it is specially claimed.²

§ 968. When company charged with knowledge of sender's purpose. Independently of all other considerations, to be recoverable damages must be the proximate and natural consequence of the defendant's acts or default. This is the [308] universal requirement; remote and speculative effects are always excluded in the assessment of compensatory damages.³ Where a telegram was sent by defendant's line to plaintiff asking for \$500, and by negligence of its employee it was changed to \$5,000, which the plaintiff sent to the party making the request, and he upon receipt of it appropriated it to his own use and absconded, it was held that the defendant's negligence was not the proximate cause of the loss; the embezzlement did not naturally result therefrom, and could not reasonably have been expected.⁴ To maintain an action for special damages it has sometimes been stated that they must appear to be the legal and natural consequences arising from

¹ *Walden v. Western U. Tel. Co.*, 105 Ga. 275, 31 S. E. Rep. 172.

² *Western U. Tel. Co. v. Partlow*, 71 S. W. Rep. 584 (Tex. Ct. of Civ. App.).

³ The failure to deliver a message reading thus: "Cannot come today. Will come tomorrow," does not impose liability for mental distress, nor for physical discomfort occasioned by walking and carrying heavy parcels a distance of four blocks. *Western U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. Rep. 358.

Neglect to promptly deliver a message saying: "Wait. I mail letter this day with particulars," does not make the telegraph company liable for the loss of a business situation by the sendee. *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278, 24 So. Rep. 535.

⁴ *Lowery v. Western U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *Johnson v. Same*, 79 Miss. 58, 89 Am. St. 584, 29 So. Rep. 787; *Western U. Tel. Co. v. Murray*, 68 S. W. Rep. 549 (Tex. Ct. of Civ. App.). See § 961.

It is held in Texas that it is no defense to a company whose negligence has prevented the person to whom a message was sent from going to the place to which he was summoned on the first train that could have been taken, that a second train on which he went would have taken him there in time but for the fault of the railway company. *Loper v. Western U. Tel. Co.*, 70 Tex. 689, 8 S. W. Rep. 600. This is clearly wrong; there was an intervening independent cause. See § 961.

the tort or breach of contract, and not from the wrongful act of a third person induced thereby; in other words, the damage must proceed wholly and exclusively from the injury complained of.¹ The law does not undertake to hold a person who is chargeable with a breach of duty toward another with all the possible consequences of his wrongful act. It in general takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and may be reasonably expected to follow under ordinary circumstances from the misconduct.² This rule, as we have seen, generally excludes all but nominal damages, or the price paid for sending the message, where it is written in cipher or unintelligible terms, and is accompanied with no explanation. [309] From this limit the contemplation of damages will expand with the surface of disclosure. This proposition is well illustrated and supported by a New York case,³ which has often been cited and approved. The plaintiffs at San Francisco, California, contracted with L. of that place to purchase for them in New York on commission three hundred pistols, and to deliver them in San Francisco by the steamer which should leave New York on the 20th of January, 1857; for which the plaintiffs were to receive a commission of seven and a half per cent. on the cost. They agreed to hold themselves

¹ *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 765; *First Nat. Bank v. Western U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485; 2 Pars. on Cont. 257.

In the syllabus of *McColl v. Western U. Tel. Co.*, 44 N. Y. Super. Ct. 487, it is stated that, "where the damage claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract." The case does not warrant so absolute a statement, nor can such a proposition be maintained as law; there may be a legal loss in being deprived of benefits from

future dealing depending on the voluntary action of a third person; damages are often estimated and limited by reference to such action. The case of *Western U. Tel. Co. v. Fenton*, 52 Ind. 1, is an instance. See *Beaupri v. Pacific, etc. Tel. Co.*, 21 Minn. 155.

² *Chapman v. Western U. Tel. Co.*, 90 Ky. 265, 13 S. W. Rep. 880; *Lowery v. Same*, 60 N. Y. 198, 19 Am. Rep. 154; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Rigby v. Hewett*, 5 Ex. 240, per Pollock, C. B.; *Western U. Tel. Co. v. McKinney*, 2 Tex. Civil Cas., §§ 644, 646; *Same v. Henley*, 23 Ind. App. 14, 54 N. W. Rep. 775.

³ *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530.

responsible to the sum of \$500 to be paid to L. by them if they failed to fulfill the agreement. For the purpose of executing this agreement the plaintiffs remitted from San Francisco by the Pacific Mail Company \$10,000, which arrived in New York January 13. The plaintiffs delivered to defendants at New Orleans on the 16th of January a dispatch, addressed to plaintiff's firm in New York, in these words: "Get \$10,000 of the Mail Company." On the following day the telegram was transmitted to and received at the defendant's office in New York; but the address had been so changed that it could not be delivered until the correct address was sent, which was on the morning of the 23d of January. By reason of the non-delivery of the dispatch before the 20th of January the plaintiff's agreement with L. could not be performed for want of the money mentioned in the dispatch. The plaintiffs paid L. the \$500 stipulated damages. It appeared that the sole cause of the non-delivery of the dispatch was the negligent error in the address. The actual loss of the plaintiffs was \$970.09; viz., \$500 paid L.; \$462 loss of commissions they were to receive; \$6.50 paid for transmitting the message, and \$9.59 interest on the \$10,000 for five days while its use was delayed by the erroneous address of the message. But because the defendants had no information whatever in relation to the subject of the dispatch, or the purposes to be accomplished by it except what could be derived from its language, the recovery of damages was limited to the last two items. If the message as delivered fully discloses that it is important no other notice need be given the company's agent.¹

[310] § 969. Same subject; details need not be disclosed. It does not appear to be necessary that the company should be apprised of details if the purpose of the message is made known; they will be liable for the actual injury which directly results from thwarting that object by a negligent performance of their duties, though there is no mention of facts material to the attainment of that purpose.² A party in Portland,

¹ Western U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734, 13 Am. St. 843.

² Western U. Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. Rep. 432; Same v. Church, 90 N. W. Rep. 878 (Neb.).

In Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 Am. Rep. 605, the company undertook to furnish the plaintiff, at a specified place, daily dispatches, showing the prices of grain both in Chicago and New York, for

Maine, addressed this message to a party in Baltimore: "Ship cargo named at ninety, if you can secure freight at ten. Wire us result." In an action against the company to whom this message was delivered they admitted their liability for failure to deliver it, and in determining the damages therefor the court assumed their knowledge of the object of the sender to be derived from the message itself. The court say: "We assume that the plaintiffs can prove that the firm in Baltimore to whom the telegram was addressed had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiff; that the telegram contained notice of acceptance

the consideration of ten dollars per month. During the engagement defendant's agent delivered to plaintiff a dispatch, showing the market price of wheat in Chicago to be \$1.24½ per bushel for a certain day. This report was incorrect; on that day the price was \$1.56. Upon that dispatch the plaintiff acted; he bought five thousand bushels. In an action upon the contract he recovered damages measured by that discrepancy. Beck, J., said: "It is claimed that as plaintiff was engaged in buying grain at S. R., and gave defendant no notice that the market report furnished was intended to guide him in purchases of wheat in Chicago, he cannot recover as damages the loss which he sustained by reason of the error in the dispatch in the purchase of five thousand bushels of wheat. Such damages, it is claimed, did not enter into the contemplation of the parties when the contract was made. There is nothing in the evidence upon the subject further than that plaintiff was a purchaser of grain at S. R. and that he sold in Chicago. It also appears that he made contracts for the delivery of grain at that city at a future day. All of his transactions were based upon his information of the Chicago market; and that he might have speedy and accurate in-

formation, he entered into the contract sued upon. It is within the ordinary course of business for a dealer to make contracts for future delivery, and to depend upon future purchases to enable him to fulfill his obligation. The purchases are made whenever the grain can be had at a price offering an inducement to the dealer, and such purchases are often made by business men of this state in Chicago to fill their contracts for delivery in that city. These facts, it will be presumed, entered into the contemplation of the parties to the contract in suit. The defendant, then, cannot claim that it is released from liability for the loss sustained by plaintiff on the ground of a want of notice of the transaction in which defendant used the information furnished by the report of the market. It appears to us that as the defendant contracted to furnish reports of the Chicago grain market to plaintiff, it was sufficiently notified that plaintiff's transactions were to be in that market, and there is no evidence raising a presumption that defendant was authorized to regard him as a seller only of grain there." *Evans v. Western U. Tel. Co.*, 102 Iowa, 219, 71 N. W. Rep. 219. Compare *Western U. Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105, 26 S. W. Rep. 117.

of the proposition; that the condition named, 'if you can secure freight at ten' (cents), could have been complied with if the message had been delivered when it should have been; that if it had been thus delivered the bargain would have been closed, and the plaintiffs would at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents. The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act by which the bargain would become operative and complete. It seems clear that such a message has a distinctive and clear pecuniary value, and demands of the party, who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence, and that he is subject, at least to like rules and liabilities, as if he (not being a common carrier) had undertaken to transport an article of merchandise. On its face it gives clear intimation that it is of a business character relating to a distinct and specific contract, and that, according to the well-known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured. In this respect it differs from a class of cases to be found in the re-[311] ports where the message was so brief, or enigmatical, or so obscure, that it gave the operator no notice that it was of any value pecuniarily." The defendant was held liable for the value of the bargain.¹ In another case the company negligently delayed the delivery of this message: "Will take your hogs at your offer," and the same rule of damages was applied. This message did not state the number of hogs nor the price. It was sufficient that on its face it purported to be an acceptance of an offer for the sale of merchandise.² The non-delivery of this telegram: "Hold my case until Tuesday or Thursday; please reply," subjected the company to damages for the expense of a journey by the party and his counsel, and a fee for the time of the latter.³ For delay in delivery of this message: "Ship your hogs at once," the company were

¹ True v. International Tel. Co., 60 Me. 9.

² Squire v. Western U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157.

³ Sprague v. Western U. Tel. Co., 6 Daly, 200; Western U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. Rep. 649, 9 L. R. A. 744.

held liable for decrease in market value of one hundred and eighty fat hogs.¹

A message from commission merchants reading: "Ten cars new two whites Aug. shipment fifty-six half; prompt reply," is notice that it is important and disclosed the nature of the business as fully as the case demanded.² "Cover two hundred September and one hundred August," being shown to be ordinary expressions used in the cotton trade, meaning that the person receiving the message should sell the number of bales specified in each month, was sufficient to make the company liable for an error.³ Where a dealer telegraphed a broker: "Please buy, in addition to thousand August, one thousand cheapest month," also "Put stop order on five thousand December, seventeen cents," it was held that, read in the light of well-known usage in commercial correspondence, it reasonably informed the operator that the matter was of business importance, and disclosed the transaction as far as necessary to accomplish the purpose for which it was sent.⁴ In answer to a message which gave the price of "hams, sixteens," and also the price of shoulders, lard and beef hams, the plaintiff, on the same day and from the same office at which he received it, sent this in reply: "Will take two cars sixteens." Defendant was held to have notice that plaintiff was accepting an offer made by the sender of the first telegram, the addressee of the second, purchasing two car-loads of hams at the price named.⁵ In another case the message as written was: "Will give one fifty for twenty-five hundred at London. Answer at once, as I have only till night." This disclosed enough to show that it related to a business transaction involving the purchase and sale of property, and that a pecuniary loss might result from an incorrect transmission.⁶ "You had better come

¹ *Manville v. Western U. Tel. Co.*, 37 Iowa, 214, 18 Am. Rep. 8; *Thompson v. Same*, 64 Wis. 531, 25 N. W. Rep. 789, 54 Am. Rep. 644.

² *Western U. Tel. Co. v. Harris*, 19 Ill. App. 347.

³ *Western U. Tel. Co. v. Blanchard*, 68 Ga. 299. See *Same v. Fatman*, 73 id. 285, 54 Am. Rep. 877. The *Blanchard* case is overruled on another point

in *Moss v. Exchange Bank*, 102 Ga. 808, 30 S. E. Rep. 267.

⁴ *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 23 N. E. Rep. 583, 19 Am. St. 55, 7 L. R. A. 474.

⁵ *Mowry v. Western U. Tel. Co.*, 51 Hun, 126, 4 N. Y. Supp. 666.

⁶ *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Western U. Tel. Co. v. Hart*, 62 Ill. App. 120.

and attend to your claim at once," indicated to the telegraph company that the addressee had a claim of a pecuniary nature which should be attended to at the place at which the message was dated, that the matter was urgent, and that loss would probably follow the want of such attention which might be prevented by acting in pursuance of the message.¹

In a Texas case a man who desired to be met at a particular place by his horses and a dog named "Shep" telegraphed an employee to that effect. The operator was told that the man, dog and horses were wanted to assist in driving sheep the sender had bought from the place designated in the message to that where the servant was. The word "Shep" was negligently changed to "sheep," and in consequence the employee drove sheep to the place designated, and because of delay failed to meet his master there, in consequence of which the purchased sheep suffered harm. It was held that the telegraph company, having notice of the place from and the place to which the sheep were to be driven, was chargeable with information of the distance between them, the character of the country, the expense of driving the sheep, the effect of delay upon and the injury resulting to them.² A telegram reading: "Come at once. Bring father to secure my bond," shows its importance and the necessity for prompt delivery, and shows enough to put the telegraph company upon inquiry as to whether the sender was in jail, and to render it liable for his longer confinement than would have been necessary if the message had been promptly delivered.³

§ 970. Same subject; result of the decisions. It is to be observed that in these instances there was sufficient on the face of the dispatches to show not only that they related to business of pecuniary concern, but they were likewise explicit enough to suggest the nature, though not the extent, of the consequences of any negligence touching their transmission or delivery. They support the conclusion that a telegraph company may be made liable for the actual damages resulting directly and proximately from the non-receipt or the delayed

¹ *Western U. Tel. Co. v. Sheffield*, Tex. 329, 15 Am. St. 835, 12 S. W. Rep. 71 Tex. 570, 10 S. W. Rep. 752, 10 Am. 41, 63 Tex. 668.

St. 790.

³ *Western U. Tel. Co. v. Gossett*, 15

² *Western U. Tel. Co. v. Edsall*, 74 Tex. Civ. App. 52, 38 S. W. Rep. 536.

receipt of a telegram through their negligence, where the business to which it relates and the purpose to which it is intended to contribute are stated or disclosed in a general way. It is not essential that the company be informed of the magnitude or of any of the usual incidents of the transaction; or that all the requisite agencies and conditions to accomplish the object indicated have been or will be so arranged as to insure success. It is their duty to inquire for such particulars if they desire them.¹ Telegraphic messages are very generally brief for purposes of economy, even when there is no thought [312] of concealment. Relating to certain subjects on which there is much traffic by telegraph certain abbreviated or condensed expressions are in general use among those who conduct this traffic, and telegraphic operators ought to know their conventional meaning whether they are intelligible to the general public or not.

§ 971. Same subject; opposing view. There are some cases which do not confirm the foregoing observations, and appear to be out of harmony with the decisions that suggested them. Thus, in Maryland, a suit was brought by a broker to recover damages resulting from the failure to transmit a dispatch containing this direction: "Sell fifty gold." It was proved that the dispatch would be understood among brokers to mean \$50,000 of gold, but it was not shown that the company's agent so understood it; and it was held that its nature should have been communicated to him at the time it was of-

¹ *Pepper v. Telegraph Co.*, 87 Tenn. 554, 4 L. R. A. 660, 11 S. W. Rep. 783; *Western U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. Rep. 41, 15 Am. St. 835; *Same v. McKinney*, 2 Tex. Civ. Cas. 562; *Hadley v. Western U. Tel. Co.*, 115 Ind. 191, 15 N. E. Rep. 845; *Rittenhouse v. Independent Line Telegraph*, 44 N. Y. 263, 4 Am. Rep. 673; *Candee v. Western U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Erie Tel. & T. Co. v. Grimes*, 82 Tex. 89, 17 S. W. Rep. 831; *Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. Rep. 221, 27 Am. St. 891; *Herron v. Western U. Tel. Co.*, 90 Iowa, 129, 57 N. W. Rep. 696; *Hendershot v. Same*, 106 Iowa, 529, 76 N. W. Rep. 828, 68 Am. St. 313; *Blackburn v. Kentucky Central R. Co.*, 15 Ky. L. Rep. 303 (Ky. Super. Ct.); *Dixon v. Western U. Tel. Co.*, 3 App. Div. 60, 38 N. Y. Supp. 1056; *Western U. Tel. Co. v. Bowen*, 84 Tex. 476, 19 S. W. Rep. 554; *Same v. Williford*, 2 Tex. Civ. App. 544, 22 S. W. Rep. 244; *Fererro v. Western U. Tel. Co.*, 9 D. C. App. Cas. 455, 35 L. R. A. 548; *Mitchell v. Same*, 5 Tex. Civ. App. 527, 24 S. W. Rep. 550; *Brooks v. Same*, — Utah, —, 72 Pac. Rep. 499; *Western U. Tel. Co. v. Birge-Forbes Co.*, 69 S. W. Rep. 181 (Tex. Ct. Civ. App.).

ferred to be sent, in order that the company might have observed the precautions necessary to guard itself against the risk; and that it was error to instruct the jury that plaintiff was entitled to recover to the full extent of his loss by the decline in gold.¹ Where the plaintiff intrusted the defendant, a Canadian company, with this message addressed to a person in Oswego: "Do accept your offer — ship, to-morrow, fifteen or twenty hundred," Robinson, C. J., said: "What would the message . . . have informed the man or boy whose duty it was to take it from the wire, and to send it by another man to the office of the American company? Nothing but that the plaintiff had accepted an offer, he could not tell for what, and would ship fifteen or twenty hundred, whether of staves or shingles, or barrels of flour, or bushels of grain, he could not tell; nor could he guess what might be the occasion for haste or the consequences of delay or neglect. A possible loss or gain to the plaintiff, depending on the time at which the message would arrive, was a consequence which the defendants could not appreciate, and cannot be supposed to have contemplated at the time they received the message."²

In a Minnesota case³ an order for merchandise, contained in [313] a message, was negligently delayed for several days, and the price advanced in the meantime; when received, the dealer refused to fill the order at the price current on the day of its date, or at any less than the advanced market price current at the time of its arrival. It was properly held that the sender was only entitled to recover the price paid for the message, because, if sent, it would not have concluded a bargain for the merchandise, and it was not shown as a fact that the plaintiff would have obtained it at the then market price if it had been duly delivered. But the court said that the findings implied that the defendant had only such information as was afforded by the message itself. "The message purports to relate to some business transaction the nature of which is not disclosed. It gives no intimation of the magnitude or importance of the business involved, or of the amount of damage that might re-

¹ United States Tel. Co. v. Gilder-sleeve, 29 Md. 232. See Shields v. Washington Tel. Co., 9 West. L. J. 5. Ky. 104, 4 Am. St. 126; Kinghorne v. Montreal Tel. Co., 18 Up. Can. Q. B. 60. ³ Beaupri v. Pacific & A. Tel. Co.,

² Smith v. Western U. Tel. Co., 83 21 Minn. 155.

sult from a delay in transmitting it. The company might have known from the tenor of the message that it related to a purchase of goods, and was presumably of some value; but the message itself, 'will take two hundred extra mess, price named,' would hardly have informed the defendant of the nature, quantity, price or value of the goods which the plaintiff offered to take. The damage the plaintiff might suffer from a rise in the market price of pork, if this message were not seasonably delivered, could hardly have entered into the contemplation of the defendant at the time he received and undertook to transmit this message as a probable consequence of the breach of its contract."¹ The court add, however, that whether the information conveyed to the company by the message was sufficient to render it liable for any consequential damages the plaintiff might have sustained from its delay, it was not necessary to decide, and announced the general principle, which all the cases affirm, that "considering the magnitude of the damages which may result from mistake or delay in transmitting important messages, damages often out of all proportion to the price paid for transmission, it is simply [314] justice to the company that it should not be held liable for such consequential damages unless the character and object of the message appear upon its face, or the nature of the risk assumed by the company is made known to it by the sender."

It has been ruled in Texas, though the later cases are to the contrary, that the personal knowledge of the agent of the telegraph company who receives the message, derived independently of it and without communication with the sender, is not imputable to the company.² The Illinois appellate court has gone so far as to hold that notice to the local agent at the office where a message is received of the nature and importance of it, such agent having no authority or control over the agent at the place where the message is to be delivered, does not

¹ Citing *Stevenson v. Montreal Tel. Co.*, 16 Up. Can. Q. B. 530, *Allen's Tel. Cases*, 71, 98; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165.

² *Western U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. Rep. 70, 18 Am. St. 37. See *Same v. Moore*, 76 Tex. 66, 13 S. W. Rep. 949; *Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. Rep. 221, 27 Am. St. 891; *Western U. Tel. Co. v. Bowen*, 84 Tex. 76, 19 S. W. Rep. 554.

affect the company so as to bind it for the consequences of the latter agent's negligence in failing to deliver the message.¹ The logical result of this holding is that if a message does not of itself disclose its character, the sender cannot charge the company with knowledge of it unless he notifies every agent whose duty it may be to handle it in any way of the facts connected with it. This, surely, is a doctrine which cannot find support either in law or reason.

§ 972. **Form of action; who may sue.** In England the only duty of a telegraph company is that arising out of contract, and, therefore, only the sender or party making the contract has a right of action for its breach.² There is no liability to the receiver of a telegram even for a misfeasance.³ In this country, however, a different doctrine prevails.⁴ "As will be seen on examination of their decisions, the American courts have not all agreed upon a common reason for the rule so generally adopted. The majority, apparently, have rested it upon the idea that the telegraphic agency is engaged in the exercise of a public franchise, having relation to the commerce of and between the states, and in consequence owes to the sender of the message a double duty, one by reason of the contract, the other by virtue of the general obligation to perform the assumed undertaking; and to the person addressed, a single duty by virtue of the same general obligation. Others take the ground that the person addressed may be the beneficiary of the contract made upon its delivery to the transmitter, and that his right of action does not depend upon whether the sender had been constituted his agent for the purpose, but upon the question who was to be served in the transaction, and who has been damaged. Others, again, assign for reason that the act of the telegraph company in altering the message is the mis-

¹ Pope v. Western U. Tel. Co., 14 Ill. App. 531.

² Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706, 10 B. & S. 769; Dickson v. Reuter Tel. Co., 2 C. P. Div. 62, 3 id. 1. See Feaver v. Montreal Tel. Co., 23 Up. Can. C. P. 150, 24 id. 258.

The same rule has been applied in New South Wales in an action

against a public officer who mistakenly delivered a message to the wrong person. Blakeney v. Pegus, 6 N. S. W. 323 (1885).

³ Dickson v. Reuter Tel. Co., *supra*.

⁴ Herron v. Western U. Tel. Co., 90 Iowa, 129, 134, 57 N. W. Rep. 696; Texas Tel. & T. Co. v. Seiders, 9 Tex. Civ. App. 431, 29 S. W. Rep. 258.

representation of a fact which, if reasonably resulting in injury to the receiver, entitles him to an action for his damages.”¹

For the gross negligence of a company's agent in sending

¹ Per Shepard, J., in *Fererro v. Western U. Tel. Co.*, 9 D. C. App. Cas. 455, 467, 35 L. R. A. 548.

The addressee has no contractual relation with the telegraph company. *Curtin v. Western U. Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109.

One who sends a message may maintain an action for its non-delivery although his name was not signed to it and the defendant was not notified when it was sent that it was being done at the direction or for the benefit of the plaintiff. *Landie v. Western U. Tel. Co.*, 124 N. C. 528, 32 S. E. Rep. 886.

An undisclosed principal may sue in his own name to recover for unreasonable delay in delivering a message sent him by an agent. *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685, 37 S. E. Rep. 981.

The sendee may sue if the message shows that he is interested in it, or that it is for his benefit, or that he will be damaged by negligence in its transmission or delivery. *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. Rep. 148, 21 L. R. A. 810.

The right of the addressee to sue is dependent upon his connection with the contract or the existence of knowledge on the part of the company, derived from the message or otherwise, that the contract was made for his benefit. *Western U. Tel. Co. v. Carter*, 85 Tex. 580, 34 Am. St. 826, 22 S. W. Rep. 961; *Southwestern Tel. & T. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. Rep. 686; *Western U. Tel. Co. v. Wood*, 57 Fed. Rep. 471, 6 C. C. A. 482, 21 L. R. A. 706; *McCormick v. Western U. Tel. Co.*, 79 Fed. Rep. 449, 25 C. C. A. 35, 38 L. R.

A. 684; *Butner v. Same*, 2 Okl. 234, 37 Pac. Rep. 1087.

It is held in *Sherrill v. Western U. Tel. Co.*, 109 N. C. 527, 14 S. E. Rep. 94, that the non-delivery of a message sent by one left in charge of the house of the plaintiff to a person with whom he was visiting, on a matter relating to the affairs of the plaintiff, gave him a right of action as the real party in interest. And so in Tennessee, the plaintiff being named in the message as the beneficiary. *Telegraph Co. v. Mellon*, 96 Tenn. 66, 33 S. W. Rep. 725.

The beneficiary may sue if the company is informed, independently of the message, that he is such. *Western U. Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. Rep. 688; *Same v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. Rep. 998.

A message asking the addressee to come at once, and stating that a person designated by his Christian name was very low, shows that the former was a beneficiary in the contract. *Western U. Tel. Co. v. Hale*, 11 Tex. Civ. App. 79, 32 S. W. Rep. 814; *Same v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. Rep. 225. See § 981.

In Alabama the addressee cannot sue in tort unless he was, directly or by agent, a party to the contract for the sending of the message. *Western U. Tel. Co. v. Adair*, 115 Ala. 441, 22 So. Rep. 73; *Postal Tel. Cable Co. v. Ford*, 117 Ala. 612, 23 So. Rep. 684; *Ford v. Postal Tel. Cable Co.*, 124 Ala. 400, 27 So. Rep. 409.

The receiver cannot maintain *assumpsit* for a loss caused by sending a message incorrectly, but is limited to an action on the case. *Webbe v. Western U. Tel. Co.*, 169 Ill. 610, 48 N. E. Rep. 670.

a dispatch, purporting to be that of the cashier of a bank, at the request of one known to the operator not to be such cashier, and without evidence of the latter's authority, to the effect that he would honor the drafts, for a large amount, of the person so procuring the transmission of such message, whereby a banking house to which it was presented was induced to pay money to the person so recommended, the company was held liable to make good the loss.¹ So a company was held liable in damages to the recipient of a message for the misfeasance of their agent in sending a different message from that addressed to him.² It was ruled that, though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, spring from the public nature of their employment and the contract under which the particular duty is assumed. If they negligently or wilfully violate their duty to send the very message furnished, they are responsible to the party to whom the erroneous message is addressed in an action on the case.³ Even if the company be considered only as the agent of the sender, they are liable to [315] third persons as wrong-doers for any misfeasance in the execution of the duties confided to them.⁴ Accordingly, where

¹ *Elwood v. Western U. Tel. Co.*, 45 N. Y. 549, *Allen's Tel. Cases*, 594, 6 Am. Rep. 140. See § 964.

² *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

³ *Western U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. Rep. 36; *Same v. Dubois*, 128 Ill. 248, 15 Am. St. 109, 21 N. E. Rep. 4; *Webbe v. Western U. Tel. Co.*, 169 Ill. 610, 48 N. E. Rep. 670; *Shingleur v. Same*, 72 Miss. 1030, 18 So. Rep. 425, 30 L. R. A. 444; *Lee v. Western U. Tel. Co.*, 51 Mo. App. 375 (holding that when a message is addressed to an employee, in the care of the employer, and relating to the business of the latter, if the telegraph company is not advised thereof, the right of action is in the employee).

⁴ *New York, etc. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Western U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. Rep. 4, 15 Am. St. 109;

Same v. McKibben, 114 Ind. 511, 14 N. E. Rep. 894; *Hadley v. Western U. Tel. Co.*, 115 Ind. 191, 15 N. E. Rep. 845; *Wolfskehl v. Same*, 46 Hun. 542; *Wadsworth v. Same*, 86 Tenn. 695, 6 Am. St. 864, 8 S. W. Rep. 574; *Western U. Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. Rep. 339; *Chapman v. Western U. Tel. Co.*, 90 Ky. 265, 13 S. W. Rep. 880; *Young v. Same*, 107 N. C. 370, 9 L. R. A. 669, 11 S. E. Rep. 1044; *Western U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, 16 Am. St. 920, 6 L. R. A. 844.

If an agent delivers and pays for the transmission of a message to his principal, whose name he discloses, the principal may sue in his own name for the failure to deliver it within a reasonable time. *Kennon v. Western U. Tel. Co.*, 92 Ala. 399, 9 So. Rep. 200.

they delivered a message for *two hand bouquets*, changed so as to read *two hundred bouquets*, they were held liable to the receiver for the damages resulting from the expense of a partial execution of the erroneous order before the mistake was discovered and corrected.¹ A company, by changing a telegram sent to plaintiff, informed him that eight thousand bushels of wheat could be furnished him for transportation from C. to O., three thousand being the amount written in the message furnished for transmission. In consequence of this information he gave up a contract for a cargo from another place, and sent his vessel to C., where he obtained only three thousand bushels. It was held that a reasonable compensation for sending his vessel to C. and back was all the plaintiff was entitled to recover as damages; that his real damage arose from giving up the contract for the other cargo, but that could not be taken into consideration because the defendant had no notice of it; that he was not entitled to freight on five thousand bushels which his vessel did not carry, as it did not appear that he could have obtained this freight if the message had been correctly transmitted.²

Under a statute making telegraph companies liable for unreasonable delay in transmitting messages and giving the party injured a right of action, one who sends a message from another state to a person in the state in which such statute is in force may recover for injury sustained by negligent delay in transmitting it though the element of damage (mental suffering) was not a ground of recovery in the state from which the message was sent.³ The right to recover is not dependent upon the existence of a contractual relation; failure to deliver the message entitles the party aggrieved to at least nominal damages, to which may be added compensatory or exemplary damages in the discretion of the jury.⁴

§ 973. Mitigation of damages by injured party. It is the duty of a party who has ordered a message sent, within a reasonable time after he knows that it has not been trans-

¹ New York, etc. Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338.

² Lane v. Montreal Tel. Co., 7 Up. Can. C. P. 23.

³ Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. Rep. 1063.

⁴ Telegraph Co. v. Mellon, 96 Tenn. 66, 33 S. W. Rep. 725.

mitted, to take all reasonable steps to prevent further loss.¹ If he has goods to deliver or has arranged to procure them for delivery he must make an effort to sell them, and if he has made arrangements for their purchase for the purpose of meeting his contract of sale, he cannot extend them from month to month on a declining market and hold the company for the loss.² Where an order for the purchase of one thousand shares of stock was negligently transmitted to read one hundred, it was held that it was the duty of the sender as soon as he knew of the error to have caused the purchase of the additional nine hundred shares at the price at which the stock was then being sold. He could not wait for a further advance and hold the company for the enhanced price after such knowledge came to him.³ A debtor whose default in the nonpayment of interest, by reason of a negligent mistake in transmitting a message, has caused his debt to mature cannot recover the damages resulting from the sacrifice of his lands unless he shows that he was unable to obtain the money to prevent their sale.⁴ Where a message quoted a lower price on goods than the seller offered, the buyer could not recover the difference between the price actually given and that at which he agreed to resell, he having refused to accept the property on discovering the mistake. His own conduct caused the loss of the profit.⁵

There is a difference of opinion concerning the duty of the sender of a message who offers property for sale where the offer made by him is reduced by negligence in transmission, and as reduced is accepted by the person to whom it is made. In Georgia it is held that the person making the offer is not bound to revoke it after knowledge comes to him that as ac-

¹ *Western U. Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. Rep. 1048, 26 Am. St. 759; *Gulf, etc. R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. Rep. 221, 27 Am. St. 891; *Reynolds v. Western U. Tel. Co.*, 81 Mo. App. 223; *Western U. Tel. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. Rep. 186; *Southwestern Tel. & T. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. Rep. 686; *Postal Tel. Cable Co. v. Schaefer*, 23 Ky. L. Rep. 344, 62 S. W. Rep. 1119.

² *Daugherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Western U. Tel. Co. v. Way*, 83 id. 542, 4 So. Rep. 844; *Western U. Tel. Co. v. Hart*, 62 Ill. App. 120.

³ *Marr v. Western U. Tel. Co.*, 85 Tenn. 529, 3 S. W. Rep. 496.

⁴ *Western U. Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. Rep. 478.

⁵ *Fererro v. Western U. Tel. Co.*, 9 D. C. App. Cas. 455, 35 L. R. A. 548.

cepted it names a lower price than he in fact offered. The court said: "Whether the telegraphic operator be the agent of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not, and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions, being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer literally made, though by mistake of the agency used to convey it; and when he does so settle in good faith, and is induced to do so by the negligence of the telegraph company, through its servants, whether absolutely bound by his contract or not," the company is liable for the difference between the price at which the sale was made and the market value of the property sold.¹ The rule in Maine is that as between the sender and receiver of a message, any resulting damage by a change of its terms in transmission must fall upon the party who elected that mode of communication for the particular message.² The Tennessee court holds that the seller is not bound to make good an offer which has been changed in transmission,³ and such is the rule in North Carolina,⁴ Mississippi,⁵ Texas⁶ and Kentucky.⁷

Where the owner of property has sold it for less than the

¹ *Western U. Tel. Co. v. Shotter*, 71 Ga. 760. This case is adhered to on the theory of *stare decisis*. *Western U. Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. Rep. 815.

² *Ayer v. Western U. Tel. Co.*, 79 Me. 493, 10 Atl. Rep. 495, 1 Am. St. 353.

³ *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. Rep. 783, 4 L. R. A. 660.

⁴ *Pegram v. Western U. Tel. Co.*, 100 N. C. 28, 6 S. E. Rep. 770, 6 Am. St. 557. This case holds that the sender of a message cannot recover of the company damages which he has paid pursuant to a judgment which was rendered against the receiver and which bound him, the foundation of the judgment being

the negligent alteration of the dispatch. The relation between the sender and the company is not such as is within the general rule that a suit against an agent upon a personal liability incurred in carrying out his principal's orders, notice of which is given the latter, makes him liable for the amount of the judgment.

⁵ *Shingleur v. Western U. Tel. Co.*, 72 Miss. 1030, 18 So. Rep. 425, 30 L. R. A. 444.

⁶ *Harrison v. Western U. Tel. Co.*, 3 Tex. Civ. Cas. 67, 10 Am. & Eng. Corp. Cas. 600.

⁷ *Postal Tel. Cable Co. v. Schaefer*, 23 Ky. L. Rep. 344, 62 S. W. Rep. 1119.

price he intended to exact because of an error negligently caused in the transmission of a message, he is not bound, on discovering the mistake, to recoup the damages sustained by buying like property at the price received and hold it for an advance in price; his failure to so do will not affect the right to recover all the damage done him by the negligence.¹ The same rule applies where the broker of the sender of a message fails to buy property because of negligence in sending a message.² The sender of a message may assume that it has been correctly transmitted; the failure to make inquiry on that point will not affect his rights.³ But if the receiver of a message is in doubt as to its meaning he should ask that it be repeated so as to remove any ambiguity in it.⁴

A creditor who has lost the priority he would have had against the property of his debtor but for the negligence of a telegraph company is not bound to invest money to secure himself against loss either by purchasing the property at the sheriff's sale or discharging prior liens, although its estimated or real value was so much in excess of such liens as to have met his claims, at least in the absence of proof of his ability to do so and that it would be prudent to take that course.⁵ The damages for delay in delivering a message to an agent instructing him not to buy hogs, in consequence of which he made purchases, cannot exceed the difference between the price paid and the prevailing market price at the time when, in the exercise of reasonable promptness, the agent could have informed his principal and received instructions from him, the authority of the agent being limited to buying and shipping pursuant to daily instructions.⁶ A parent who has telegraphed for a physician to attend his sick child must use diligence to procure the attendance of another physician after the arrival of the time for the one summoned to come and his failure to

¹ *Western U. Tel. Co. v. Crawford*, 156; *Western U. Tel. Co. v. Hart*, 62 Ill. App. 120.
110 Ala. 460, 20 So. Rep. 111; *Same v. Stevens*, 16 S. W. Rep. 1095 (Tex. Sup. Ct.).

² *Western U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. Rep. 232.

³ *Id.*

⁴ *Manly Manuf. Co. v. Western U. Tel. Co.*, 105 Ga. 235, 31 S. E. Rep.

⁵ *Western U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. Rep. 752, 10 Am. St. 790. See § 965.

⁶ *Western U. Tel. Co. v. North Packing & Provision Co.*, 188 Ill. 366, 58 N. E. Rep. 958, 89 Ill. App. 301.

arrive.¹ If the defendant alleges that another line of conduct on the part of the plaintiff would have lessened the damages, it has the burden of proving that proposition.²

§ 974. **Exemplary damages.** There appears to be no reason to doubt the liability of telegraph companies for exemplary damages when they are guilty of such gross negligence as amounts to wantonness or malice,³ or the misconduct of their employees is so gross as to import an intention on their part to inflict a wrong upon the sendee, or there is such a reckless and wanton disregard of their plain duty as to be equivalent to a wilful wrong.⁴ Such damages may well be imposed for the refusal to accept a proper message for transmission, as well as where there is a wanton or malicious refusal to deliver one accepted. In the former case such damages may properly be allowed though there is no element of ill-will entertained against the person who offers the message. The functions and duties of the company are so nearly allied to those which are devolved on common carriers that such refusal may be regarded as a breach of duty owing to the public.⁵

¹ *Western U. Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. Rep. 982.

² *North Packing & Provision Co. v. Western U. Tel. Co.*, 70 Ill. App. 275.

³ *West v. Western U. Tel. Co.*, 39 Kan. 93, 17 Pac. Rep. 807; *Western U. Tel. Co. v. Lawson*, — Kan. —, 72 Pac. Rep. 283; *Same v. Watson*, — Miss. —, 33 So. Rep. 76 (a verdict for \$900 as exemplary damages was sustained). See, as to the circumstances under which exemplary damages are allowed in Texas, *Western U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; § 950.

Punitive damages are not recoverable unless the defendant acted wantonly or oppressively, or with such malice as implied a spirit of mischief or criminal indifference to civil obligations. *Davis v. Western U. Tel. Co.*, 46 W. Va. 48, 32 S. E. Rep. 1026.

⁴ *Western U. Tel. Co. v. Seed*, 115 Ala. 670, 22 So. Rep. 474; *Same v. Cunningham*, 99 Ala. 314, 14 So. Rep.

579; *Lewis v. Western U. Tel. Co.*, 57 S. C. 325, 35 S. E. Rep. 556; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. Rep. 118; *Marsh v. Western U. Tel. Co.*, — S. C. —, 43 S. E. Rep. 953.

⁵ In *Davis v. Western U. Tel. Co.*, 1 Cin. Super. Ct. 100, the plaintiff, a commercial news agent, engaged in furnishing customers information and reports of the state of the market, brought an action against the defendant for delaying such information sent to him by his agents, and purposely doing it, to injure his business and giving precedence to a rival in the same business. The court said: "It is evident that the mere allowance of the amount of loss the plaintiff proved he actually sustained would not, in justice, remunerate him for the violation by the defendant of its agreement, and the jury might very properly have given an additional sum." The court favored a liberal course in the assessment of damages for a wilful and

§ 975. **Damages for mental suffering.** There is very great conflict of authority as to the liability of telegraph companies for mental suffering caused by the non-delivery or negligently-delayed delivery of a dispatch announcing the death or serious illness of a near relative of the person to whom it is addressed, where such negligence deprives the addressee or sender of the opportunity to see his relative or attend his funeral, if the message as delivered informs the company receiving it that such suffering may thereby be caused, or if it is informed of that fact by information otherwise given its agent in the course of his employment.¹ Up to 1893 a majority of the courts which passed upon the question maintained the proposition that where a person has a right of action for an injury done to his name, person or property he may recover as actual damages compensation for all the proximate results thereof, including injury to his feelings, if such injury is caused by and was, as matter of law, contemplated in the doing of the wrongful act, whether bodily pain was an incident to it or not. During the past ten years, by changes of position, as in Indiana and Florida, and the rulings of several courts which have first determined their position, there has been a change of the weight of authority to the negative. The discussions of the last decade have not thrown much additional light upon the subject, though some of the later judicial opinions are worthy of consideration. Compensation for mental suffering may be recovered under the civil law.²

In jurisdictions in which recovery is allowed the fact that a message of the nature indicated is delivered for transmission is held to be notice to the company that mental suffering will probably result to some person if it is not promptly transmitted; hence it is liable for its negligence.³ Damages for

causeless violation of contract by the defendant.

¹ See as to the sufficiency of the notice, *Western U. Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664, 38 S. W. Rep. 665; *Same v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. Rep. 564; *Same v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. Rep. 811; *Same v. McFadden*, 75 S. W. Rep. 352 (Tex. Ct. of Civ. App.); § 968 *et seq.*

² *Graham v. Western U. Tel. Co.*, — La. —, 34 So. Rep. 91.

³ *So Relle v. Western U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805 (the case in which the doctrine was first held); *Stuart v. Same*, 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. Rep. 351; *Gulf, etc. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *Loper v. Western U. Tel. Co.*, 70 Tex. 689, 8 S. W. Rep. 600; *Western U. Tel. Co. v. Broesche*,

such suffering may be recovered either by the person to whom the message was addressed or by him who caused it to be sent.¹ Thus, it is laid down in Indiana that although there is nothing in a message to indicate the kinship existing between the

73 Tex. 654, 10 S. W. Rep. 743, 13 Am. St. 843; *Same v. Simpson*, 73 Tex. 422, 11 S. W. Rep. 385; *Beasley v. Western U. Tel. Co.*, 39 Fed. Rep. 181 (Texas circuit court); *Chapman v. Western U. Tel. Co.*, 90 Ky. 265, 13 S. W. Rep. 880; *Western U. Tel. Co. v. Van Cleave*, 54 S. W. Rep. 827, 107 Ky. 464; *Louisville & N. R. Co. v. Hull*, — Ky. —, 68 S. W. Rep. 433; *Young v. Western U. Tel. Co.*, 107 N. C. 370, 11 S. E. Rep. 1044, 9 L. R. A. 669; *Thompson v. Same*, 107 N. C. 449, 12 S. E. Rep. 427; *Reese v. Same*, 123 Ind. 294, 7 L. R. A. 583, 24 N. E. Rep. 163 (overruled in *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. Rep. 674, 54 L. R. A. 846; see 26 Ind. App. 213, 59 N. E. Rep. 416); *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, 6 Am. St. 864; *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. Rep. 419, 18 Am. St. 148; *Gulf, etc. Tel. Co. v. Richardson*, 79 Tex. 619, 15 S. W. Rep. 869; *Western U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125, 32 N. E. Rep. 871; *Same v. Wilson*, 93 Ala. 32, 9 So. Rep. 414; *Same v. Adair*, 115 Ala. 441, 22 So. Rep. 73; *Same v. Seed*, 115 Ala. 670, 22 So. Rep. 474; *Same v. Cline*, 8 Ind. App. 364, 35 N. E. Rep. 564; *Same v. Bryant*, 17 Ind. App. 70, 46 N. E. Rep. 358; *Same v. Briscoe*, 18 Ind. App. 23, 47 N. E. Rep. 473; *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752, 62 N. W. Rep. 1, 57 Am. St. 294, 28 L. R. A. 72; *Same v. Cleaver*, 13 Ky. L. Rep. 301 ("personal inconvenience and annoyance," Ky. Super. Ct.); *Same v. McIlvoy*, 21 Ky. L. Rep. 1393, 55 S. W. Rep. 428; *Sher-rill v. Western U. Tel. Co.*, 116 N. C. 655, 21 S. E. Rep. 429; *Havener v.*

Same, 117 N. C. 540, 23 S. E. Rep. 457; *Cashion v. Same*, 123 N. C. 267, 31 S. E. Rep. 493; *Lyne v. Same*, 123 N. C. 129, 31 S. E. Rep. 350; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. Rep. 118; *Western U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. Rep. 336; *Same v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. Rep. 266; *Same v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. Rep. 982; *Same v. De Jarles*, 8 Tex. Civ. App. 109, 27 S. W. Rep. 792; *Same v. Kinsley*, 8 Tex. Civ. App. 527, 28 S. W. Rep. 831; *Same v. Johnson*, 9 Tex. Civ. App. 48, 28 S. W. Rep. 124; *Same v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. Rep. 429; *Marsh v. Western U. Tel. Co.*, — S. C. —, 43 S. E. Rep. 953 (such damages are recoverable pursuant to a statute); *Western U. Tel. Co. v. Fisher*, 107 Ky. 513, 54 S. W. Rep. 830.

In Illinois it was held by a majority of the court, in 1887, that the sender of a telegram of this nature "was entitled to recover nominal damages at least, including the loss of the price of the telegram." *Logan v. Western U. Tel. Co.*, 84 Ill. 468.

¹ If the face of a message shows that it was sent for the benefit of the sendee and he accepts it, he may recover for the breach of the contract made for his benefit by the sender, notwithstanding the latter paid the charges and had not been previously constituted the agent of the sendee for the purpose of sending the message. *Western U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. Rep. 336.

In *Railroad v. Griffin*, 92 Tenn. 694, 22 S. W. Rep. 737, a son to whom his mother endeavored to send a message informing him that his father

sender and the addressee or the person who is therein announced to be dangerously sick, and it does not request the presence of the addressee at the bedside of the sick person, yet, if it in plain terms announces the serious illness of a person, the company is bound to know that prompt communication with the person to whom it is addressed is much desired, and that mental anguish may, and probably will, come to some person if it is not promptly delivered. The sender of the telegram is entitled to recover for such suffering resulting from negligent delivery.¹ And in Tennessee a majority of the court holds that a sister who is deprived of the opportunity of attending on a brother in his last sickness and making necessary preparations for his burial may recover from a company which has negligently failed to deliver a dispatch which would have informed her of his condition such sum, in addition to what she might recover for such neglect, as will reasonably compensate her for the grief, disappointment or other injury to her feelings resulting from the negligence.² Where there was negligent failure to transmit money to a woman who was about to remove the body of her dead husband, with knowledge that the money was desired for that purpose, damages for mental suffering while she was delayed for two days in making the removal were recoverable.³ A message sent to a physician read: "Come first train to see my wife, very low." The language suggested the necessity of speedy delivery, and made the sender's anxiety an element of recoverable damages for delay.⁴ In a North Carolina case a wife about to be con-

was in a dying condition and requesting the son to come to the father's bedside, recovered damages for its non-delivery notwithstanding the son, without receiving the message, visited his father two days later, and reached him thirty-six hours before his death.

¹ *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 24 N. E. Rep. 163, 7 L. R. A. 583; *Lyne v. Western U. Tel. Co.*, 123 N. C. 129, 31 S. E. Rep. 350; *Western U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, 16 Am. St. 920, 6 L. R. A. 844; *Bennett v. Telegraph Co.*, 128 N. C. 103, 38 S. E. Rep. 294.

² *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, 6 Am. St. 864. The decision of this case was somewhat influenced by a statute which makes telegraph companies liable for damages without distinction as to the nature of the message.

³ *Western U. Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. Rep. 385.

⁴ *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. Rep. 419, 18 Am. St. 148; *Same v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. Rep. 982; *Same v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. Rep. 143.

fixed sent a message for transmission to her husband. It was not delivered. She alleged that she suffered more physical pain, mental anxiety and alarm and sustained permanent and incurable injury because of his absence. The damages were not too remote.¹ In reply to a message announcing the death of his wife and asking him to come, and if not, to answer, the plaintiff delivered to the carrier a message stating that he would come on the first train. In consequence of the delay in transmitting the latter, the burial occurred before the plaintiff reached the place where his wife died. It was considered that the burial at the time it occurred was within the contemplation of the parties as the result of such delay.²

Without giving any other reason for so doing, except that to hold otherwise would result in intolerable litigation, the Texas court has ruled that the continued anxiety of a person who has knowledge of the illness of a relative, resulting from neglect in transmitting a reply as to the condition of the sick person, is not of itself an element of damage.³ This view is approved by a majority of the North Carolina court, the rule being thus expressed: A company is not liable in compensatory damages for its failure to forward or deliver a message intended to relieve mental anxiety then existing in the mind of the sender.⁴ It is declaredly difficult to harmonize this doctrine with that which permits a father to recover compensation for increased mental anguish caused by witnessing the suffering of a sick child, which was occasioned by the negligent failure to promptly deliver a message summoning a physician to visit the child. It has been suggested that the dis-

¹Thompson v. Western U. Tel. Co., 107 N. C. 449, 12 S. E. Rep. 427.

²Roach v. Jones, 18 Tex. Civ. App. 231, 44 S. W. Rep. 677; Jones v. Roach, 21 Tex. Civ. App. 301, 51 S. W. Rep. 549.

³Rowell v. Western U. Tel. Co., 75 Tex. 26, 12 S. W. Rep. 534; Western U. Tel. Co. v. Griffin, 93 Tex. 530, 56 S. W. Rep. 744, 77 Am. St. 896; Johnson v. Western U. Tel. Co., 14 Tex. Civ. App. 536, 38 S. W. Rep. 64; Akard v. Same, 44 S. W. Rep. 538. Compare Western U. Tel. Co. v. Cun-

ningham, 99 Ala. 314, 14 So. Rep. 579; Same v. Womack, 9 Tex. Civ. App. 607, 29 S. W. Rep. 932.

The ruling in the Rowell case has been considered inconsistent with the general rule in Texas. Connelly v. Western U. Tel. Co., — Va. —, 40 S. E. Rep. 618, 56 L. R. A. 663; Francis v. Same, 58 Minn. 252, 263, 58 N. W. Rep. 1078, 49 Am. St. 507, 25 L. R. A. 406.

⁴Sparkman v. Western U. Tel. Co., 130 N. C. 447, 41 S. E. Rep. 881.

inction between the two doctrines is that, in the case last put, the increased mental anguish was proximately caused by the negligence of the company, and that in the former cases the prolonged mental anguish was too remote from such negligence to constitute a basis for damages. "If this be not the distinction, none exists, and the opinions are in irreconcilable conflict."¹ There cannot be a recovery for mental anxiety which arises from purely imaginary causes, as for the failure to deliver a message sent by a husband to his wife, on his return from a hunting trip, apprising her of his good health, it being sent pursuant to an understanding between them if he should be well and uninjured. The court observed that no facts are alleged which were calculated to produce in the mind of the wife a reasonable apprehension concerning the safety of her husband. It is not alleged that he was, during his absence from her, exposed to serious danger or imminent peril. Her distress was, therefore, unnecessary, and arose from purely imaginative causes. It was self-provoked, and was based upon no reasonable ground. Mental anxiety so occasioned cannot be made the subject-matter of a contract.² This view is not harmonizable with a recent South Carolina case.³ A husband cannot recover for mental anxiety on account of his wife's exposure to smallpox, her alarm being because of the exposure of her baby; neither could she recover because of that alarm, the defendant not having notice that the baby would be with her.⁴ In Kentucky there cannot be a recovery for mental suffering for delay in transmitting messages which are not of a social nature. "Telegraphic messages of a business nature should be, and are, subject to the law applicable to other business transactions."⁵

Where the plaintiff sent a message which was not delivered,

¹ *Western U. Tel. Co. v. Gavin*, 70 S. W. Rep. 229 (Tex. Ct. of Civ. App.). A rehearing was denied in this case, as was a writ of error, the latter being denied by the supreme court. The view stated is supported in *Gulf, etc. Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. Rep. 689; *Western U. Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. Rep. 148; *Same v. Kendzora*, 26 S. W. Rep. 245.

² *Morrison v. Western U. Tel. Co.*, 24 Tex. Civ. App. 347, 59 S. W. Rep. 1127.

³ *Simmons v. Western U. Tel. Co.*, 63 S. C. 425, 41 S. E. Rep. 521.

⁴ *Western U. Tel. Co. v. Murray*, 68 S. W. Rep. 549 (Tex. Ct. of Civ. App.).

⁵ *Robinson v. Western U. Tel. Co.*, 24 Ky. L. Rep. 452, 68 S. W. Rep. 656.

asking how his sister was, and she died and was buried, the plaintiff not having seen her, he could not recover for mental anguish. It was not certain that his message would have been answered if delivery had been made, or that, if answered, the answer would have reached him.¹ Where the defendant's agent forged a dispatch which purported to be from an unmarried woman to an unmarried man with whom she was only slightly acquainted, requesting him to meet her at a designated place, and the agent exhibited the dispatch and boasted of having sent it, the company was liable to the woman for damages for the mental suffering caused by the injury thereby done her reputation. The act of the agent was within the scope of his business.² Where liability for mental suffering exists it may logically extend to the consequences which naturally result therefrom. Thus, in a South Carolina case,³ the plaintiff alleged that, because of the negligence of the defendant in delivering a message, she was made to suffer great mental pain and anguish, and was made sick, forced to take to her bed, call a physician and expend large sums of money in medicine, care and nursing. On considering exceptions to the denial of a motion to strike out these allegations the court said they were relevant to the cause of action. It could not say as matter of law that bodily illness is not a natural and proximate result of negligence in delivering certain messages; that was a question for the jury.

In an action to recover damages for negligent delay in delivering a message summoning the family physician to attend the plaintiff's wife in her confinement, the following propositions were ruled: 1. That the death of the child before its birth and the grief or sorrow occasioned thereby was not an element of damages. "If it is made to appear from the testimony that Mrs. C. suffered more physical pain, mental anxiety and alarm on account of her own condition than she would have done if Dr. K. had been in attendance upon her, and the

¹ *Taliferro v. Western U. Tel. Co.*, 21 Ky. L. Rep. 1290, 54 S. W. Rep. 825; *Western U. Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. 58, 26 S. W. Rep. 490. Compare *Same v. Griffin*, 27 Tex. Civ. App. 306, 65 S. W. Rep. 661.

² *Magouirk v. Western U. Tel. Co.*, 79 Miss. 632, 31 So. Rep. 206, 89 Am. St. 663.

³ *Simmons v. Western U. Tel. Co.*, 63 S. C. 425, 41 S. E. Rep. 521.

failure to secure his services is shown to be due to the want of proper care on the part of the defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering.¹ . . . Injury to the mother alone, her physical pain and mental suffering because of her own condition, would be a proper consideration, and it would be correct to allow proof that the child was still-born, if such fact tended to show that the labor was thereby prolonged and her suffering so increased." 2. The husband could not recover for injury to his feelings. "His suffering could only be from alarm and sympathy for his wife's suffering; his distress is merely a reflection from her distress, and that might be very considerable, but it is too remote and consequential."² 3. The pain and suffering for which recovery could be had was limited to that which would not have been endured if the physician had been in attendance.³ A father has recovered damages for his mental suffering because of the non-arrival of a minister of the gospel summoned to administer the rite of baptism and other spiritual consolation to his dying daughter. His right to do so was not affected by her mistaken supposition that the minister could have admitted her to membership in the church;⁴ because of the non-arrival of a casket in which to place the remains of a minor son, the funeral thereby being delayed and decomposition of the body resulting;⁵ because of the marriage of a minor who eloped and a license for whose marriage was issued by reason of delay in delivering a message forbidding the license;⁶ because he did not see his deceased child until after decomposi-

¹ The proposition quoted has been approved where the husband of the woman confined was absent from her on account of the negligent non-delivery of a message. *Thompson v. Western U. Tel. Co.*, 107 N. C. 449, 12 S. E. Rep. 427.

² *Western U. Tel. Co. v. Stratemier*, 6 Ind. App. 125, 32 N. E. Rep. 871; *Same v. Lovett*, 24 Tex. Civ. App. 84, 58 S. W. Rep. 204.

³ *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. A.

728, 10 Am. St. 772; *Same v. Church*, 90 N. W. Rep. 878 (Neb.).

⁴ *Western U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. Rep. 545, 34 L. R. A. 431. This case is disapproved by the Texas supreme court. *Western U. Tel. Co. v. Arnold*, 73 S. W. Rep. 1043. See *infra*, this section.

⁵ *Western U. Tel. Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. Rep. 688.

⁶ *Western U. Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. Rep. 811.

tion had begun;¹ and because of unfounded alarm respecting a child supposed to be lost, information concerning him not being received by reason of the telegraph company's neglect.² A brother has recovered because of an error in a message whereby he was led to believe that his sister was dead, instead of better as the message was written.³

The damages must be limited to compensation for the suffering caused by the defendant.⁴ Hence a sister who has been deprived the privilege of seeing her brother before his death cannot recover for suffering endured because of statements made to her respecting her brother's belief of her indifference toward him.⁵ But a mother who sues to recover because she did not see her son may show that he, just before dying, frequently called for her and desired to see her; this fact tends to show that her suffering was increased.⁶ It has been held that evidence is admissible to show that the plaintiff was his mother's favorite son. The court remarked that while juries, in the absence of any evidence on the subject, may act upon their own knowledge of the affection subsisting between a mother and her son, the admission of evidence upon the subject may be proper, and we cannot say that proof of a special regard felt and shown by a mother for one of her children may not be properly considered by the jury, in connection with other circumstances, in estimating the feeling of the child for the parent.⁷ But this rule is not to be extended so far as to permit evidence to be received showing that the plaintiff's mother before her death made inquiries respecting him, and kept calling for him. Such evidence is not direct proof of the feelings of the parties for each other. The mental suffering

¹ *Western U. Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109, 27 S. W. Rep. 792.

² *Western U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. Rep. 932.

³ *Western U. Tel. Co. v. Odom*, 21 Tex. Civ. App. 537, 52 S. W. Rep. 632; *Same v. Hines*, 22 Tex. Civ. App. 315, 54 S. W. Rep. 627.

⁴ It is not enough that the plaintiff could, but for the defendant's negligence, have reached his relative be-

fore death by the exercise of diligence; it must be shown that the means of doing so could have been found, and that they would have been availed of. *Telephone Co. v. Brown*, 104 Tenn. 56, 55 S. W. Rep. 155, 78 Am. St. 906.

⁵ *Western U. Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. Rep. 438.

⁶ *Western U. Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. Rep. 266.

⁷ *Western U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. Rep. 701.

which may be recovered for is such as ordinarily arises under the circumstances, and evidence which tends to show an aggravation of it is inadmissible.¹

In some states the right to recover for mental suffering is restricted to persons who are in the first degree of relationship to the party who sues, or to the person on account of whose illness or death the message was sent.² It is said in an Alabama case: We are unwilling to extend the doctrine of recoverable damages on account of mental pain and suffering to cases wherein there does not exist that close degree of relationship, such as parent and child, husband and wife, brother and sister, from which natural love and affection are presumed. To do so would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature and unjust and oppressive in its results.³ But a recovery has been sustained by the same court in favor of the father of a four-year-old son for the neglect to deliver a message to the latter's grandmother, in consequence of which she failed to reach the sender's home before the child's death.⁴

¹ *Western U. Tel. Co. v. Waller*, 74 S. W. Rep. 751 (Tex. Sup. Ct.); *Same v. Stiles*, 89 Tex. 312, 34 S. W. Rep. 438.

² *Robinson v. Western U. Tel. Co.*, 24 Ky. L. Rep. 452, 68 S. W. Rep. 656.

³ *Western U. Tel. Co. v. Ayers*, 131 Ala. 391, 31 So. Rep. 78, citing *Same v. Steenbergen*, 54 S. W. Rep. 829, 107 Ky. 469; *Same v. Lusk*, 41 S. W. Rep. 469, 91 Tex. 178, 66 Am. St. 869; *Same v. Coffin*, 30 S. W. Rep. 896; *Same v. McMillan*, 30 S. W. Rep. 298; *Same v. Gibson*, 39 S. W. Rep. 198; *Same v. Brown*, 2 L. R. A. 766; *Davidson v. Western U. Tel. Co.*, 54 S. W. Rep. 853 (Ky.); and disapproving *Western U. Tel. Co. v. Cashin*, 31 S. E. Rep. 493, 32 id. 746. To the same effect as the principal case is *Western U. Tel. Co. v. Arnold*, 73 S. W. Rep. 1043 (Tex. Sup. Ct.). Compare *Same v. Robinson*, 97 Tenn. 638, 37 S. W. Rep. 545, 34 L. R. A. 431, stated in this section.

⁴ *Western U. Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. Rep. 45.

Mental anguish will not be presumed from the failure of a father-in-law to be at the funeral of his daughter-in-law. *Bennett v. Telegraph Co.*, 128 N. C. 103, 38 S. E. Rep. 294.

It is said in a recent case: Mental anguish must be something more than mere disappointment, and, like every other material allegation relied upon by the plaintiff, must be alleged and proved. It is true that there are certain facts which, when proved, presume mental anguish. The tender ties of love and sympathy existing between husband and wife or parent and child are the commonest knowledge of the human race, so they are the holiest instincts of the human heart. It is useless to tell the jurors of the anguish of a true wife, waiting for hours to take the train to the bedside of a dying husband,

In Alabama if the complaint is based on the breach of contract and that is shown, so as to authorize the recovery of nominal damages, there may be a recovery for mental suffering by way of aggravation. But if the complaint is in form *ex delicto* and case, no damage being alleged or claimed for any actual injury to the person, reputation or estate of the plaintiff, but only damages for mental suffering, there cannot be a recovery. This is the result where the *gravamen* of the complaint is the breach of duty in failing to deliver the message, and not the breach of the promise to deliver.¹

§ 976. Same subject; reasons upon which liability rested.

In sustaining the recovery of damages for mental suffering the Texas court has thus answered the objection that they cannot be allowed independently of bodily injury: "In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case — not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a

knowing well that the sands of life are falling fast, but uncertain of the vital measure, and finally reaching her journey's end only to bestow her last greeting upon lifeless clay. But beyond the marriage state, this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption, but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder into the family circle. It is true that with him such affection may exist, and in the present case doubtless does exist, but it must be shown. Moreover, there is a difference between those cases where the plaintiff is herself kept away from the bed-

side of a dying relative, and where she is merely deprived of the company of another relative whose sympathetic love might tend to comfort and console her in her hour of sorrow. This difference may be considered by the jury in fixing the damages. We do not mean to say that damages for mental anguish may not be recovered from the absence of a mere friend, if it actually results; but it is not presumed. *Cashion v. Western U. Tel. Co.*, 123 N. C. 267, 68 Am. St. 822, 31 S. E. Rep. 493; *Western U. Tel. Co. v. Johnson*, 9 Tex. Civ. App. 48, 28 S. W. Rep. 124, and Texas cases cited.

¹ *Western U. Tel. Co. v. Krichbaum*, 132 Ala. 535, 31 So. Rep. 607. See *Blount v. Western U. Tel. Co.*, 126 Ala. 105, 27 So. Rep. 779.

wound to the person.”¹ The Kentucky court of appeals has ruled that for the negligent failure to deliver telegrams announcing the illness, death and date of the funeral of the father of the person to whom they are addressed the telegraph company is liable to him in substantial damages for the injury to his feelings without proof of physical pain or pecuniary loss. Speaking for the court, Holt, J., said: “Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract, and, whenever a party does so, it is liable at least to some extent. Every infraction of a legal right causes injury in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party’s wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi*-public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damages. Is it to be said or held that, as to matters of a far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that

¹ Stuart v. Western U. Tel. Co., 66 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. Tex. 580, 59 Am. Rep. 623, 18 S. W. A. 728.
Rep. 351; Western U. Tel. Co. v. Cooper,

his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damages, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us that it should equally be so considered in cases of this character. If not, then the most grievous wrongs may often be inflicted with impunity; legal insult added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages.”¹

§ 977. **Same subject; opposing authorities.** At present the weight of authority is to the effect that damages are not recoverable solely on account of mental suffering resulting from negligence in transmitting a message announcing the illness or death of a relative, though the message as delivered to the company disclosed the reason for desiring that it be sent, and the negligence of the company gives the person who

¹Chapman v. Western U. Tel. Co., 90 Ky. 265, 13 S. W. Rep. 880, 30 Am. & Eng. Corp. Cas. 626. The quotation above is approved in Young v. Western U. Tel. Co., 107 N. C. 370, 9 L. R. A. 669, 11 S. E. Rep. 1044. The opinion in Reese v. Same, 123 Ind. 294, 24 N. E. Rep. 163, 7 L. R. A. 583, is interesting and strong, as is the opinion of Deemer, J., in Mentzer v. Same, 93 Iowa, 752, 62 N. W. Rep. 1, 57 Am. St. 294, 28 L. R. A. 72.

pays the price for the transmission of the message a cause of action to recover the money paid.¹ It is provided by a statute of Minnesota that if the owner or operator of a telegraph line shall fail to transmit a message within a reasonable time, or if

¹ *Chapman v. Western U. Tel. Co.*, 88 Ga. 763, 46 Alb. L. J. 409, 15 S. E. Rep. 901, 30 Am. St. 183, 17 L. R. A. 430; *Russell v. Western U. Tel. Co.*, 3 Dak. 315, 19 N. W. Rep. 408; *West v. Same*, 39 Kan. 93, 17 Pac. Rep. 807; *Chase v. Same*, 44 Fed. Rep. 554, 10 L. R. A. 464; *Western U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. Rep. 823, 24 Am. St. 300, 13 L. R. A. 859; *Crawson v. Western U. Tel. Co.*, 47 Fed. Rep. 44; *Western U. Tel. Co. v. Adams*, 28 Ind. App. 420, 63 N. E. Rep. 125; *Peay v. Western U. Tel. Co.*, 64 Ark. 538, 43 S. W. Rep. 965, 39 L. R. A. 463; *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810, 14 So. Rep. 148 (one judge dissenting); *Western U. Tel. Co. v. Haltom*, 71 Ill. App. 63; *Giddens v. Western U. Tel. Co.*, 111 Ga. 824, 35 S. E. Rep. 638; *Connell v. Same*, 116 Mo. 34, 22 S. W. Rep. 345, 38 Am. St. 575, 20 L. R. A. 172; *Curtiss v. Same*, 13 App. Div. 253, 42 N. Y. Supp. 1109, following *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. Rep. 354, 56 Am. St. 604, 34 L. R. A. 781; *Butner v. Western U. Tel. Co.*, 2 Okl. 234, 37 Pac. Rep. 1087; *Kester v. Same*, 1 Ohio Dec. 453, 8 Ohio Ct. Ct. 236; *Kline v. Same*, 4 Ohio Dec. 224; *Morton v. Same*, 53 Ohio St. 431, 41 N. E. Rep. 689, 53 Am. St. 648, 32 L. R. A. 735; *Lewis v. Same*, 57 S. C. 325, 35 S. E. Rep. 556; *Davis v. Same*, 46 W. Va. 48; *Western U. Tel. Co. v. Ferguson*, 26 Ind. App. 213, 59 N. E. Rep. 416 (recommending to the supreme court a change of its ruling on the question, which has been made, 157 Ind. 64, 60 N. E. Rep. 674, 54 L. R. A. 846); *Connolly v. Western U. Tel. Co.*, — Va. —, 40 S. E. Rep. 618, 56 L. R. A. 663 (one judge dissented).

Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N. E. Rep. 88, 38 L. R. A. 512, 60 Am. St. 393, is decisive of the view of the Massachusetts court on the question. In *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. Rep. 674, 54 L. R. A. 846, a great many cases are referred to as requiring the same conclusion as was there arrived at.

It is wrongly assumed in *Chase v. Western U. Tel. Co.*, 44 Fed. Rep. 554, 10 L. R. A. 464, that the Texas case which first allowed the recovery of damages for mental suffering (*So Relle v. Telegraph Co.*, 55 Tex. 308) has been overruled by *Railway Co. v. Levy*, 59 id. 563. The fact is that the former case is overruled only in so far as it holds that the right to recover exists independently of a right of action on other grounds. Besides the cases referred to, the judge who wrote the opinion in the *Chase* case cited to sustain his view *Wyman v. Leavitt*, 71 Me. 227; *Johnson v. Wells, etc. Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Nagel v. Missouri Pacific R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Indianapolis, etc. R. Co. v. Stables*, 62 Ill. 313; *Freese v. Tripp*, 70 Ill. 503; *Meidel v. Anthis*, 71 Ill. 241; *Joch v. Dankwardt*, 85 Ill. 333; *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 83; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. Rep. 501; *Ferguson v. Davis County*, 57 Iowa, 601, 10 N. W. Rep. 906; *Stewart v. Ripon*, 38 Wis. 584; *Masters v. Warren*, 27 Conn. 293; *Blake v. Midland R. Co.*, 21 L. J. (Q. B.) 233, 10 Eng. L. & Eq. 437, 442; *Lynch v. Knight*, 9 H. of L. Cas. 577; *Burke v. Cork & M. R. Co.*, 13 Irish L. T. Rep. 171, 10 Cent. L. J. 48 (1879); *Rowell v. Telegraph Co.*, 12

it is shown due diligence has not been exercised after the reception thereof for that purpose, or shall fail to deliver the same to the party to whom it is addressed within a reasonable time after its arrival at the point of destination, they shall be liable in a civil action at the suit of the party injured for all actual damages sustained by reason of such neglect or omission. In a case in which a husband and wife estranged from each other were seeking a reconciliation and the latter, in reply to a letter from the former, delivered a message for transmission indicating his willingness to accede to his proposition for the resumption of the marital relation, which message was not delivered, it was held that he could not recover for the mental pain he endured during the time which elapsed after the message should have been received and the time he heard from his wife by mail. The effect of the statute was to establish the rule that the party injured, whether sender or addressee, may sue, and recover all actual damages proximately resulting from its breach of contract, regardless of whether or not it was advised of the nature of the subject-matter of the message. The statute has no bearing upon the right to recover for mental suffering. The action, being for breach of contract, was governed by the common law, under which there could not be a recovery for such suffering.¹ A Wisconsin statute declaring that telegraph companies shall be liable for all damages occasioned by failure or negligence of their operators, servants or employees in receiving, copying, transmitting, or delivering messages, does not create any new elements of damage. Hence there cannot be a recovery for mental suffering alone.² The federal courts consider that the right to recover damages for mental suffering is one of general law as to which, in the absence of statute, they are not controlled by the decisions of state courts.³ The liability for such damages

S. W. Rep. 534, 75 Tex. 26; Thompson v. Same, 106 N. C. 549, 11 S. E. Rep. 269, 30 Am. & Eng. Corp. Cas. 634. See Wilcox v. Richmond & D. R. Co., 52 Fed. Rep. 364, 3 C. C. A. 73, 17 L. R. A. 804.

¹ Francis v. Western U. Tel. Co., 58 Minn. 252, 59 N. W. Rep. 1078, 49 Am. St. 507, 25 L. R. A. 406; in ac-

cord, Gahan v. Same, 59 Fed. Rep. 433.

² Summerfield v. Western U. Tel. Co., 87 Wis. 1, 57 N. W. Rep. 973, 41 Am. St. 17. Cassoday, C. J., dissented as to the construction of the statute only.

³ Western U. Tel. Co. v. Wood, 57 Fed. Rep. 471, 6 C. C. A. 432, 21 L. R. A. 706.

has almost uniformly been held by the former not to exist.¹ The analogous English cases are in accord with the courts in this country which hold the view indicated in this section.²

§ 978. **Same subject; grounds upon which liability denied.** Recent and able discussions sustaining the view last stated may be found in the opinion of Baker, J., of the Indiana court, in the case which overruled the former view held by that court;³ in the opinion of Cardwell, J., of the Virginia court of appeals;⁴ in the opinion of Mitchell, J., of the Minnesota court;⁵ in the opinion of Gannt, P. J., of the Missouri court;⁶ in the dissenting opinion of Lurton, J., of the Tennessee court;⁷ and in that of Cooper, J., of the Mississippi court.⁸ The facts in the case before the latter squarely raised the question whether the person to whom a message was addressed, notifying him of the death of his brother, could recover damages for mental suffering resulting from negligent delay in delivering it. The court took the view that has been taken by courts which hold that damages so occasioned may be recovered, viz., that it was immaterial whether the action be considered as for the breach of the contract or on the case for the tort in failure to perform the duty. The merits are thus discussed: "It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from

¹ *Id.*; *Tyler v. Western U. Tel. Co.*, 54 Fed. Rep. 634; *Wilcox v. Richmond & D. R. Co.*, 52 Fed. Rep. 264, 3 C. C. A. 73, 17 L. R. A. 804; *Kester v. Western U. Tel. Co.*, 55 Fed. Rep. 603; *Gahan v. Same*, 59 Fed. Rep. 433; *McBride v. Sunset Tel. Co.*, 96 *id.* 81; *Stansell v. Western U. Tel. Co.*, 107 *id.* 668.

² *Allsop v. Allsop*, 5 H. & N. 534; *Lynch v. Knight*, 9 H. L. Cas. 592. See §§ 95-97.

³ *Western U. Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. Rep. 674, 54 L. R. A. 846.

⁴ *Connelly v. Western U. Tel. Co.*, — Va. —, 40 S. E. Rep. 618, 56 L. R. A. 663.

⁵ *Francis v. Western U. Tel. Co.*, 58 Minn. 252, 59 N. W. Rep. 1078, 49 Am. St. 507, 25 L. R. A. 406.

⁶ *Connell v. Western U. Tel. Co.*, 116 Mo. 34, 22 S. W. Rep. 345, 38 Am. St. 575, 20 L. R. A. 172.

⁷ *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695, 8 S. W. Rep. 574, 6 Am. St. 864.

⁸ *Western U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. Rep. 833, 24 Am. St. 300.

physical injury, furnish a substantial cause of action for which recovery may be had. The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must from the nature of things be purely speculative and uncertain. In 1881, in the case of *So Relle v. Western Union Tel. Co.*,¹ the supreme court of Texas, relying upon the authority of two previous decisions in that state,² in one of which an assault and battery had been committed on a passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of *Shearman & Redfield on Negligence*, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by reason of which default he was not informed of her death, and failed to attend her funeral. This decision has been since overruled upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly affirmed.³ The courts of Alabama, Tennessee, Indiana [the case so holding has recently been overruled] and Kentucky⁴ have followed the supreme court of Texas, re-

¹ 55 Tex. 308, 40 Am. Rep. 805.

² *Hays v. Houston, etc. R. Co.*, 46 Tex. 279; *Houston, etc. R. Co. v. Randall*, 50 id. 254, 261.

³ *Railroad Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, 59 Tex. 563, 46 Am. Rep. 278; *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351, 59 Am. Rep. 623; *McAllen v. Same*, 70 Tex. 243, 7 S. W. Rep. 715; *Western U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598, 1 L. R. A. 728; *Loper v. Telegraph Co.*, 70 Tex. 689, 8 S. W.

Rep. 600; *Western U. Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. Rep. 385; *Same v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, 16 Am. St. 920, 6 L. R. A. 844; *Same v. Feegles*, 75 Tex. 537, 12 S. W. Rep. 860; *Same v. Moore*, 76 Tex. 67, 12 S. W. Rep. 949, 18 Am. St. 25; *Same v. Broesche*, 72 Tex. 654, 10 S. W. Rep. 734, 13 Am. St. 843.

⁴ Also North Carolina and Louisiana. See § 975.

lying upon the decisions above noted as authority. These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other states or those of England. In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is that the jury may, and, since it is impossible to draw the line between physical pain and mental suffering in such instances, must give damages for both. Expressions used by the courts as argument or illustration in those cases . . . have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages." After adverting to the classes of cases in which mental suffering has been considered an element of damages, the opinion continues: "The decisions in Texas, Tennessee, Kentucky, Indiana and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not, in our opinion, sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the case of *So Relle*, in which an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the *So Relle* case the bar had not entertained the view that an action therefor could be maintained; but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident resulting from negligence, by which bodily injury was sustained, was properly

considered by the jury in awarding damages.¹ But where there is no bodily injury, damages for fright should not be given.² . . . We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced.”³

¹ *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 id. 293; *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Canning v. Williamstown*, 1 Cush. 451.

² *Canning v. Williamstown*, *supra*; *Victorian Rys. Com'rs v. Coultas*, L. R. 13 App. Cas. 222; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. of L. Cas. 598.

³ *Western U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. Rep. 823, 24 Am. St. 300, 13 L. R. A. 859.

The objections to the recovery of damages for mental suffering, as presented by the Georgia court through Lumpkin, J., are also worthy of consideration. Referring to the cases which hold otherwise than it does, it is said: “These rulings involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone; to what extent the message must show on its face the family relationship; whether the damages to be given are in their nature punitive or compensatory,—these are the chief problems encountered, and solved in various ways. Some of the cases rest on breach of contract, of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. This view grapples with the big question, how can one, in an action for breach of contract, recover for mere disappointment or anguish

of mind resulting from the breach? The answer given is that the subject-matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract which the injured party desires performed brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort, or breach of common-law or statutory duty, the contract serving merely to create the relation of duty between the parties. The difficulty arising here is whether, as there is no tort independently of the contract, the contract can be rightly treated as not precluding recovery in tort, and the telegraph company can be dealt with in this respect like a common carrier. A tendency is observed to escape this difficulty by applying code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case. In this state no such abolition has been effected. Regarding the nature of the damages the majority opinion in this class of decisions is that they are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is wilful, wanton or malicious. . . . The law protects the person and the purse. The person includes the reputation. The body, reputation and property of the citizen are not to

§ 979. Same subject; summary of the authorities. It elsewhere appears that mental suffering is an element of damages where a passenger is wrongfully removed from a train;¹ that "nervous shock" is not distinguishable from physical in-

be invaded without responsibility in damages to the sufferer. But outside these protected spheres the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries. The case of *Telegraph Co. v. Rogers*, *supra*, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have not been frequent in the past. If their foundation principle be sanctioned they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let

some of the courts favoring recovery measure out the quantity. If they are unable to do this, then on principle any mental suffering would be actionable, the degree of it merely determining the *quantum* of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages at least; in other words, there must be an infraction of some legal right of the plaintiff. Then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not a ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that although allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable;

¹§ 942.

jury;¹ that mental anguish must be compensated for when it is accompanied by physical suffering.² We think that the better reasoning, as well as the analogies of the law, justify the award of damages for mental pain when it results from the neglect of a telegraph company to deliver messages of the character we have been considering. It may be useful to summarize in this connection a number of cases somewhat variant from each other and from the subject-matter of this chapter, in which, a right of action existing, damages for mental suffering have been allowed. A verdict of \$1,000 was not disturbed where a female passenger was kissed by a railroad conductor, although, according to her testimony, "there was no actual injury to complain of."³ Where a physician took a non-professional unmarried man to attend with him a case of confinement, no necessity for so doing existing, it was held that both were liable for damages.⁴ The removal of the body of a child from the lot in which it was rightfully buried to a charity plot gives the parent a right to recover for injury to his feelings.⁵ The action was trespass *quare clausum fregit*. The verdict was for \$837.50. The court said: "We know of no rule of law which requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness." In a recent action of trespass for beating and injuring an old horse of little or no

then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it is actual damage. Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself an

infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?" *Chapman v. Western U. Tel. Co.*, 88 Ga. 763, 15 S. E. Rep. 901, 30 Am. St. 183, 17 L. R. A. 430, 46 Alb. L. J. 409.

¹ § 21.

² § 943.

³ *Craker v. Chicago & N. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504.

⁴ *De May v. Roberts*, 46 Mich. 160, 9 N. W. Rep. 146, 41 Am. Rep. 154.

⁵ *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, and several cases cited in § 1029.

value, there was a recovery of \$40. The court said: "The award, as we construe it, compensates the plaintiff for the damage he has sustained by the injury to his property, and for his mental damage by reason of the defendant's malice."¹ The verdict was sustained. An undertaker who had agreed to keep the body of plaintiff's deceased daughter in a vault until such time as he might be ready to inter it, negligently took or allowed it to be taken therefrom and buried or otherwise disposed of, and refused to give information concerning its whereabouts. Referring to the cases which allow damages for mental suffering the court said: "The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish or distress of mind on the part of the other party contracting, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part."² The failure to transport the corpse of a husband gives his widow a right of action in which mental suffering is an element of damage.³ A widow may recover for such suffering and nervous shock against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damage is alleged or proven.⁴ Where a person who was not in fact summoned as a witness until her arrest on a *capias* because of the failure to appear, it was held in an action against the officer for making a false return of the *subpoena* and the resulting arrest, that there might be a recovery for mental suffering, though no element of malice or wantonness was shown on the part of the defendant. "It is true, as a general rule, that mental suffering alone does not constitute a cause of action; but it may be an element of damages when it is a natural and proximate consequence of some recognized cause of action. In many actions of tort mental suffer-

¹ Kimball v. Holmes, 60 N. H. 163.

² Renihan v. Wright, 125 Ind. 536, 546, 25 N. E. Rep. 822, 21 Am. St. 249, 9 L. R. A. 514.

³ Hale v. Bonner, 82 Tex. 33, 27 Am. St. 850, 17 S. W. Rep. 605, 14 L. R. A. 336; Louisville & N. R. Co. v. Hull, — Ky. —, 68 S. W. Rep. 433.

⁴ Larson v. Chase, 47 Minn. 307, 50 N. W. Rep. 238, 28 Am. St. 370, 14 L. R. A. 85, distinguished in Francis v. Western U. Tel. Co., 58 Minn. 252, 59 N. W. Rep. 1078, 49 Am. St. 507, 25 L. R. A. 406, on the ground that the act was wilful and the action to recover was in tort.

ing is recognized as the ordinary, natural and proximate consequence of the wrong complained of, and in such cases, if properly alleged, may be proved as an element of actual damages.”¹

§ 980. **Same subject; conclusion of author.** The best reconsideration we have been able to give the subject of damages for mental injury, that reconsideration being had with the result of the cases decided since the original edition of this work was prepared in mind, confirms the conclusion then arrived at—given a cause of action on contract or for a tort, the allowance of damages on that account depends on the same rule by which they are allowed for any other resulting injury, namely, in an action *ex contractu* the injury to the feelings must be such as was presumably contemplated by the parties as likely to occur at the time it was made, if a breach resulted; and in an action of tort it must be the natural and proximate consequence of the wrong. In both cases the act or omission which constitutes the cause of action must in some way result in a deprivation of comfort, produce annoyance, personal inconvenience, wound the sensibilities by indignity or something like it, as distinguished from a sense of disappointment on being denied money due or a commodity for business purposes. The objections to the allowance of compensation for such injury are largely based upon reluctance to opening to juries an inquiry as to an indefinite wrong for which there is no precise measure of reparation. But when injury of this character is contemplated as likely to result from the breach of a contract, the parties may, when they make their agreement, liquidate the damages; if they do not, the party at fault is not entitled to immunity merely because there is danger that a jury may require him to pay too much. This consideration is still more potent in tort actions.

§ 981. **Same subject; notice to the company.** The general rule that the message must disclose or the sender must inform the agent of the company of the facts which make its

¹ *Gibney v. Lewis*, 68 Conn. 392, 396, 36 Atl. Rep. 799. See *Mentzer v. Western U. Tel. Co.*, 93 Iowa, 752, 62 N. W. Rep. 1, 57 Am. St. 294, 28 L. R. A. 72, for a strong presentation of the view that the general rule which

permits recovery for mental suffering, if the sufferer has a ground of action for the recovery of nominal damages, should govern in actions against telegraph companies.

prompt transmission important in order that the latter may be liable for anything more than nominal damages applies where compensation for mental suffering is sought.¹ But it is not required in a message concerning illness or death, when the subject-matter is apparent on its face, that the company shall be apprised of the relationship of the parties, unless information on that point is called for.² Thus, a message reading: "Clara, come quick; Rufe is dying," charges the company with notice that the parties are near relatives.³

§ 982. *Same subject; measure of damages.* The general rule which induces appellate courts not to interfere with the verdicts of juries unless it appears that they were rendered under the influence of passion, prejudice or other reprehensible motive, applies with especial force to awards made as compensation for mental suffering.⁴ It is proper in such cases for the trial court to caution the jury not to confound the corroding grief occasioned by the loss of a near relative with the disappointment and suffering resulting from the negligence of the company.⁵ A verdict for \$1,168 for delay in delivering a dispatch concerning the arrival of the corpse of plaintiff's wife was sustained.⁶ And where a woman was unable for two days to remove the corpse of her husband on account of delay in forwarding money by telegraph a verdict of \$1,000 was held not to be excessive.⁷ The same amount was

¹ *McAllen v. Western U. Tel. Co.*, 70 Tex. 243, 7 S. W. Rep. 715; *Western U. Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. Rep. 70, 18 Am. St. 37; *Kennon v. Western U. Tel. Co.*, 126 N.-C. 232, 35 S. E. Rep. 468; *Darlington v. Same*, 127 N. C. 448, 37 S. E. Rep. 479; *Western U. Tel. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. Rep. 358.

² *Western U. Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. 920, 6 L. R. A. 844, 12 S. W. Rep. 857; *Reese v. Western U. Tel. Co.*, 123 Ind. 294, 24 N. E. Rep. 163, 7 L. R. A. 583.

³ *Western U. Tel. Co. v. Adams*, *supra*; *Same v. Moore*, 76 Tex. 66, 12 S. W. Rep. 949, 18 Am. St. 25; *Same v. Feegles*, 75 Tex. 537, 12 S. W. Rep.

860; *Same v. Rosentreter*, 80 Tex. 406, 16 S. W. Rep. 25.

⁴ *Western U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. Rep. 734, 13 Am. St. 843; *Western U. Tel. Co. v. Newhouse*, 6 Ind. App. 442, 33 N. E. Rep. 800; *Same v. Stratemeier*, 11 Ind. App. 601, 39 N. E. Rep. 527; *Same v. Robinson*, 97 Tenn. 638, 37 S. W. Rep. 545, 34 L. R. A. 431.

⁵ *So Relle v. Western U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Beasley v. Same*, 39 Fed. Rep. 181; *Western U. Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. Rep. 982.

⁶ *Western U. Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. Rep. 743, 13 Am. St. 843.

⁷ *Western U. Tel. Co. v. Simpson*, 73 Tex. 222, 11 S. W. Rep. 385.

ruled not to be exorbitant where a brother was unable to attend his sister's funeral because of the company's negligence,¹ and where a physician was prevented from attending the plaintiff's child for the same reason.² In a similar case a verdict of \$1,500 was sustained.³ A verdict of \$1,475 was sustained in favor of a son who was prevented from attending the burial of his father.⁴ Where both parents were prevented from seeing their son while alive, a verdict of \$2,500 was sustained.⁵ A verdict of \$500 for failure to deliver a message sent by the father of a dying girl to a minister of the gospel for the purpose of securing the administration of the rite of baptism and giving spiritual consolation to her, while full and ample, was sustained.⁶ A verdict of \$2,150 in favor of a son who was prevented from reaching his father until after the latter had become unconscious was regarded as large, but not so excessive as to authorize interference.⁷ On testimony showing that the absence of a husband from his wife during childbirth rendered her mental and physical condition and suffering much worse, a verdict of \$600 was sustained.⁸ The father of a sick child retained a verdict for \$225 for the suffering endured because of the non-arrival of the child's grandmother before its death.⁹ Where the plaintiff was detained in a filthy prison five days longer than he would have been but for the telegraph company's negligence, a verdict of \$500 was not excessive.¹⁰ Where a message, stating that the brother of the sendee was insane, and asking the former to

¹ *Western U. Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. Rep. 25; *Same v. Smith*, 15 Ky. L. Rep. 334 (Ky. Super. Ct.); *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. Rep. 118 (punitive damages being included).

² *Gulf, etc. Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. Rep. 689; *Western U. Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129, 21 S. W. Rep. 148. But where the services of another physician than the one summoned might have been secured, a verdict of \$1,999.99 was set aside. *Western U. Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517, 21 S. W. Rep. 982.

³ *Western U. Tel. Co. v. Russell*, 12 Tex. Civ. App. 82, 33 S. W. Rep. 708.

⁴ *Western U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. Rep. 336.

⁵ *Western U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. Rep. 998.

⁶ *Western U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. Rep. 545, 34 L. R. A. 431.

⁷ *Western U. Tel. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. Rep. 66.

⁸ *Western U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122, 30 S. W. Rep. 378.

⁹ *Western U. Tel. Co. v. Crocker*, 135 Ala. 492, 33 So. Rep. 45.

¹⁰ *Western U. Tel. Co. v. Gossett*, 15 Tex. Civ. App. 52, 38 S. W. Rep. 536.

come to him, was negligently delayed one day, and the insane person was found by his brother to be in great need of attention, which the latter rendered until his death a few days after reaching him, a verdict for \$1,000 was considered "rather large, but under all the circumstances not so large as to call for interference."¹ But a verdict for \$4,500 was excessive in favor of a father who did not receive a message from his wife informing him that a sick child of theirs was worse, and summoning the plaintiff home, he not reaching there till after the child's death;² and one of \$4,750 in favor of a son who did not reach his father until after the latter became unconscious.³ A verdict of \$900 was considered excessive where the delay did not prevent the son reaching his father before the death of the latter.⁴

¹ *Western U. Tel. Co. v. McIlvoy*, 21 Ky. L. Rep. 1393, 55 S. W. Rep. 423.

² *Western U. Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. Rep. 846, 15 L. R. A. 129. See *Erie Tel. & T. Co. v. Grimes*, 82 Tex. 89, 17 S. W. Rep. 831; *Western U. Tel. Co. v. Nations*, 82 Tex. 539, 18 S. W. Rep. 709, 27 Am. St. 914.

³ *Western U. Tel. Co. v. Piner*, 1 Tex. Civ. App. 301, 21 S. W. Rep. 315.

A verdict for \$5,000 in favor of a mother who did not reach her son while alive was set aside in *Western U. Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. Rep. 266.

⁴ *Railroad v. Griffin*, 92 Tenn. 694, 22 S. W. Rep. 737.

CHAPTER XXIII.

BREACH OF MARRIAGE PROMISE.

- § 983. Nature of the action; who may sue.
- 984. Seduction as an aggravation.
- 985. Consequences of seduction.
- 986. Injury to feelings and other elements of damage.
- 987. Same subject; exemplary damages.
- 988. Damages for loss of marriage.
- 989. What will excuse a breach of the contract.
- 990. What may be proved in mitigation.

§ 983. **Nature of the action; who may sue.** The [316] action for this cause is peculiar. While it is in form upon contract, and in truth based upon it and its breach, the damages are governed by principles which apply to actions for personal torts.¹ The motive of the breach may be inquired into, and may be very material in respect to the amount of damages.² The right of action is so personal in its nature that it will not survive to or against personal representatives. Nor are the damages confined to the mere pecuniary loss. Either party may sue for breach by the other,³ though in the large majority of instances the female is the plaintiff. The recovery may be for injury to her feelings, affections and wounded pride, as well as for the loss of the marriage.⁴

§ 984. **Seduction is an aggravation.** The result of an ordinary breach of promise is the loss of the alliance and the

¹ *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. Rep. 242, quoting the text; *Drury v. Merrill*, 20 R. I. 2, 36 Atl. Rep. 835; *Kennedy v. Rodgers*, 2 Kan. App. 764, 44 Pac. Rep. 47; *Poeblmann v. Kertz*, 105 Ill. App. 249; *Davis v. Pryor*, 3 Ind. Ty. 396, 58 S. W. Rep. 660.

² *Kaufman v. Fye*, 99 Tenn. 145, 167, 42 S. W. Rep. 25, quoting the text.

³ There are several instances reported of actions by the male party to the contract. *Baker v. Cartwright*,

10 C. B. (N. S.) 124, 100 Eng. C. L. 124; *Harrison v. Cage*, 1 Ld. Raym. 386, 1 Salk. 24; *Atchinson v. Baker*, Peake's Add. Cas. 103, 104.

⁴ *Daggett v. Wallace*, 75 Tex. 352, 13 S. W. Rep. 49, 16 Am. St. 908; *Wilbur v. Johnson*, 58 Mo. 600; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Royal v. Smith*, 40 Iowa, 615; *Wells v. Padgett*, 8 Barb. 323; *Harrison v. Swift*, 13 Allen, 144; *Parker v. Forehand*, 99 Ga. 743, 28 S. E. Rep. 400.

mortification and pain consequent on the rejection.¹ If the defendant, during the subsistence of the promise, has seduced the plaintiff, this fact may be proved in aggravation of the damages.² The common-law practice is substantially uniform in allowing such proof. The seduction which is allowed to be proven is brought about in reliance upon the contract, and is, [317] in itself, in no indirect way, a breach of its implied conditions. Such an engagement necessarily brings the parties into very intimate and confidential relations, and the advantage taken of them by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, guardian or confidential adviser who cheats a confiding ward, beneficiary or client into a losing bargain. It differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has thus been abused cannot fail to be aggravated in fact by the seduction. The contract is twice broken; for to the results of an ordinary breach there are added loss of character and social position, and not only a deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect as well as affection, and is violated by the seduction, as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of the injury that cannot be lost sight of in any view of justice.³ The right to prove

¹ *Sheahan v. Barry*, 27 Mich. 217.

² *Jennette v. Sullivan*, 63 Hun, 381, 18 N. Y. Supp. 266; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. Rep. 79.

The seduction need not be alleged. *Jennette v. Sullivan*, *supra*. But it may be pleaded merely in aggravation of the damages, without subjecting the complaint to the objection that it embraces two causes of action. *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. Rep. 554.

³ *Sheahan v. Barry*, 27 Mich. 217; *Coil v. Wallace*, 24 N. J. L. 291; *Whalen v. Layman*, 2 Blackf. 194, 18 Am. Dec. 157; *Green v. Spencer*, 3

Mo. 318; *Hill v. Maupin*, *id.* 323; *Conn v. Wilson*, 2 Overt. 233, 5 Am. Dec. 663; *Goodall v. Thurman*, 1 Head, 209; *Williams v. Hollingsworth*, 6 Baxter, 12; *Mathews v. Cribbett*, 11 Ohio St. 330; *Fidler v. McKinley*, 21 Ill. 308; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Kniffen v. McConnell*, 30 N. Y. 285; *Sherman v. Rawson*, 102 Mass. 395; *Kelly v. Riley*, 106 *id.* 339, 8 Am. Rep. 336; *Sauer v. Schulenberg*, 33 Md. 288, 3 Am. Rep. 174; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Smith v. Braun*, 37 La. Ann. 225; *Bird v. Thompson*, 96 Mo. 424, 9 S. W. Rep. 788; *Musselman v. Barker*,

the seduction in aggravation of damages is not affected by a statute giving to an unmarried woman over twenty-one a right of action for her own seduction. But in such a case, and independent of the statute, it is in the discretion of the jury to award damages on account of the seduction.¹ In Wisconsin, Indiana and Maine seduction as matter of aggravation cannot be proved unless specially alleged.² In Kentucky, Pennsylvania and Maine the seduction cannot be proven in aggravation of damages. The act is one of mutual imprudence, and the maxim *volenti non fit injuria* applies.³ In Maine evidence of the fact that the plaintiff had been seduced and delivered of a child may be proven if the facts are specially pleaded, for the purpose of showing her condition at the time of the breach, and increasing the damages on that account.⁴

§ 985. **Consequences of seduction.** There cannot be added to the damages awarded for mental suffering, injury to reputation and loss of virtue, compensation for the loss of time, or the expense of medical or other attendance resulting from the seduction. In considering a recovery for the last-mentioned

26 Neb. 737, 42 N. W. Rep. 759; Daggett v. Wallace, 75 Tex. 352, 13 S. W. Rep. 49, 16 Am. St. 908; Giese v. Schultz, 53 Wis. 462, 10 N. W. Rep. 598; Bennett v. Beam, 42 Mich. 346, 4 N. W. Rep. 8; Dent v. Pickens, 34 W. Va. 240, 12 S. E. Rep. 698, 26 Am. St. 921; Spellings v. Parks, 104 Tenn. 351, 58 S. W. Rep. 126; Geiger v. Payne, 102 Iowa, 581, 69 N. W. Rep. 554; Liese v. Meyer, 143 Mo. 547, 562, 45 S. W. Rep. 282; Osmun v. Winters, 25 Ore. 260, 35 Pac. Rep. 250, citing the text; Davis v. Pryor, 3 Ind. Ty. 396, 58 S. W. Rep. 660; Maniz v. Lederer, 21 R. I. 370, 374, 43 Atl. Rep. 876, quoting the text and distinguishing Perkins v. Hersey, 1 R. I. 493, which has been cited in opposition to the rule; Rosenquest v. Noble, 21 App. Div. 583, 48 N. Y. Supp. 398; Poehlmann v. Kertz, 105 Ill. App. 249; Wolters v. Shultz, 1 N. Y. Misc. 196, 21 N. Y. Supp. 768; Finkelstein v. Barnett, 17 N. Y. Misc. 564, 40 N. Y. Supp. 694.

As to the vindication of the general usefulness of the remedy, see observations of Parker, C. J., in Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77. A different view is advanced by Mr. Schouler in 7 So. L. Rev. 57.

The fact that the seduction was on account of the promise of marriage may be inferred from the circumstances, in the absence of express proof. Walters v. Cox, 67 Mo. App. 299.

¹ Osmun v. Winters, 25 Ore. 260, 35 Pac. Rep. 250.

² Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Tyler v. Salley, 82 Me. 128, 19 Atl. Rep. 107.

³ Burks v. Shain, 2 Bibb, 841, 5 Am. Dec. 616; Weaver v. Bachert, 2 Pa. 80; Gring v. Lerch, 112 id. 244, 250, 3 Atl. Rep. 841, 56 Am. Rep. 314; Tyler v. Salley, 82 Me. 128, 19 Atl. Rep. 107.

⁴ Tyler v. Salley, *supra*.

items, Lyon, J., said, referring to the liability for the other consequences of seduction, that it is believed that none of the cases go beyond their allowance, and "it would seem that the rule as stated includes all elements of proximate injury resulting from the breach of the promise of marriage, if indeed it does not go beyond the line of proximate injury. Other elements of injury, such as loss of time, expenses of medical and other attendance and the like, might be held proximate, and might therefore increase the damages in an action of *per quod servitium amisit*, in which the seduction of the servant is proved in aggravation of the damages. In that form of action the loss of service caused by the seduction is the primary cause of action, and, of course, such loss is proximate. And the same may be said of the expenses which are the direct result of the act which caused the loss of service. But in this case the cause of action is further removed from the injuries just mentioned. The breach of promise of marriage is the foundation of the action; the seduction is the result of such promise — perhaps proximate — although, but for the authorities, that might well be doubted; but the loss of service and expenses of sickness which might or might not result from the seduction are certainly not the proximate results of the breach of promise, although they may be of the seduction."¹ On a second appeal of the same case it was ruled, in accordance with the foregoing quotation, that additional damages are not to be allowed because the plaintiff was gotten with child or suffered a miscarriage.²

If seduction is, on principle, an element of damages in an action for breach of promise, and the disgrace or injury to reputation which follows it is such an element, it seems illogical to exclude any other direct result of the seduction from the consideration of the jury. Mental suffering may result from seduction without pregnancy following; but compensation for disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy. Hence, the physical suffering and the expense connected with confinement, where pregnancy follows the seduction, are not more

¹ Giese v. Schultz, 53 Wis. 462, 10 N. W. Rep. 598.

² Giese v. Schultz, 65 Wis. 487, 27 N. W. Rep. 353.

remote than injury to the reputation. It might be otherwise where there is a miscarriage. In Minnesota it is held that evidence of the physical condition, the sickness of the plaintiff directly after the intercourse with the defendant, is admissible both for the purpose of corroborating her testimony and as bearing upon the matter of damages.¹

§ 986. Injury to feelings and other elements of damage.

As the plaintiff is entitled to recover damages for injury to her feelings any circumstances may be proved which tend to increase or mitigate this injury.² The plaintiff may show that she announced the fact of her engagement to her friends and invited them to her wedding;³ that the defendant assigned as a reason for discontinuing his attentions to her that she was a thief, and had submitted her person to his pleasure.⁴ Injury to the feelings of the family and friends of the plaintiff are not

¹ Schmidt v. Durnham, 46 Minn. 227, 49 N. W. Rep. 126. See next note.

² Parker v. Forehand, 99 Ga. 743, 28 S. E. Rep. 400; Robinson v. Craver, 88 Iowa, 381, 55 N. W. Rep. 492; Rime v. Rater, 108 Iowa, 61, 78 N. W. Rep. 835; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. Rep. 47; Rutter v. Collins, 103 Mich. 143, 62 N. W. Rep. 267; Brown v. Odill, 104 Tenn. 250, 56 S. W. Rep. 840; Stewart v. Anderson, 111 Iowa, 329, 82 N. W. Rep. 770; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. Rep. 745; Grubbs v. Pence, 73 S. W. Rep. 785 (Ky.).

It is error for the court to assume that the feelings of the plaintiff were injured; the question is for the jury. Walters v. Cox, 67 Mo. App. 299.

In Goddard v. Westcott, 82 Mich. 180, 188, 46 N. W. Rep. 242, the following instruction was approved as not including any special damages: "And first, she is entitled to damages as compensation for loss of time, for any expense she may have been put to in making preparations for marriage, for mental suffering which may have been occasioned by the breaking off of the contract, for in-

jury to her health, if any, for loss of a permanent home, and the worldly advantages which might have been derived therefrom by her—the circumstances as to home, property and pecuniary condition of the defendant being considered from the evidence in the case, and her own lack of independent means, if established. She is entitled [to compensation for damage] to her reputation, if any, either moral or physical, for injury to her future prospects of marriage. She is entitled to damages for any humiliation, contempt or mortification she may have suffered in the circles wherein she has moved, by reason of the breach of the contract upon defendant's part. All these she may recover by way of compensatory damages; and these she would be entitled to, even if the jury should find that he broke the contract in a careful, considerate, discreet and kindly manner."

³ Reed v. Clark, 47 Cal. 194; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. Rep. 936; Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. Rep. 1098.

⁴ Chesley v. Chesley, 10 N. H. 327.

to be considered, though she was seduced.¹ Evidence may be given of defamatory words, actionable in themselves, or otherwise, as circumstances of contumely and aggravation which attended the defendant's refusal to perform his contract;² but, it has been held, not an indecent and insulting letter written by the defendant to the plaintiff after the commencement of the action,³ though on this point there is authority to the contrary.⁴ It is doubtful if a recovery can be had for slanderous words used either before or after the commencement of the suit, because the defendant is liable therefor in a distinct action, and if it is brought cannot set up a recovery in the breach of promise suit.⁵ Any misconduct of the defendant in which

¹ Bell v. Giberson, 30 N. B. 10.

² Chesley v. Chesley, *supra*; Roberts v. Druillard, 123 Mich. 286, 82 N. W. Rep. 49.

³ Greenleaf v. McColley, 14 N. H. 303.

⁴ In Osmun v. Winters, 30 Ore. 177, 46 Pac. Rep. 780, an article published over the defendant's signature, attacking the character of the plaintiff, and an insulting letter addressed by him to her, both being written after the commencement of the action, were admitted in evidence as tending to prove the *animus* of the defendant in breaking the contract and in aggravation of the damages. The court said: We are aware that there are good authorities against the admission of the statement and this letter in evidence. The reasons upon which they proceed are that they involve matters or transactions occurring subsequent to the commencement of the action, which should not be permitted to contribute to an increase of damages above such as were contemplated by the plaintiff when the action was begun (Leavitt v. Cutler, 37 Wis. 46; Greenleaf v. McColley, 14 N. H. 303), and because they require the consideration of an independent tort. But if we are right in our position that an un-

founded charge of unchastity incorporated in the answer is cause for aggravation of damages, then, logically, these authorities are wrong. Strahan, J., in Kelley v. Highfield, 15 Ore. 290, 14 Pac. Rep. 794, says: "There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time towards her, or afterwards, was harsh, cruel or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong." So, in this case, if the contractual relations were wantonly broken off by the defendant, and he afterwards wilfully and maliciously persisted in casting imputations against the plaintiff's character through the public press, and by inditing to her indecent and insulting letters, whether done before or after the commencement of the action, such acts may be considered as a reflex of the defendant's wicked incentive for severing such relations, and taken into account by the jury in awarding damages.

⁵ Greenup v. Stoker, 7 Ill. 688;

the plaintiff did not participate at the time of the breach, or before or afterwards, tending to increase the injury therefrom, may be shown, as well as loss of time and expense incurred in preparations for marriage.¹ The jury in estimating the damages, therefore, may well take into account, as has been stated, the seduction of the plaintiff by the defendant as tending to increase the mortification and distress suffered by her.²

In the exercise of their right to draw inferences from facts proved, it is competent for them in estimating the damages to consider the period of time that had elapsed pending the [320] engagement,³ the intimacy of the parties, the frequency of the defendant's visits, the time, place and circumstances of making them; the imputations, if any, cast upon the plaintiff's character by the defendant's denial on oath, that, notwithstanding all these considerations, he never promised or intended to marry her.⁴ In such a case if the jury discredit his testimony in such denial, they may regard it as an attempt on his part, in the most public and solemn manner, to excite groundless suspicions against the plaintiff's character.⁵

In fixing the amount of damages the jury may take into

Dunlap v. Clark, 25 Ill. App. 573;
Roberts v. Druillard, 123 Mich. 286,
82 N. W. Rep. 49.

¹Baldy v. Stratton, 11 Pa. 316;
Johnson v. Jenkins, 24 N. Y. 252;
Chellis v. Chapman, 125 N. Y. 214, 26
N. E. Rep. 308, 11 L. R. A. 784. See
Smith v. Sherman, 4 Cush. 408;
Thorn v. Knapp, 42 N. Y. 474, 1 Am.
Rep. 561; Dunlap v. Clark, 25 Ill. App.
573; Goddard v. Westcott, 82 Mich.
180, 46 N. W. Rep. 242.

The recovery on account of expenditures must be limited to the proven loss resulting to the plaintiff on account of them. Stribley v. Welz, 1 Ohio Dec. 621, 624, 8 Ohio Ct. Ct. 571; Olmstead v. Hoy, 112 Iowa, 349, 83 N. W. Rep. 1056.

The plaintiff cannot show, in order to affect the amount of recovery, that while the contract to marry was in force she sold a part of her stock of goods at a loss in order to

be ready to marry the defendant and that he knew of such sale at the time it occurred. Clement v. Skinner, 72 Vt. 159, 47 Atl. Rep. 788.

²Sherman v. Rawson, 102 Mass. 395; Musselman v. Barker, 26 Neb. 737, 42 N. W. Rep. 759; Berry v. Da Costa, L. R. 1 C. P. 331; Bennett v. Beam, 42 Mich. 463, 4 N. W. Rep. 8.

³Coolidge v. Neat, 129 Mass. 146; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. Rep. 936; Grant v. Willey, 101 Mass. 356; Miller v. Rosier, 31 Mich. 475; Olmstead v. Hoy, 112 Iowa, 349, 83 N. W. Rep. 1056.

⁴Lawrence v. Cooke, 26 Me. 187, 45 Am. Dec. 103; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. Rep. 308, 11 L. R. A. 784; Stribley v. Lenz, 1 Ohio Dec. 621, 624, 8 Ohio Ct. Ct. 571; Poehlman v. Kertz, 105 Ill. App. 249.

⁵Id.; Duvall v. Fuhrman, 3 Ohio Ct. Ct. 305.

consideration the nature of the defense set up; if by pleading or evidence the defendant attempts to justify or palliate his abandonment or breach of the contract to marry on the ground of any misconduct or bad character of the plaintiff, and fails to establish the same and had no reasonable grounds for believing any such objections to exist, such defamatory and fraudulent defense may be considered as increasing the injury and justifying a larger verdict.¹ To justify any increase of damages on account of such defense, not established, the jury should be satisfied that it is interposed in bad faith.² Where the only evidence offered to sustain the allegations of unchastity was of the defendant's own criminal conduct with the plaintiff, the claim of good faith was pronounced baseless.³ But in Wisconsin it is held that allegations of the plaintiff's unchastity in the answer, though unsupported by any evidence, are not cause for aggravating the damages unless the charges were made dishonestly or in bad faith.⁴ One who enters into a contract to marry, knowing that he is afflicted with a contagious venereal disease, perpetrates a fraud upon the other party to the contract and aggravates the damages she may recover on the breach thereof by him.⁵ If services have been rendered in expectation of marriage with the party served, they cannot be recovered for in any other action than that based on the breach of promise to marry.⁶ Where the plaintiff sought in the first count of her complaint to recover for services rendered to the defendant pending their engagement, in consideration of and reliance upon the promise of marriage, and in the second count to recover for the breach of that

¹ Denslow v. Van Horn, 16 Iowa, 476; Southard v. Rexford, 6 Cow. 254; Reed v. Clark, 47 Cal. 194; White v. Thomas, 12 Ohio St. 312, 80 Am. Dec. 347; Kniffen v. McConnell, 30 N. Y. 285; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kelley v. Highfield, 15 Ore. 277, 14 Pac. Rep. 744; Liese v. Meyer, 143 Mo. 547, 561, 45 S. W. Rep. 282; Osmon v. Winters, 30 Ore. 177, 46 Pac. Rep. 780; Kaufman v. Fye, 99 Tenn. 145, 167, 42 S. W. Rep. 25; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. Rep. 293.

² Leavitt v. Cutler, 37 Wis. 46; Simpson v. Black, 27 Wis. 206; Powers v. Wheatly, 45 Cal. 113; Clark v. Reese, 35 Cal. 89; Blackburn v. Mann, 85 Ill. 222; Kelley v. Highfield, 15 Ore. 277, 14 Pac. Rep. 74.

³ Kelley v. Highfield, *supra*.

⁴ Alberts v. Albertz, 78 Wis. 72, 47 N. W. Rep. 95, 10 L. R. A. 584.

⁵ Trammell v. Vaughan, 158 Mo. 214, 59 S. W. Rep. 79.

⁶ Lafontain v. Hayhurst, 89 Me. 388, 36 Atl. Rep. 623, 56 Am. St. 430.

promise, it was ruled that, inasmuch as the compensation which she had agreed to receive was the performance of the promise of marriage, and that performance would have satisfied her claim, the damages recovered under the second count were the legal equivalent of performance, and that no other compensation could be recovered.¹ A plaintiff who has broken an existing contract to marry at the solicitation of the defendant, and promised to marry him, cannot recover for the loss of the opportunity to marry her jilted lover. She cannot profit by her own perfidy.²

§ 987. **Same subject; exemplary damages.** It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into such a contract with improper motives, and then ruthlessly and unjustifiably breaks it, does a wrong to the woman, and also, in a more remote sense, to society; and needs to be punished in the interest of society, equally with the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate;—so much depends upon the circumstances surrounding the case, upon the conduct, standing and character of the parties. [321] Accordingly, in actions for breach of promise of marriage, where it appears that the contract was made and broken, exemplary damages may be given if the defendant was actuated by such motives and has been guilty of a ruthless and unjustifiable breach.³ The jury may⁴ give such an amount of dam-

¹ *Smith v. Hall*, 69 Conn. 651, 666, 38 Atl. Rep. 386.

² *Hahn v. Bettingen*, 81 Minn. 91, 83 N. W. Rep. 467; *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. Rep. 79.

³ *Johnson v. Travis*, 33 Minn. 231, 22 N. W. Rep. 624; *Kelley v. Highfield*, 15 Ore. 277, 14 Pac. Rep. 744; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. Rep. 303, 11 L. R. A. 784; *Duvall v. Fuhrman*, 3 Ohio Ct. Ct. 305; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Coryell v. Colbaugh*, 1 N. J. L. 77, 1 Am. Dec. 192; *Johnson v. Jen-*

kins, 24 N. Y. 252; *Hughes v. Nolte*, 7 Ind. App. 526, 34 N. E. Rep. 745; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. Rep. 217; *Wolters v. Schultz*, 1 N. Y. Misc. 196, 21 N. Y. Supp. 768; *Finklestein v. Barnett*, 16 N. Y. Misc. 488, 38 N. Y. Supp. 961; *Stribley v. Welz*, 1 Ohio Dec. 621, 8 Ohio Ct. Ct. 571; *Kaufman v. Fye*, 99 Tenn. 145, 167, 42 S. W. Rep. 25, quoting the text; *Ayers v. Mahuka*, 9 Hawaii, 377; *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. Rep. 783.

⁴ It is error to direct the jury to award such damages. Their allow-

ages, not flagrantly excessive and disproportionate to the injury, as will mark their disapprobation of, and deter others from, the violation of such sacred promises.¹ For this purpose the jury may take into consideration all the facts and circumstances of the case, and the conduct of both parties toward each other, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action.² It is, among other facts, a legitimate subject for the consideration of the jury, if the fact is so, that the defendant not only abandoned the plaintiff and trifled with her affections, but had sought to disgrace her and ruin [322] her character.³ If the abandonment of the plaintiff by the defendant was wanton and ruthless, and so accomplished as to manifest an intent unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects, all the circumstances showing the latter to have been influenced by bad motives may be proved, and then the largest measure of damages, not only by way of compensation to the plaintiff, but by way of punishment to the defendant, is proper.⁴ On the contrary, if the breach was occasioned by a change of circumstances which, without legally justifying, took from the abandonment all its character of cruelty and wantonness, and [323] the defendant, in withdrawing from his engagement, was tender of the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation, and to do the least injury to her feelings and future

ance is for the discretion of that body. *Jacobs v. Sire*, 4 N. Y. Misc. 398, 23 N. Y. Supp. 1063. See § 403.

¹ *Coil v. Wallace*, 24 N. J. L. 291.

² *Kelley v. Highfield*, 15 Ore. 277, 282, 14 Pac. Rep. 744, quoting the text.

³ *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561, per Smith, J. The general principles here stated, it is believed, are sustained by the best authorities, and, considering the exceptional character of the action, are just and reasonable. They are ably

discussed and illustrated by Earl, C. J., in the case last cited. Compare *Greenleaf v. McColley*, 14 N. H. 303; *Leavitt v. Cutler*, 37 Wis. 46. See *Osmun v. Winters*, in note to § 896.

The marriage of the defendant to a third person subsequently to the bringing of the suit cannot be proven to show that he was deceitful or malicious toward the plaintiff. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. Rep. 698, 26 Am. St. 291.

⁴ *Johnson v. Jenkins*, 24 N. Y. 252.

prospects, it would be a case for compensatory damages merely.¹ In respect to damages imposed as a punishment, a woman who has lived in adultery with a man who breaks his engagement to marry her does not stand in the same position as one to whose conduct no exception can be taken, and cannot recover anything beyond compensatory damages.² In Missouri it is said that if the defendant fraudulently entered into the contract the plaintiff was entitled to withdraw therefrom, the fraud having vitiated her consent. If he entered his suit in malice and not in love [which the facts indicated] this aggravated the plaintiff's damages, and she was entitled to compensation therefor, but not to punitive damages.³

§ 988. **Damages for loss of marriage.** In determining the damages for the loss of marriage, where no special damages are alleged, the jury may take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of the marriage which would have given the plaintiff a permanent home and an advantageous establishment; and if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections may be considered as an additional element of damage.⁴ It is

¹ Id.; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. Rep. 318, 17 Am. St. 248; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. Rep. 925; *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. Rep. 242.

² *Clement v. Brown*, 57 Minn. 314, 59 N. W. Rep. 198.

³ *Trammell v. Vaughan*, 158 Mo. 214, 224, 59 S. W. Rep. 79.

⁴ *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. Rep. 925, quoting the text; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Harrison v. Swift*, 13 Allen, 144; *Grubbs v. Pence*, 73 S. W. Rep. 785 (Ky.).

In *Coolidge v. Neat*, 129 Mass. 146, 149, the following instruction was approved as being in conformity with repeated decisions of the supreme court: "As elements of damage the jury would have the right to consider: 1. The disappointment of the plaintiff's reasonable expecta-

tions, and to inquire what she had lost by reason of such disappointment, and, for that purpose, to consider, among other things, what would be the money value or worldly advantage of a marriage which would have given her a permanent home and an advantageous establishment. 2. The wound and injury to her affections, whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfill his promise. That, in connection with the question how she had been wounded in her affections or suffered mortification or distress, the jury might consider the length of time during which the engagement had subsisted; that if a female had been wantonly deserted, after an engagement of this kind, public policy as well as justice dictated the propriety of a legal indemnity, and

proper for the jury to consider the pecuniary as well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by the marriage.¹ In these cases the jury should take into consideration the rank and condition of the parties, the estate of the defendant, and all the facts proven.² And the amount of damages, not being capable of measurement by any precise rule, is left to the discretion of the jury on the circumstances of each particular case,³ subject to the power of the court to set aside

if her affections had been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which might result by reason of such desertion after a long courtship, were all matters for their consideration. It cannot be assumed that the defendant, by associating with the plaintiff, prevented her from forming any other marriage alliance or engagement to marry. The plaintiff might have had no other opportunity for marriage, and the defendant cannot be held responsible for merely possible damage."

In *Hahn v. Bettingen*, 81 Minn. 91, 83 N. W. Rep. 467, a broader rule of liability is stated: In assessing damages the jury may take into consideration the plaintiff's pecuniary loss, her loss of opportunities during her engagement to the defendant for contracting a suitable marriage with another, the disappointment of her reasonable expectations of material and social advantages resulting from the intended marriage, the injury to her health or feelings, the wounding of her pride, the blighting of her affections, and the marring of her prospects in life by reason of the defendant's promise and his refusal to keep it.

¹ *Richmond v. Roberts*, 90 Ill. 472; *Crosier v. Craig*, 47 Hun. 83; *McPherson v. Ryan*, 59 Mich. 33, 26 N. W. Rep. 321; *Johnson v. Travis*, 33

Minn. 231, 22 N. W. Rep. 624; *Bennett v. Beam*, 42 Mich. 346, 4 N. W. Rep. 8; *Olson v. Solverson*, 71 Wis. 663, 38 N. W. Rep. 329; *Dent v. Pickens*, 34 W. Va. 240, 26 Am. St. 921, 12 S. E. Rep. 698; *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. Rep. 308, 11 L. R. A. 784; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Rutter v. Collins*, 103 Mich. 143, 61 N. W. Rep. 267; *Tamke v. Vangsnes*, 72 Minn. 236, 75 N. W. Rep. 217; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. Rep. 875; *Brown v. Odill*, 104 Tenn. 250, 265, 56 S. W. Rep. 840; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. Rep. 581, citing the text; *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. Rep. 621; *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. Rep. 10; *Smith v. Compton*, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480.

In *Harrison v. Cage*, *Carthew*, 467, an action for breach on the part of the woman, the value of her estate when the plaintiff courted her and also its subsequent increase was shown.

² *Id.*; *Jarvis v. Johnson*, 2 West. L. Monthly, 389; *Royal v. Smith*, 40 Iowa, 615; *Reed v. Clark*, 47 Cal. 194; *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. Rep. 554; *Rime v. Rater*, 108 Iowa, 61, 78 N. W. Rep. 835; *Kennedy v. Rodgers*, 2 Kan. App. 764, 44 Pac. Rep. 47; *Casey v. Gill*, 154 Mo. 181, 55 S. W. Rep. 219.

³ *Southard v. Rexford*, 6 Cow. 254;

the verdict when it appears that the jury has been misled or influenced by passion or prejudice.¹

Where the plaintiff introduces no proof as to the de- [324] fendant's pecuniary condition it has been held that the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.² But as damages for loss of the marriage are to be ascertained by considering the rank and condition of the parties, and as the pecuniary standing of the defendant is a material element, the offer of proof of that condition by him is not so much to reduce damages as to exhibit the state of facts from which they are primarily to be determined. The true principle is well stated in an Iowa case.³ While in such action the question whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded should have no influence with the jury in arriving at the amount of their verdict, they may, nevertheless, properly consider the pecuniary as well as social standing of the defendant as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract.⁴ In a Maine case the instruction of the

Wilbur v. Johnson, 58 Mo. 600; Hol-
loway v. Griffith, 32 Iowa, 409, 7 Am.
Rep. 208; Lawrence v. Cooke, 56 Me.
187, 96 Am. Dec. 443; Goodall v.
Thurman, 1 Head, 209; Denslow v.
Van Horn, 16 Iowa, 476; Richmond
v. Roberts, 98 Ill. 472; Schrecken-
gast v. Ealy, 16 Neb. 510, 20 N. W.
Rep. 853; Musselman v. Barker, 26
Neb. 737, 42 N. W. Rep. 759; Kelley
v. Highfield, 15 Ore. 277, 14 Pac. Rep.
744; Daggett v. Wallace, 75 Tex. 352,
13 S. W. Rep. 49, 16 Am. St. 908;
Giese v. Schultz, 69 Wis. 521, 34 N.
W. Rep. 913; Olson v. Solverson, 71
Wis. 663, 38 N. W. Rep. 329; Mahiat
v. Codde, 106 Mich. 387, 64 N. W.
Rep. 194; Liese v. Meyer, 143 Mo.
547, 45 S. W. Rep. 282; Brown v.
Odill, *supra*; Hooker v. Phillippe, 26
Ind. App. 501, 60 N. E. Rep. 167;
Lohner v. Coldwell, 15 Tex. Civ.
App. 444, 39 S. W. Rep. 591, citing
this section.

¹ Wilbur v. Johnson, 58 Mo. 600;

Collins v. Mack, 31 Ark. 684; Doug-
lass v. Gausman, 68 Ill. 170; Gough
v. Farr, 1 Y. & J. 477; Goodall v.
Thurman, 1 Head, 209; Wolters v.
Schultz, 1 N. Y. Misc. 196, 21 N. Y.
Supp. 768; Kellett v. Robie, 99 Wis.
303, 74 N. W. Rep. 781; Kolsch v.
Jewell, 21 App. Div. 581, 48 N. Y.
Supp. 527; Bowman v. Bowman, 153
Ind. 498, 55 N. E. Rep. 422; Hahn v.
Bettingen, 84 Minn. 512, 88 N. W.
Rep. 10; Smith v. Woodfine, 1 C. B.
(N. S.) 660. See Berry v. Vreeland,
21 N. J. L. 184.

² Wilbur v. Johnson, 58 Mo. 600.

Where the evidence does not show
the loss of a permanent home, it is
error for the court to instruct that
damages may be awarded on that
account. Dunlap v. Clark, 25 Ill.
App. 573.

³ Holliday v. Griffith, 32 Iowa, 409,
7 Am. Rep. 208.

⁴ Royal v. Smith, 40 Iowa, 615.

court to the effect that, if the jury found for the plaintiff, the rule in actions of this sort, as in other cases, is that the plaintiff is entitled to such damages as will place her in as good condition as she would have been in if the contract had been fulfilled, was approved. It was construed as referring to her pecuniary condition. Her loss of pecuniary support is one of the elements of damage. Evidence of the defendant's pecuniary ability was properly introduced to show the probable character of such support. The instruction was treated as calling for the judgment of the jury upon the question of the pecuniary value to the plaintiff of a matrimonial alliance with the defendant, and in that view was held unobjectionable.¹

The relevancy of the defendant's financial condition to the plaintiff's cause of action is placed on impregnable ground by the reasoning of the Michigan court: "In this state it is a well-settled legal axiom that the just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. . . . Now the contract for a breach of which this suit was brought was one for a life association of interests, and it is one of the most obvious facts that the pecuniary circumstances of the defendant, as well as his social position, would largely influence any one's estimate of the damages suffered. This would be so even if the woman had in no manner taken the man's property into account in engaging herself to him; but the law always supposes that property considerations are not ignored in these cases. In cases like the present what loss is it that the plaintiff has sustained by a breach of the contract? To determine this we must look at the surroundings, and see what it was to which the defendant invited her. If it was to a home of poverty and a life of probable hardship and misery, the loss would apparently be small, but if it was to a home possessed of and surrounded by all the comforts and even the luxuries of life, and where her social position in the circles in which she would move by right of the marriage would be the very best, the case would be exactly the opposite, because in such case there would be abundant promise of social and domestic happiness. But beyond this, the very marriage confers certain rights in

¹ *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443.

the husband's real and personal estate of which she cannot afterwards be deprived, except by her own consent, and she would naturally and justly look to them as her security against becoming dependent through the accidents and misfortunes of life. It is all these that the breach of the marriage contract deprives the woman of, and she is allowed to prove them, not to show that he will be able to satisfy a judgment if she obtains one, but to measure the extent of her loss."¹ The evidence of the defendant's financial ability must be limited to the time the breach occurred, or to such time as he might reasonably be expected to fulfill his contract;² though where the trial of the action for the breach occurs soon after the contract was made, proof may be made of the property owned by the defendant at the time of the trial.³ Testimony as to the financial ability of the relatives of the defendant is not admissible.⁴

The financial condition of the defendant may be proven by evidence of general reputation,⁵ "but it seems to have been the common practice in such cases to allow specific evidence of defendant's pecuniary circumstances to be introduced."⁶ The last proposition is denied by the New Jersey court of errors and appeals, which says that in principle the question is the same as when an attack is made on character; it must be sustained by proof of general reputation and not by proving particular instances. But if the defendant conveyed particular tracts of land to relatives shortly before the time fixed for the marriage, the value of the land conveyed may be proven to show bad faith on his part,⁷ and so if special damages are

¹ *Bennett v. Beam*, 42 Mich. 346, 4 N. W. Rep. 8, approved in *Mahiat v. Codde*, 106 Mich. 387, 64 N. W. Rep. 194. The text is approved in *Stribley v. Welz*, 1 Ohio Dec. 621, 625, 8 Ohio Ct. Ct. 571. See *Miller v. Rosier*, 31 Mich. 475.

² *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. Rep. 698, 26 Am. St. 921.

³ *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. Rep. 621.

⁴ *Miller v. Rosier*, 31 Mich. 475; *Aldis v. Stewart*, 4 N. Y. Misc. 389, 24 N. Y. Supp. 329; *Totten v. Read*, 16 Daly, 282, 10 N. Y. Supp. 318.

⁵ *Chellis v. Chapman*, 125 N. Y. 214, 26 N. E. Rep. 308, 11 L. R. A. 784; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. Rep. 875.

⁶ *Vierling v. Binder*, *supra*, citing *Sprague v. Craig*, 51 Ill. 288; *Dougllass v. Gausmann*, 68 Ill. 170; *Clark v. Hodges*, 65 Vt. 273, 26 Atl. Rep. 726; *Rime v. Rater*, 108 Iowa, 61, 78 N. W. Rep. 835.

⁷ *Smith v. Compton*, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480; *Kerfoot v. Marsden*, 2 F. & F. 160; *Kniffen v. McConnell*, 30 N. Y. 285. *Stratton v. Dole and Chellis v. Chap-*

claimed because of the loss of the right of dower in the defendant's property.¹

§ 989. What will excuse a breach of the contract. A promise of marriage in consideration of illegal intercourse is void.² A man is not legally holden on his promise of marriage and may justify his refusal to fulfill it if he made it in ignorance of the fact that the woman had an illegitimate child, or had committed fornication with other men, and on that ground declines entering into the marriage.³ All promises of this kind are founded upon the presumption of chastity on the part of the woman. This is the consideration of the contract, and [326] where that is discovered to have failed she has herself been guilty of the first breach.⁴ And if she be guilty of such immorality after the promise it will be a bar.⁵ But if the

man, *supra*, are referred to as being opposed to the rule of the Iowa cases.

¹ Id.

² *Edmonds v. Hughes*, — Ky. —, 74 S. W. Rep. 282; *Baldy v. Stratton*, 11 Pa. 316; *Judy v. Sterrett*, 52 Ill. App. 265; *Hanks v. Naglee*, 54 Cal. 52, 35 Am. Rep. 67.

³ *Guptill v. Verback*, 58 Iowa, 98, 12 N. W. Rep. 125; *Bench v. Merrick*, 1 C. & K. 463; *Irving v. Greenwood*, 1 C. & P. 350; *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Berry v. Bakeman*, 44 Me. 164; *La Porte v. Wallace*, 89 Ill. App. 517; *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. Rep. 316, 54 Am. St. 886; *Edmonds v. Hughes*, *supra*.

In *Wharton v. Lewis*, 1 C. & P. 529, it was held that if it appear that the defendant was induced to make the promise or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, this goes in bar, and not to the damages only. And in *Baddeley v. Mortlock*, Holt's N. P. 151, which was an action against a woman for breach of a promise of marriage, it

was held a sufficient justification for non-performance that the person to whom she had given the promise turned out upon inquiry to be a man of bad character. The bad conduct charged against the plaintiff was dishonesty in some pecuniary concerns and perjury.

In *Foulkes v. Sellway*, 3 Esp. 236, Lord Kenyon ruled that where the defendant relies upon general bad character a witness may be examined as to representations made to him by third persons.

In *Berry v. Bakeman*, 44 Me. 164, Tenney, C. J., said no case has been found which sustains the principle that a breach of the criminal law by the plaintiff, accruing after the promise or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit, but such conduct would be material on the question of damage.

⁴ *Budd v. Crea*, 6 N. J. L. 370; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. Rep. 875.

⁵ *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. Rep. 624.

Plaintiff's unchaste and lewd hab-

defendant made his promise with knowledge of such past misconduct with other men, or if such misconduct occurs afterwards with his connivance, it is no bar.¹ In an early Massachusetts case² the following distinctions were declared as law, and they appear to be generally recognized by later adjudications: 1. That if the woman was of bad character at the time of the contract and that was unknown to the defendant the verdict ought to be in his favor. 2. If the plaintiff after the promise had prostituted her person to any other than the defendant she thereby discharged the defendant. 3. If her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages. 4. If such was her conduct after the promise it was proper, in the same view, for the consideration of the jury. So, when a man breaks off the engagement after he has seduced the woman, and does so on grounds furnishing no excuse or reason, and on the trial produces evidence of her previous incontinence before or during the engagement, of which he had no knowledge or suspicion before he so broke off the engagement, such evidence, if believed, will go in mitigation only, and not in bar of damages.³

General reputation of bad character in respect to chastity is not a defense; the defendant must prove that the plaintiff is what she is reputed to be;⁴ nor is it a defense that the plaintiff was hysterical or subject to nervous or convulsive fits;⁵ nor that the plaintiff had previously contracted to marry another person than the defendant;⁶ nor that the latter was married, the plaintiff not knowing the fact.⁷ A woman who knows

its cannot be proven unless they are pleaded. *Smith v. Braun*, 37 La. Ann. 225.

¹ *Johnson v. Travis*, 33 Minn. 231, 22 N. W. Rep. 624; *Kelley v. Highfield*, 15 Ore. 277, 14 Pac. Rep. 744; *Denslow v. Van Horn*, 16 Iowa, 476; *Burnett v. Simpkins*, 24 Ill. 264; *Johnson v. Smith*, 3 Pittsb. 184; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. Rep. 422; *Sprague v. Craig*, 51 Ill. 288; *Von Storch v. Griffin*, 77 Pa. 504.

² *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122.

³ *Sheahan v. Barry*, 27 Mich. 217.

⁴ *Butler v. Eschleman*, 18 Ill. 44; *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. Rep. 316, 54 Am. St. 886.

⁵ *Rime v. Rater*, 108 Iowa, 61, 67, 78 N. W. Rep. 835, citing *Simmons v. Simmons*, 8 Mich. 318.

⁶ *Casey v. Gill*, 154 Mo. 181, 55 S. W. Rep. 219; *Hahn v. Bettingen*, 81 Minn. 91, 83 N. W. Rep. 467.

⁷ *Kerns v. Hagenbuchle*, 60 N. Y. Super. Ct. 222, 17 N. Y. Supp. 367; *Davis v. Pryor*, 3 Ind. Ty. 396, 58 S. W. Rep. 660.

that the man to whom she has engaged herself has for many years lived and cohabited with another woman as her husband is bound to know that he is married, and, though he represented that he was single, cannot maintain an action for breach of his promise to marry her.¹ No action for breach of promise will lie if the parties are disqualified by statute by reason of affinity.² The defendant, of course, can claim no advantage growing out of his own wrong conduct to the plaintiff after the promise to marry was made.³ Lord Ellenborough charged in a case brought by a man that if he had conducted himself in a brutal or violent manner and threatened to use the defendant illy, she had a right to say that she would not commit her happiness to such keeping, and such facts would constitute a legal defense.⁴

The marriage engagement is made upon the assumption that the woman is perfect as such; if the fact is otherwise it is a defense to an action for the breach of the contract. If she informs the man of her defective physical condition and promises to have it remedied, but does not do so, he is not bound to marry her. The defect that works this result need not be such as would entitle him to a divorce if he was her husband.⁵ By unnecessarily submitting to an operation, subsequent to the contract to marry, whereby a woman is made incapable of procreation, the right to recover for the breach of such contract is lost.⁶

Where the defendant, who had contracted syphilis, entered into an agreement to marry, believing in good faith that he had been cured of the disease, the reappearance of the disease, without fault on his part, so as to render him unfit to marry, constituted a good defense to an action for the breach of his contract. The court said: While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either

¹ *Davis v. Pryor*, 112 Fed. Rep. 274, 50 C. C. A. 579, reversing 3 Ind. Ty. 396.

² *Reed v. Reed*, 49 Ohio St. 654, 32 N. E. Rep. 750.

³ *Dunn v. Trout*, 87 Ill. App. 432; *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. Rep. 422.

⁴ *Leeds v. Cook*, 4 Esp. 256.

⁵ *Gring v. Lerch*, 112 Pa. 244, 3 Atl. Rep. 841, 56 Am. Rep. 314; *Vierling v. Binder*, 118 Iowa, 337, 85 N. W. Rep. 621. See *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. Rep. 242.

⁶ *Edmonds v. Hughes*, — Ky. —, 74 S. W. Rep. 283.

party, without fault, so as to render it impossible in the nature of things to accomplish the objects of the marriage relation, will release the parties from the agreement. Impotency, insanity or such a diseased condition of the body as would affect the offspring and endanger the life of the mother if the contract were carried out would certainly be within this rule.¹ In a recent Virginia case it is ruled that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable.² This is substantially the view held in Missouri, with the condition that if the disease is merely of a temporary character the party afflicted is entitled to postpone the marriage until health is restored.³ The New Jersey court of errors and appeals refuses to recognize that an exception exists as to the duty to perform a contract of marriage which is absolute, and withholds its assent from the doctrine just stated, because, as said by Van Syckel, J., such a defense is excluded by the well settled rule that no one can claim to be absolved from the performance of his obligation by reason of his own immoral conduct or his own turpitude, where the other party has not participated in it. Where both parties are in complicity in an illegal act or an act of turpitude, the court will not listen to a controversy between them founded upon it, but will leave them in the position in which they have placed themselves. Where a party offers to set up in his own defense his own immoral conduct, the court will not permit it. In my judgment, it would be more in accordance with correct legal principle to hold that the plaintiff would be entitled to refuse to marry him, and treat his condition as a breach of the contract. . . The contract is an unconditional one, into

¹ Shackleford v. Hamilton, 93 Ky. 80, 88, 19 S. W. Rep. 5, 15 L. R. A. 531, approving the minority opinions in Hall v. Wright, 96 Eng. C. L. 745. See Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444. Gardner v. Arnett, 21 Ky. L. Rep. 1, 50 S. W. Rep. 840, follows the principal case.

² Sanders v. Coleman, 97 Va. 690,

34 S. E. Rep. 621, 47 L. R. A. 581, citing Shackleford v. Hamilton and Allen v. Baker, *supra*. The same view is favored in Iowa in discussion. Vierling v. Binder, 113 Iowa, 337, 340, 85 N. W. Rep. 621.

³ Trammell v. Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 51 L. R. A. 854.

which the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in *Hall v. Wright*,¹ that it is not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient, or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff.²

A recent Massachusetts case contains some important general rules respecting fraudulent concealment as a ground for annulling a contract to marry: It is not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; if the parties became engaged without making any investigations, and without receiving any assurances or representations which led to the engagement, even though matters were discovered subsequently which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery, they will be bound by their engagement to marry. The fact, if it was a fact, that the plaintiff had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or that there was incompatibility resulting from disparity of age, difference in character and disposition, and other causes, which, apart from fraud, were the things relied on by the defendant, would not justify him as matter of law in breaking the contract.³ "But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were neces-

¹ 96 Eng. C. L. 746.

² *Smith v. Compton*, 55 Cent. L. J. 409, 52 Atl. Rep. 386, 67 N. J. L. 548, 58 L. R. A. 480.

³ Referring to *Reynolds v. Reynolds*, 3 Allen, 605; *Coolidge v. Neat*, 129 Mass. 146; *Gring v. Lerch*, 112

Pa. 244, 3 Atl. Rep. 841; *Berry v. Bakeman*, 44 Me. 164; *Leeds v. Cook*, 4 Esp. 256; *Baker v. Cartwright*, 10 C. B. (N. S.) 124; *Beachey v. Brown*, El., Bl. & El. 796; *Young v. Murphy*, 3 Bing. N. C. 54; *Bench v. Merrick*, 1 C. & K. 463.

sary to a correct understanding on the part of the defendant of the facts which she stated, and if she wilfully concealed and suppressed such facts, and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment."¹

§ 990. What may be proved in mitigation. If a man promises to marry a woman, knowing at the time that she had borne an illegitimate child, or that she is loose and immodest, he is bound by his contract, and if he refuses to perform it must respond in damages.² Such actions, however, are brought to recover, among other things, for injury to reputation, and therefore it is involved in them, and must necessarily de- [327] pend on the general conduct of the party subsequent as well as previous to the injury complained of.³ It may be the subject of inquiry on the question of damages, for a loose and immodest woman cannot be said to be entitled to so large a compensation as one on whose reputation no imputation has ever rested.⁴ Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation.⁵ The general reputation and standing

¹ Van Houten v. Morse, 162 Mass. 414, 38 N. E. Rep. 705, 26 L. R. A. 430, citing Kidney v. Stoddard, 7 Met. 252; Short v. Currier, 153 Mass. 182, 26 N. E. Rep. 444; Burns v. Dockray, 156 Mass. 135, 137, 30 N. E. Rep. 551; Prentiss v. Russ, 16 Me. 30; Atwood v. Chapman, 68 Me. 38, 40, 41, 28 Am. Rep. 5; Potts v. Chapin, 133 Mass. 276; Clark v. Baird, 5 Seld. 183; Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Devoe v. Brandt, 53 N. Y. 462; Hill v. Gray, 1 Stark. 434; Stevens v. Adamson, 2 Stark. 422; Arkwright v. Newbold, 17 Ch. Div. 301, 313, 318; Aortson v. Ridgway, 18 Ill. 23; Add. Torts (Wood's ed.), 1205.

² Irving v. Greenwood, 1 C. & P. 350; Bench v. Merrick, 1 C. & K. 463; Denslow v. Van Horn, 16 Iowa, 476; Morgan v. Yarborough, 5 La. Ann. 316; Woodard v. Bellamy, 2 Root,

354; Johnson v. Caulkins, 1 Johns. Cas. 116; Johnson v. Smith, 3 Pittsb. 184.

³ Willard v. Stone, 7 Cow. 22; Johnson v. Caulkins, 1 Johns. Cas. 116, 3 id. 437; Markham v. Herrick, 82 Mo. App. 327; Stratton v. Dole, 45 Neb. 472, 63 N. W. Rep. 875.

⁴ Bench v. Merrick, 1 C. & K. 463; Johnson v. Caulkins, *supra*; Von Storch v. Griffin, 77 Pa. 504; Budd v. Crea, 6 N. J. L. 370; Butler v. Eschleman, 18 Ill. 44; Burnett v. Simpkins, 24 Ill. 264; Denslow v. Van Horn, 16 Iowa, 476; Palmer v. Andrews, 7 Wend. 142; Daubet v. Kirkman, 15 Ill. App. 622; Kantzler v. Grant, 2 id. 236; Dupont v. McAdow, 6 Mont. 226, 9 Pac. Rep. 925.

⁵ Leeds v. Cook, 4 Esp. 256; Button v. McCauley, 5 Abb. Pr. (N. S.) 29; Alberts v. Albertz, 78 Wis. 72, 47 N. W. Rep. 95, 10 L. R. A. 584.

of the plaintiff's family may be shown by her to enhance, and by the defendant to diminish, damages, but the reputation of a particular member of the family, other than the plaintiff, cannot be inquired into.¹ The defendant cannot reduce damages by showing his want of affection for the plaintiff, on the assumption that he would not fulfill the duties of a husband.² She may, however, show that she is sincerely attached to the defendant.³ So it has been held that declarations made by the plaintiff after the breach that she would not marry the defendant but for his money may be proved by him in mitigation of damages,⁴ but such declarations made after the commencement of the action have been excluded.⁵ The defendant may show instances of licentious conduct in the plaintiff, and her general character as to sobriety and virtue.⁶ A defendant, however, who was shown to have seduced the plaintiff and gotten her with child was held not entitled to prove her general reputation. Parker, J., said: "It appears from the declaration in this case that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of [328] such a proposal in a stronger light than the bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, in-

¹ *Spellings v. Parks*, 104 Tenn. 349, 58 S. W. Rep. 126, citing *Thompson v. Clendenning*, 1 Head, 297.

² *Richmond v. Roberts*, 98 Ill. 472; *Coolidge v. Neat*, 129 Mass. 146; *Piper v. Kingsbury*, 48 Vt. 480. See *Hall v. Wright, El., B. & E.* 746, 96 Eng. C. L. 745, 763.

³ *Sprague v. Craig*, 51 Ill. 288.

⁴ *Miller v. Rosier*, 31 Mich. 475; *Robinson v. Craver*, 88 Iowa, 381, 55 N. W. Rep. 492.

⁵ *Miller v. Hayes*, 34 Iowa, 496, 11 Am. Rep. 154.

⁶ *Johnson v. Caulkins*, 1 Johns. Cas. 116, 3 id. 437; *Foulkes v. Sellway*, 3 Esp. 236; *Williams v. Hollingsworth*, 6 Baxt. 12; *Cole v. Holliday*, 4 Mo. App. 94; *Button v. McCauley*, 38 Barb. 413, 417, 418, 5 Abb. Pr. (N. S.) 29; *Alberts v. Albertz*, 73 Wis. 72, 47 N. W. Rep. 95, 10 L. R. A. 584; *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. Rep. 783.

adequate as it is, is to be resisted or reduced by arguing her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of justice."¹ Nor will a defendant be permitted to show by general reputation that after the promise another had supplanted him in the affections of the plaintiff.² He may prove in mitigation of damages that at the time of the breach he was afflicted with an incurable disease.³ If, however, the disease was contracted subsequently to the promise, or if before, and he knew it was incurable, he must respond in damages; but it is otherwise if it was contracted prior to the engagement and he had reason to believe that it was temporary only.⁴

The courts are not agreed concerning the effect of proof of a subsequent offer to perform the contract. The weight of authority is against its reception for the purpose of mitigating damages.⁵ It is doubtful if any hard-and-fast rule can be laid down on this proposition. The facts and circumstances of the whole case will determine whether such evidence is to be received or rejected. The defendant cannot affect his liability by proof of relationship where the degree is not within the prohibition of the statute;⁶ nor by the fact that the plaintiff did him bodily harm after the breach was committed.⁷ The acts, conduct and declarations of the defendant after the breach and down to the time of trial may be proven in mitigation if they have a tendency to that end.⁸ Where seduction is proved by way of aggravation its consideration in that view cannot be excluded on account of the existence or even the prior actual

¹ *Boynton v. Kellogg*, 3 Mass. 187; *Espy v. Jones*, 37 Ala. 379; *Fleetford v. Barnett*, 11 Colo. App. 77, 52 Pac. Rep. 293 (intercourse before and after the promise).

² *Willard v. Stone*, 7 Cow. 22, 17 Am. Dec. 496.

³ *Sprague v. Craig*, 51 Ill. 288; *Ma-bin v. Webster*, 129 Ind. 430, 28 N. E. Rep. 863, 28 Am. St. 199 (if the plaintiff knew of the affliction). See *Hall v. Wright*, El., B. & E. 746, 96 Eng. C. L. 745.

⁴ *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

⁵ *Southard v. Rexford*, 6 Cow. 254; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Bennett v. Beam*, 42 Mich. 246, 4 N. W. Rep. 8. Compare the last case with *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441.

⁶ *Alberts v. Albertz*, 78 Wis. 72, 47 N. W. Rep. 95, 10 L. R. A. 584.

⁷ *Schmidt v. Durnham*, 46 Minn. 227, 49 N. W. Rep. 126.

⁸ *Crandall v. Quin*, 51 N. Y. Super. Ct. 276.

enforcement of the parent's or master's right of action for that wrong, for such action is not for the same injury; although the damages they may recover for loss of service are allowed to be much larger than the value of wages could have been, they are, nevertheless, in legal contemplation, the damages of the parent or master and not of the woman.¹ Though the action for the seduction be brought by the plaintiff in the breach of promise suit it is not a bar to the latter even if in such suit it be alleged that the seduction was accomplished under promise of marriage.² The engagement of the plaintiff to another man at the time the defendant promised to marry her, and her fraudulent representation to the contrary, does not mitigate the damages if the engagement for the breach of which she sues was continued after knowledge of the previous one and its discontinuance.³ Nor are they mitigated by proof that the plaintiff, prior to her association with the defendant, had kept company with another man, it not appearing that such prior association was of anything more than a friendly nature.⁴ It seems that, under proper pleadings, the defendant may show that he had contracted with the plaintiff not knowing that insanity existed in her family, if he broke the engagement on that ground.⁵ A plea of the diseased condition of the plaintiff on the question of the existence of the contract, and not in mitigation, does not justify the consideration of that condition in mitigation. Matter in mitigation should be specially pleaded.⁶

¹ *Sheahan v. Barry*, 27 Mich. 217; 55 N. W. Rep. 492; *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. Rep. 649.

² *Ireland v. Emmerson*, 93 Ind. 1, 47 Am. Rep. 364. ⁵ *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S. W. Rep. 591.

³ *Alberts v. Albertz*, *supra*.

⁶ *Vierling v. Binder*, 113 Iowa, 337,

⁴ *Robinson v. Craver*, 88 Iowa, 381, 85 N. W. Rep. 621.

CHAPTER XXIV.

EJECTMENT.

§ 991. Proceedings regulated by statute.

SECTION 1.

MESNE PROFITS.

§ 992. The remedy for.

- 993. What may be allowed as damages.
- 994. Recovery limited to compensation.
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§ 991. Proceedings regulated by statute. The dam- [329] ages for withholding possession of real property are recoverable in this country by proceedings, to a great extent regulated by statute, either in the action for recovery of its possession or in a supplementary suit or proceeding. The ac- [330-343] tion for recovery of the land is made, in many states, a bar to any other action or proceeding to recover *mesne* profits. But in most cases, even though such profits may be recovered in the same action in which the land is recovered, the common-law action for them may be maintained after the action for the recovery of the land has been determined in favor of the plaintiff.

¹ Newell on Eject. 607; Tyler on Eject. 838.

SECTION 1.

MESNE PROFITS.

§ 992. **The remedy for.** The action of trespass for *mesne* profits is usually regarded as consequential to the recovery in ejectment.¹ The plaintiff in the latter, upon the introduction of the fictions by which the proceedings were distinguished, was a nominal party, and the damages assessed became nominal also.² As these damages are not given in satisfaction of [344] the *mesne* profits, but only entitle the plaintiff to costs,³ the recovery of the latter will not preclude him from the recovery of such profits by action⁴ — that is, in trespass.⁵ Where

¹ Lord Mansfield in *Aslin v. Parkin*, 2 Burr. 668; *Mitchell v. Mitchell*, 1 Md. 55; *Morgan v. Varick*, 8 Wend. 587; *Benson v. Matzdorf*, 2 Johns. 369; *Blount v. Garen*, 3 Hayw. 88; *Van Alen v. Rogers*, 1 Johns. Cas. 283, note, 3 id. 457; *Cushwa v. Cushwa*, 9 Gill, 242; *People v. Mullender*, 132 Cal. 217, 64 Pac. Rep. 299; *Bockes v. Lansing*, 74 N. Y. 437; *Alt v. Gray*, 55 App. Div. 563, 67 N. Y. Supp. 467. See note 4, *infra*.

² It has been held that it is not error to assess the actual damages in ejectment. *Miller v. Melchor*, 13 Ired. 439; *Boyd's Lessee v. Cowan*, 4 Dall. 128; *Lessee of Battin v. Bigelow*, 1 Pet. C. C. 452; *Osbourne v. Osbourn*, 11 S. & R. 58, per Duncan, J.

Under a statute expressing that "damages in actions for the possession, or for the use and occupation, of land must be computed to the time of the verdict," there cannot be a recovery in the statutory real action of damages for waste growing out of the destruction of timber standing on the lands. *Prestwood v. Watson*, 111 Ala. 604, 20 So. Rep. 600.

³ *Van Alen v. Rogers*, 1 Johns. Cas. 283, note, 3 id. 457; *Davis v. Doe*, 25 Miss. 445.

⁴ *Van Alen v. Rogers*, *supra*, and note; *O'Reilly v. Long*, 25 Ind. App. 525, 58 N. E. Rep. 563.

In Indiana, inasmuch as under the statute a recovery may be had in one suit for possession and for use and occupation of the premises wrongfully withheld, it would seem necessarily to follow that when possession had been obtained by the voluntary surrender of the premises by the wrong-doer, the right to the *mesne* profits remains and may be enforced. *Huncheon v. Long*, 25 Ind. App. 530, 58 N. E. Rep. 563.

And it is said in a late case that where the disseisor surrenders possession or abandons the premises, and the owner enters in assertion of his right, we can see no reason why the rule that *mesne* profits can only be recovered in ejectment should hold good, since it would allow the defendant to deprive the real owner of a substantial right to damages by his own wrongful act. *Blew v. Ritz*, 82 Minn. 530, 85 N. W. Rep. 548.

In Pennsylvania a defendant who quits the premises in controversy pending the ejectment suit is not liable for *mesne* profits afterward accruing. *Mitchell v. Friedley*, 10 Pa. 198.

⁵ Bac. Abr., tit. Ejectment (H.).

his title expires after the commencement of the ejectment suit and before trial, he cannot recover the land, but he is entitled to damages and costs, and these he is entitled to recover in such suit. This was allowed at common law,¹ and is a right now very generally declared by statute. In this action of trespass for *mesne* profits after recovery in ejectment, the tenant or defendant is estopped from controverting the title from the time of the ouster complained of in the ejectment or date of the demise laid in the declaration;² but if the plaintiff proceed for antecedent profits he must prove his title to the premises whence they arose to show his right to recover them.³ Only the lessor of the plaintiff can proceed for damages anterior to the demise.⁴ No party can recover *mesne* profits for any time prior to his obtaining title; an heir or devisee cannot recover those which accrued in his ancestor's time.⁵ The right of a purchaser at an execution sale does not cover the period between the time thereof and the execution of the deed.⁶ If there has not been an ouster, damages, as between tenants in common, can be recovered only from the time suit was instituted.⁷ Heirs in possession are not personally liable for rents and profits received by their ancestor, unless it is shown that a portion thereof have come into their possession.⁸ The holder of a tax deed in possession of land is liable to account for the value of the use to the holder of the better estate

In California there must be a finding of the value of the use and occupation in the ejectment suit or the plaintiff cannot recover *mesne* profits. *Camarillo v. Fenlon*, 49 Cal. 205.

¹ *Jackson v. Davenport*, 18 Johns. 295; *Wilkes v. Lion*, 2 Cow. 333; *Woodhull v. Rosenthal*, 61 N. Y. 393.

² *Id.*; *Benson v. Matzdorf*, 2 Johns. 369; *Avent v. Hord*, 3 Head, 458; *Van Alen v. Rogers*, 3 Johns. Cas. 457; *Crockett v. Lashbrook*, 5 T. B. Mon. 531; *Man v. Drexel*, 2 Pa. 202; *Drexel v. Man*, *id.* 271, 44 Am. Dec. 195; *Myers v. Sanders' Heirs*, 8 Dana, 65; *Doe ex d. Marshall v. Dupey*, 4 J. J. Marsh. 388; *Graves v. Joice*, 5 Cow. 261; *Poston v. Jones*, 2 Dev. & B. 294; *Brewer v. Beckwith*, 35 Miss. 467;

Chirac v. Reinecker, 11 Wheat. 280; *Leland v. Tousey*, 6 Hill, 328; *Den v. McShane*, 13 N. J. L. 35.

³ *Id.*; *Masterson v. Hagan*, 17 B. Mon. 328; *Avent v. Hord*, 3 Head, 458; *Kille v. Ege*, 82 Pa. 102; *Brewer v. Beckwith*, *supra*; *West v. Hughes*, 1 Har. & J. 574, 2 Am. Dec. 539; *Danziger v. Boyd*, 54 N. Y. Super. Ct. 365.

⁴ *Tyler on Eject.* 839; *Denn v. Chubb*, 1 N. J. L. 466.

⁵ *King v. Little*, 77 N. C. 138; *Hotchkiss v. Auburn, etc. R. Co.*, 36 Barb. 600; *Brown v. McCloud*, 3 Head, 280. See *Cook v. Webb*, 21 Minn. 428.

⁶ *Clark v. Boyreau*, 14 Cal. 634.

⁷ *Miller v. Myers*, 46 Cal. 535.

⁸ *Noble v. Douglass*, 56 Kan. 92, 42 Pac. Rep. 328.

on its being adjudicated, in an action to quiet the latter's title, that his deed was void as an instrument of title and the right of possession under it is denied.¹ But this liability does not attach to the holder of a tax deed in possession under a statute authorizing it until the successful claimant of the land repays the taxes to which the former is entitled.²

§ 993. **What may be allowed as damages.** The plaintiff must prove the value of the *mesne* profits, for the judgment in ejectment does not establish anything as to that.³ In estimating them, however, the jury are not confined to the mere rent of the premises; they may give extra damages; and the costs in ejectment are recoverable whether the judgment be by default against the casual ejector or upon a verdict against the tenant or landlord, and are, therefore, usually declared for as damages in the action for *mesne* profits.⁴ The general principle is that the plaintiff in this action is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession.⁵ They may be computed during the whole period the defendant has withheld the premises from him down to the verdict, unless the statute of limitations is pleaded,⁶ if the defendant has kept possession; the time and extent of his possession are open to proof.⁷ On this principle

¹ Will v. Ritchie, 61 Kan. 715, 60 Pac. Rep. 734, distinguishing Uhl v. Small, 54 Kan. 651, 39 Pac. Rep. 178.

² Hoffmire v. Rice, 22 Kan. 749.

³ Willis v. Morris, 66 Tex. 628, 1 S. W. Rep. 799, 59 Am. Rep. 634.

⁴ Bac. Abr., tit. Ejectment (H.); Goodtitle v. Tombs, 3 Wils. 118.

⁵ Symonds v. Page, 1 Cr. & J. 29; Doe v. Perkins, 8 B. Mon. 198; Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

⁶ Dawson v. McGill, 4 Whart. 230; Whissenhunt v. Jones, 78 N. C. 361; Pendergast v. McCaslin, 2 Ind. 87; McCrubb v. Bray, 36 Wis. 341; Field v. Columbet, 4 Sawyer, 523; Jackson v. Wood, 24 Wend. 443; Budd v. Walker, 9 Barb. 493; Morgan v. Varick, 8 Wend. 587; Avent v. Hord, 3 Head, 458; Love v. Shartzer, 31 Cal. 487; Danziger v. Boyd, 120 N. Y. 628,

24 N. E. Rep. 482; Pearson v. Carr, 97 N. C. 194, 1 S. E. Rep. 916; Ashmead v. Wilson, 22 Fla. 255; Dean v. Tucker, 58 Miss. 487; F. A. Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. Rep. 214.

In Missouri it is declared by statute that the judgment shall provide for the payment of accruing rents and profits at the rate found by the jury from the time of verdict until possession of the premises is delivered to the plaintiff. Stump v. Hornback, 109 Mo. 272, 18 S. W. Rep. 37.

In the absence of statutory direction a judgment against two for profits prior to their joint possession is erroneous. Ashmead v. Wilson, 22 Fla. 255.

⁷ Aslin v. Parkin, 2 Burr. 668; Pearse v. Coaker, L. R. 4 Ex. 92, 38 L. J. (Ex.) 32; Vance v. Inhabitants, etc., 7 Blackf. 241; Ryers v. Wheeler,

he is entitled to recover *the costs of the ejectment suit*, both on the trial and in error. In England if the costs have been taxed the recovery is confined to the taxed costs, and no extra costs will be allowed; but it is not essential to the recovery that they be taxed.¹ And where the costs cannot be taxed it has been held that the jury might reasonably consider those be- [346] tween attorney and client as the measure.² Costs of the ejectment suit have been held recoverable in this country.³ The right to recover the expenses of the former action depends upon the necessity for the action, and not upon its particular form. In an action of trespass *quare clausum* the costs of preliminary proceedings in equity may be recovered.⁴ It was held in a Kentucky case which has recently been overruled that the costs which may be recovered are not limited to those which are taxable between party and party. Marshall, C. J., said: "The principle from which the rule on this subject is to be extracted is in our opinion this: that the plaintiff in this action is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which the defendant has wrongfully taken or withheld from him." "The amount recoverable under this head cannot exceed what he has actually paid, or is in good faith actually bound to pay for obtaining restitution. But as he cannot have been compelled to pay more than the reasonable fees and charges for the services of others necessary for obtaining legal redress, he may not be entitled to recover the full amount which he has bound himself to pay for such services. And on the other hand, as he may have obtained the services for less than their actual or reasonable value, he may not always be entitled to recover to the full amount of that value. The recovery under this head may thus be limited below the

Hill & D. Supp. 389; Ainslie v. Mayor, etc., 1 Barb. 168; Mitchell v. Freedley, 10 Pa. 198; Miller v. Henry, 84 id. 33.

¹Newell v. Roake, 7 B. & C. 404; Symonds v. Page, 1 Cr. & J. 29; Doe v. Davis, 1 Esp. 358; Doe v. Filliter, 13 M. & W. 47, 11 id. 80; Doe v. Hare, 2 Dowl. P. C. 245, 2 Cr. & M. 145; Doe v. Huddart, 2 Cr., M. & R. 316.

²Newell v. Roake, 7 B. & C. 404.

³Furlong v. Cooney, 72 Cal. 322, 14 Pac. Rep. 12; Baron v. Abeel, 3 Johns. 481, 3 Am. Dec. 515; Doe v. Perkins, 8 B. Mon. 198; Denn v. Chubb, 1 N. J. L. 466. See Tate v. Doe, 24 Miss. 465.

⁴Fowler v. Owen, 68 N. H. 270, 39 Atl. Rep. 329.

amount which the plaintiff has actually paid or bound himself to pay on the ground that that amount is more than the reasonable value of the services necessary in his suit for restitution of his right. But it cannot be carried beyond that amount on the ground that the necessary services were reasonably worth more. Then the criterion in this case is not what would have been reasonable if the plaintiff had paid or undertaken to pay so much, but what the plaintiff had paid, or had undertaken and was bound to pay, if that sum was not unreasonable.”¹ In Rhode Island the defendant’s liability for counsel fees and expense incurred for the services of an engineer in examining records, making plat, etc., for use in the trial of the ejectment suit are not allowed. Referring to the case last quoted from Durfee, C. J., says: “The court cite no authority for their decision. Such an allowance may be just, but it is anomalous, for there is no reason for the recovery of the counsel fees and expenses of the ejectment suit which would not apply as well to any other suit. If plaintiff is entitled to recover his counsel fees and expenses when he succeeds in the ejectment suit, why should not the defendant have the same measure of justice when he succeeds?”² This is doubtless the rule in Pennsylvania³ and Tennessee.⁴ In a *nisi prius* case in New Jersey the jury was instructed that in assessing *mesne* profits they might include in the damages all the plaintiff’s reasonable and necessary expenses, including the fee to his counsel.⁵ But this view has been disapproved, and the plaintiff can recover only such costs as are taxed.⁶

§ 994. Recovery limited to compensation. There are old cases in which observations have been made tending to convey the impression that the plaintiff may recover more than the annual income from the land during the time the defendant

¹ Doe v. Perkins, 8 B. Mon. 198. This case is not now the law in Kentucky. Apparently, without knowledge of it, the court held that such fees could not be recovered, and, on having its attention called to the case, added an addendum to its opinion overruling so much of it as allowed attorneys’ fees. Smith v.

Bell, 91 Ky. 655, 25 S. W. Rep. 752 (1891).

² Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. Rep. 104.

³ Alexander v. Herr, 11 Pa. 537.

⁴ White v. Clack, 2 Swan, 230.

⁵ Denn v. Chubb, 1 N. J. L. 466 (1795).

⁶ Pike v. Daly, 54 N. J. L. 4, 23 Atl. Rep. 7.

withheld possession. The general rule is that the damages are to be measured on this basis, though other damages are recoverable if waste has been committed. That measure affords compensation.¹ This income is measured by the value of the use of the property, not by what the defendant received from it, nor by what he might have obtained.² If, however, the title is in real doubt, and the parties have acted in entire good faith, the actual receipts, and not the rental value, will be taken as the damages.³ In an English case in which [347] there had been an actual ouster, and the defendant kept the plaintiff out until judgment in the ejectment, it was held that recovery was not to be confined to *mesne* profits only, but, as was remarked by Gould, J., the plaintiff might recover for "his trouble, etc.;" that he had known four times the value of such profits to be given.⁴ Referring to this language, Gibson, C. J., said: "If trouble and expense are subjects of compensation, why are they not also included in the original judgment? But it would have been viewed as a startling novelty. A separate suit could not lie for the trouble and expense of a

¹ *Larwell v. Stevens*, 12 Fed. Rep. 559; *Carman v. Bean*, 88 Pa. 319; *Campbell v. Brown*, 2 Woods, 349; *Kille v. Ege*, 82 Pa. 102-112; *Goodtitle v. Tombs*, 3 Wils. 118; *Dewey v. Osborn*, 4 Cow. 329; *Drexel v. Man*, 2 Pa. 271, 44 Am. Dec. 195; *Brown's Lessee v. Galloway*, Pet. C. C. 291; *Lippett v. Kelley*, 46 Vt. 516; *Congregational Society v. Walker*, 18 Vt. 600; *Averett v. Brady*, 20 Ga. 523; *Masterson v. Hagan*, 17 B. Mon. 325; *New Orleans v. Gaines*, 15 Wall. 624; *Woodhull v. Rosenthal*, 61 N. Y. 394.

² *Kille v. Ege*, 82 Pa. 102; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Campbell v. Brown*, 2 Woods, 349; *Bolling v. Leisner*, 26 Gratt. 36; *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. Rep. 980; *Sanders v. Thornton*, 2 Ind. Ty. 92, 48 S. W. Rep. 1015.

Where the land was wild and unfenced, and no injury was done it nor profits received from it, a recovery was refused. *Griffey v. Ken-*

nard, 24 Neb. 174, 38 N. W. Rep. 791. Where it was part of a highway and was occupied by a railroad, and pending the ejectment action was condemned, only nominal damages were recovered for withholding possession prior to the award made in the condemnation proceedings. *Judge v. New York, etc. R. Co.*, 56 Hun, 60, 9 N. Y. Supp. 158.

In *Graham v. St. Louis, etc. R. Co.*, 69 Ark. 562, 65 S. W. Rep. 1048, 66 id. 344, land conveyed for railroad purposes only, with the grantee's acquiescence, remained in the possession of the grantor and was cultivated by him for a number of years until he notified the grantee that he was holding adversely. In an action of ejectment the grantee was held to be entitled to nominal damages only.

³ *Lawrence v. Rector*, 137 U. S. 139, 11 Sup. Ct. Rep. 33.

⁴ *Goodtitle v. Tombs*, 3 Wils. 118.

previous one; and there is no reason why they should be component parts of a cause of action in common with something else. There is no case in which compensation has been specifically recovered for them. There are *dicta* that a jury may give whatever they may think reasonable; but surely no court will subject a party to a blind and an unbridled discretion. A verdict will not be set aside for excess of damages except in an extreme case; and the defendant would often suffer all but extreme injustice."¹

Consequential damages, besides costs of the ejectment, may be recovered—as for shutting up an inn and destroying its custom, if they are specially declared for.² The plaintiff may recover the actual damage and injury to the premises as well as the yearly value of the land.³ Defendants, in an action for [348] *mesne* profits, had demised premises for a term of fifteen years at an annual rent of \$2,000, besides the payment of royalty on each ton of iron ore mined; they had received the rent for one year; but the premises were in no way injured, and no ore was taken therefrom. The defendants, having been evicted by the plaintiffs, became unable to fulfill their covenants in the lease, and the lessors thereby acquired a right of action against them for damages. It was held that the \$2,000 received did not establish a correct basis for fixing the rental value of the premises.⁴ A defendant, being a *bona fide* purchaser for value, and having taken possession, under color of title, of mines which were unimproved, and expended

¹ *Alexander v. Herr*, 11 Pa. 539. See *Good v. Mylin*, 8 id. 51, 49 Am. Dec. 493.

² *Dunn v. Large*, 3 Doug. 335.

³ *Cooch v. Gerry*, 3 Harr. 280; *Huston v. Wickersham*, 2 W. & S. 308; *Masterson v. Hagan*, 17 B. Mon. 325; *Lippett v. Kelley*, 46 Vt. 516; *Ashmead v. Wilson*, 22 Fla. 255.

It is otherwise under statutes in some states. *Pacquette v. Pickness*, 19 Wis. 219; *Bottorff v. Wise*, 53 Ind. 32; *Emrich v. Ireland*, 55 Miss. 390.

Under the California code it is optional with the plaintiff to sue for injury to the premises in the same action. *Field v. Columbet*, 4 Sawyer, 523.

The occupant cannot be held liable for diminution in the value of the land which has occurred without his fault. *Willis v. Morris*, 66 Tex. 628, 1 S. W. Rep. 799, 59 Am. Rep. 634.

If the land was suitable only for a particular crop and its detention prevented the owner from putting in seed, with the result that the rental value of the land was thereby impaired for the year following the recovery of possession, the impaired value may be considered in estimating the damages. *Case v. Hall*, 2 Ind. Ty. 8, 46 S. W. Rep. 180.

⁴ *Kille v. Ege*, 82 Pa. 102.

large sums in their development, as well as in permanent improvements thereon of great value, it was held he was chargeable for ores removed only their value in place, that is, by deducting from their market value the cost of mining, cleansing and delivering in market.¹ And he may defend against the claim of *mesne* profits by showing that the improvements he has made and left upon the lands are of value sufficient to be a full compensation for their use and occupation.² Under a statute which fixes the damages at "the clear annual value of the premises for the time" the defendant was in possession, the jury cannot take into consideration the special value of the land in dispute as a passageway to adjacent premises.³ The purchaser from a life tenant cannot mitigate the damages recoverable by the remainder-man by proving his outlay in preserving the property.⁴ If the action is not founded on the want of probable cause and the existence of malice punitive damages are not recoverable.⁵

§ 995. **Proof of rental value.** If the land which has been recovered could not or would not, in the usual course of things, be held, used or occupied independently of adjoining lands owned by the plaintiff, it is proper to prove the rental value of such lands with and without that in dispute. The difference between the two sums would, *prima facie*, be the basis for ascertaining the rental value of the latter.⁶ Where a wall formed one side of a store room, a narrow strip of which was in dispute, proof of the rental value of the entire room was admitted to aid the jury in assessing *mesne* profits.⁷

§ 996. **What property withheld.** "Whatever would be rent as between landlord and tenant is *mesne* profits as between the parties in ejectment."⁸ Where there was a mill on

¹ Ege v. Kille, 84 Pa. 333; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; § 103.

² Id.

³ McMahan v. Bowe, 114 Mass. 140, 19 Am. Rep. 321; Furlong v. Cooney, 72 Cal. 322, 14 Pac. Rep. 12.

⁴ Schorr v. Carter, 120 Mo. 409, 25 S. W. Rep. 538.

⁵ Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980.

⁶ Danziger v. Boyd, 54 N. Y. Super. Ct. 365.

⁷ Jenkins v. Means, 59 Ga. 55.

⁸ Morris v. Tinker, 60 Ga. 466.

"*Mesne* profits" means the rents and profits, or the value of the use and occupation of the land recovered, and consist of the net rents after deducting all necessary repairs and taxes, or the net rental value of the use and occupation. Wallace v. Berdell, 103 N. Y. 13, 3 N. E. Rep. 769, 57 Am. Rep. 701.

the premises the court said: "Though the mill and the land may have been separable without injury to either, still, while they were in fact together and used, or capable of being used in the ordinary way, they were worth so much for rent. It is proper and accords with usage, we think, to speak of the rent of a mill, the rent of a factory, etc., and in so doing the use of the machinery, fixed or unfixed, is not thought of as excluded, but as included. The exact point made by counsel, however, is that the declaration does not mention the mill, but describes the land only. There is plausibility in the objection, but not much positive force. With reference to rent or *mesne* profits, the whole is to be taken as realty, and a suit for the profits of the land applies to the land in its actual condition."¹ In an action to recover *mesne* profits of a ferry landing it was sufficiently liberal to the defendant to instruct the jury to consider the proceeds of the ferry, deducting the expense of fitting it up and carrying it on; and making due allowance for all risk and expense.² As will appear presently, if a *bona fide* occupant of land makes lasting and valuable improvements thereon in good faith, he is entitled to have them taken into account in the ascertainment of the *mesne* profits. If the improvements made are such as the occupant cannot recover for, as where, without his fault, they are burned before he delivers possession, he should not be charged with the income which has been derived from them.³ The owner, if liable for the cost of improvements, is entitled to the resulting increased income.⁴

¹ Morris v. Tinker, 60 Ga. 466.

² Averett v. Brady, 20 Ga. 523; Dunlap v. Yoakum, 18 Tex. 582.

³ Nixon v. Porter, 38 Miss. 401; Tatum v. McLellan, 56 id. 352; Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448, 7 So. Rep. 760; Davis v. Louk, 30 Wis. 308; Pacquette v. Pickness, 19 id. 219.

The equity of this rule is recognized in Texas, but it was not applied because the court was committed to the contrary doctrine. Evetts v. Tendick, 44 Tex. 570.

⁴ Bell v. Barnet, 2 J. J. Marsh. 517.

In Dungan v. Von Puhl, 8 Iowa,

263, 269, it is held that the occupier of unimproved land who puts it in a state suitable for cultivation may be charged for its use and occupation in the state in which he puts it, "without having the right to complain that he is required to pay rent for improvements made by himself." The argument upon which this liability is rested is thus stated, if not demolished, by the court: "He pays rent, not upon such improvements, but upon land, worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation. The owner is en-

§ 997. **Interest.** Interest has been held recoverable on *mesne* profits.¹ Where the property was situate in New York city, rent being payable quarterly, it was held proper to add interest quarterly.² But this is not allowable in Massachusetts.³ Under the statute of New York, and similar statutes in other states, providing for the recovery of damages upon a suggestion after determination of the ejectment suit, the measure is that applicable in *assumpsit* for use and occupation. The compensation is adjusted as upon contract, and not upon the footing of a tort.⁴ The statutes indicate the measure of damages and the defenses which may be made.

§ 998. **Compensation on recovery of a term.** In a case of ejectment brought for the recovery of a term it appeared that the buildings on the leased premises were partially destroyed; neither party expressed an intention to rebuild; they were replaced by the defendant's grantor by a more expensive and larger building, erected in good faith, which yielded increased rents and profits. The plaintiff's damages were measured by the amount which would place him in as good position as he would have been in if he had not been dispossessed. He was not entitled to the whole amount of the rents and profits of the improved estate. His rights were governed by what would have been the measure of damages if the defendant had wrongfully withheld possession of the premises for the same length of time in substantially the same condition in which they were just prior to the fire. The court suggest that this rule was too favorable to the plaintiff: "If the defendant had objected we

titled to rents and profits according to the value of the land for the purpose for which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule, we think, there will nothing be found inequitable. It does not require the occupant to pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor."

The court also held that no rent was to be charged for the use of buildings or farm fixtures erected by the occupant.

¹ Jackson v. Wood, 24 Wend. 443; Low v. Purdy, 2 Lans. 422; Allen v. Smith, 63 Mo. 103; Furlong v. Cooney, 72 Cal. 322, 14 Pac. Rep. 12; New Orleans v. Gaines, 15 Wall. 624.

² Jackson v. Wood, 24 Wend. 443.

³ Hodgkins v. Price, 141 Mass. 162, 5 N. E. Rep. 502.

⁴ Holmes v. Davis, 19 N. Y. 488, reversing 21 Barb. 265; Woodhull v. Rosenthal, 61 N. Y. 394.

might have found it difficult to hold that it was not too favorable." In determining the damages upon this basis it was right to deduct from the gross rents and profits which might have been received a fair compensation for the necessary time and labor involved in the care and management of the premises and in the collection of rents. The plaintiff was entitled to interest on the net profits while he was dispossessed; but notwithstanding the rents were payable quarterly, interest should not be computed by making quarterly rests, compound interest not being allowed in Massachusetts.¹

[349] § 999. **Claims for improvements, taxes, etc.** The common-law action of trespass for *mesne* profits is a liberal one, and equitable defenses may be made.² Taxes paid by the defendant may be deducted from the damages.³ Where he had paid ground rent during his occupancy, which otherwise the plaintiff must have paid, it was deducted from the damages in an action for *mesne* profits.⁴ And so where necessary repairs had been made.⁵ At common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bona fide* or *mala fide* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseizor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages.⁶ The owner is not compelled to pay for improvements as a condition on which he may regain posses-

¹ *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. Rep. 502.

² *Murray v. Gouverneur*, 2 Johns. Cas. 441; *Jackson v. Loomis*, 4 Cow. 172.

The evicted occupant cannot maintain a bill in equity against the ejectment plaintiff to recover compensation for improvements made during his occupancy, they not having been made in consequence of the owner's fraud or negligence. *Anderson v. Reid*, 14 D. C. App. Cas. 54.

³ *Ringhouse v. Keener*, 63 Ill. 230; *Stark v. Starr*, 1 Sawyer, 15; *Sample v. Bank*, 5 id. 394.

⁴ *Doe v. Hare*, 2 Cr. & M. 145.

⁵ *Sample v. Bank*, *supra*.

A deficiency of profits of one year, to meet payments, may be deducted from an excess of profits over the payments of another year. The plaintiff may show that a deficiency of profits in particular years within the period of recovery has been compensated by an excess in years without that period because barred by the statute. But the defendant cannot increase his claim for reimbursement by the recovery of expenses for a period during which he has, by pleading the statute of limitations, barred the recovery of profits against him. *Ewalt v. Gray*, 6 Watts, 427.

⁶ *Green v. Biddle*, 8 Wheat. 1.

sion of his property. The improvements, when annexed to the land, become part of the freehold.¹ But a *bona fide* occupant is entitled to have them taken into account in ascertaining whether the owner has sustained damages or not, both in the case where such improvements were made by him and where they were made by one whose title he has purchased.² In such case the defendant should be allowed the value of lasting and valuable improvements reasonably necessary for the enjoyment of the premises, made in good faith, that is, in belief of his title and without notice of the real owner's claim,³ to the extent of the rents and profits due to such owner.⁴ The improvements should be estimated in favor of the de- [350] fendant at such amount as they add to the market value of the premises.⁵ The claim for them may be co-extensive in

¹ Anderson v. Fisk, 36 Cal. 629; Russell v. Blake, 2 Pick. 505. See, as to the rule in equity, Bright v. Boyd, 2 Story, 605, 1 id. 478; Valle's Heirs v. Fleming's Heirs, 29 Mo. 152; Union Hall Ass'n v. Morrison, 39 Md. 281, 296; Hatcher v. Briggs, 6 Ore. 31.

² Willingham v. Long, 47 Ga. 540; Morrison v. Robinson, 31 Pa. 456.

³ Bodkin v. Arnold, 48 W. Va. 108, 35 S. E. Rep. 980; Williamson v. Jones, 43 W. Va. 563, 27 S. E. Rep. 411, 38 L. R. A. 694.

⁴ Jackson v. Loomis, 4 Cow. 172; Hatcher v. Briggs, 6 Ore. 31; Tongue v. Nutwell, 31 Md. 302; Irick v. Fulton, 3 Gratt. 193; Dowd v. Faucett, 4 Dev. 92; Ewing v. Handley, 4 Litt. 346; Porter v. Hanley, 10 Ark. 187; Doe v. Roe, 2 Houst. 321; Dothage v. Stuart, 35 Mo. 251; Russell v. Blake, 2 Pick. 505; Campbell v. Brown, 2 Woods, 349; Utterbach v. Binns, 1 McLean, 242; Averett v. Brady, 20 Ga. 523; White v. Moses, 21 Cal. 34; McGarrity v. Byington, 12 Cal. 426; Worthington v. Young, 8 Ohio, 401; Bedell v. Shaw, 59 N. Y. 46; Bright v. Boyd, 1 Story, 478, 2 id. 607; Union Hall Ass'n v. Morrison, 39 Md. 281; Morrison v. Robinson, 31

Pa. 456; Worsham v. Lancaster, 20 Ky. L. Rep. 701, 47 S. W. Rep. 448.

A defendant in ejectment is not liable for mesne profits taken prior to his own entry by those under whom he claims; but if in accounting for the profits chargeable to himself he claims credit for improvements made by his predecessors, such improvements must first answer for the profits taken by those who erected them. Gardner v. Grannis, 57 Ga. 539.

A defendant in such an action who claims under a tax title, also under a conveyance from a third party, and who made improvements before the tax title accrued, cannot recover the value of his improvements from the plaintiff. Jacks v. Dyer, 31 Ark. 334.

Improvements made by the grantee of one who has not purchased for value cannot be charged against the owner though the grantor covenanted to protect the grantee's possession. Schettler v. Southern Oregon Co., 19 Ore. 192, 24 Pac. Rep. 25.

⁵ Thomas v. Thomas' Ex'r, 16 B. Mon. 420; Bell's Heirs v. Barnett, 2 J. J. Marsh. 516; Allison v. Taylor's Heirs, 3 B. Mon. 363; Stark v. Starr,

time with the allowance of rents and profits which the improvements contributed to produce. In other words, their value is not to be limited to their worth in cash at the time of the trial, but by the benefit they have conferred upon the plaintiff, whether by adding to the worth of the land at the time of its recovery or, retrospectively, by augmenting the amount he may recover as *mesne* profits.¹ Interest on the gross expense of repairs made has been allowed.²

The compensation allowed at common law for improvements was a mere equitable defense in mitigation of damages. Now very generally this defense, or the right of a *bona fide* occupant to compensation for improvements, is defined and regulated by statute; and where it is so defined and regulated the party claiming such compensation must bring himself within the statute.³ It is not the policy of these statutes that the owner of property shall be improved out of his title by volunteers or wrong-doers. Hence, such statutes, being in derogation of the common law, are strictly construed,⁴ and allow a recovery for improvements "only in excess of the clear annual value of the premises during the time the occupant was in possession (exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims), and only to the extent and upon clear and full proof of the amount to which the value of the premises is actually increased thereby at the time of the assessment."⁵ If the de-

1 Sawyer, 15; Woodhull v. Rosenthal, 61 N. Y. 396, 397; Wythe v. Myers, 3 Sawyer, 598.

In some states the value of the improvements is measured by the benefits which the owner will receive from them. McMurray v. Day, 70 Iowa, 671, 28 N. W. Rep. 476; Morris v. Tinker, 60 Ga. 466.

¹ Johnson v. Futch, 57 Miss. 73. Compare Morris v. Tinker, 60 Ga. 466.

² New Orleans v. Gaines, 15 Wall. 624.

³ Lanquest v. Ten Eyck, 40 Iowa, 213; Love v. Shartzler, 31 Cal. 487; Huggins v. Clark, 51 Cal. 112; McCrubb v. Bray, 36 Wis. 342. See

Rutland R. Co. v. Chaffee, 72 Vt. 404, 48 Atl. Rep. 700, sustaining the right to a judgment for betterments made on a railroad right of way, and pointing out the manner of enforcing it. Such statutes stand upon a principle of natural justice and equity, and do not impair vested rights. Searl v. School District, 133 U. S. 553, 561, 10 Sup. Ct. Rep. 374.

⁴ Sutherland on Statutory Construction, §§ 290, 400.

⁵ Hollingsworth v. Funkhouser, 85 Va. 448, 8 S. E. Rep. 592.

The rule is expressed in various ways. Thus, in a late case it is said the plaintiff is only entitled to the rents which the land would have

defendant was not a *bona fide* occupant of the premises he may set off against the claim for waste the improvements made by him in the nature of general repairs. He is not liable for the natural wear or tear resulting from the lapse of time, but only for the consequences of his negligence, misuse or abuse of the premises.¹

It has recently been adjudged in Georgia that neither in an action of ejectment nor in complaint for land can the defendant set off the value of improvements placed thereon by him to an amount beyond the sum which the plaintiff would be entitled to recover by way of *mesne* profits; nor can the defendant in such a case, upon an equitable answer, recover against the plaintiff the value of improvements in good faith placed upon the premises by such defendant, and have the same, by equitable decree against the owner, made a charge upon the premises on which they are placed, and from which the defendant is evicted under a judgment rendered against him in such a suit.² It has also, and more recently, been held in that state that it is competent for the legislature to provide, even as to improvements made prior to its action in the premises, that a defendant who has been in *bona fide* possession of land under an adverse claim of title may plead as a set-off the value of all permanent improvements *bona fide* placed thereon by him, or by other *bona fide* claimants under whom he asserts title, and that if the value of such improvements at the time of the trial exceeds the *mesne* profits, the defendant shall re-

produced had no improvements been made by the defendant, and to such damages as he has sustained by reason of waste or injury to the land. But in estimating the damages from waste and the rent which results solely from the defendant's improvements, any valuable and lasting improvements made by him should be deducted from such damages and rent, as the plaintiff is not damaged beyond the loss he has sustained, and it cannot be said that he has sustained any loss beyond what is left after thus deducting the improvements which he necessarily received under the judgment. In no

state of the case, however, can the value of the improvements be allowed to be paid out of the land or deducted from the rents which it would have borne if the defendant had not trespassed upon or improved it; nor is he entitled to judgment for any excess of his improvements beyond the waste or rents accruing on the land before or after its improvement. *Smith v. Bell*, 91 Ky. 655, 25 S. W. Rep. 752.

¹ *Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. Rep. 980.

² *Dudley v. Johnson*, 102 Ga. 1, 29 S. E. Rep. 50.

cover the amount thereof although in excess of such profits. Where the plaintiff had been in possession of or enjoyed the rents, issues and profits from lands of the defendant which he had received in lieu of the lands involved in the suit, the latter could plead such benefits derived by the former as a set-off to his claim for *mesne* profits. A defendant who claims credit for improvements made by his predecessor is liable for all such profits chargeable to the latter; but if the defendant claims credit only for such improvements as he made since his possession began, the rule is otherwise.¹

§ 1000. Remedy under the code. The claim for damages for withholding possession is a distinct cause of action from the claim of possession. It was necessarily the subject of a subsequent action at common law. Under the code, however, it is at the option of the plaintiff to join it with the claim of possession or bring a separate action. By the New York statute, prior to the code, the action for *mesne* profits was required, in substance, to be an action for use and occupation.² The change in the statutes by the introduction of the code did not disturb or affect this right of action for use and occupation, but the action or procedure for its recovery was changed. [351] When the code came to unite the various classes of actions into one, under which all rights of action were to be enforced, and to abolish all peculiarities in the forms of pleading, the remedy for *mesne* profits naturally fell into the arrangement and became the subject of a civil action under the new system; and the peculiar method of commencing it by suggestion became inapplicable.³ Hence a claim for the recovery of real property and damages for withholding the possession was held not to embrace the claim for the rents and profits, because the latter is a separate and distinct cause of action.⁴ It is otherwise under the present code of New York.⁵ If the defendant is in possession the plaintiff is entitled by way of damages to the rents and profits or the value of the use and

¹ Mills v. Geer, 111 Ga. 275, 36 S. E. Rep. 673. See Deitzler v. Wilhite, 55 Kan. 200, 40 Pac. Rep. 272.

² Holmes v. Davis, 19 N. Y. 488; Woodhull v. Rosenthal, 61 id. 394.

³ Holmes v. Davis, *supra*.

⁴ Larned v. Hudson, 57 N. Y. 151; Livingston v. Tanner, 12 Barb. 481. See Cagger v. Lansing, 64 N. Y. 417.

⁵ Clason v. Baldwin, 129 N. Y. 183, 29 N. E. Rep. 226.

occupation of the land from the time the action was commenced.¹

Under the Kentucky statute the plaintiff may unite in the same petition "claims for the recovery of specific real property, and the rents, profits and damages for withholding the same." It was held that if the plaintiff shall elect to sue for the recovery of the land merely, or for that and damages for being kept out of possession in the same action, and seek by another suit to recover damages for trespasses and injuries committed by the destruction of timber or other property upon or appurtenant to the land, a judgment in one case should not bar a recovery in the other.²

The right to damages for withholding the possession of real property given by the Oregon code is equivalent to the action of trespass for *mesne* profits under the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises as well as for waste committed or suffered by the occupant as the value of the use and occupation. Such right is a distinct cause of action, and if joined with a claim of possession should be separately stated.³ The same rule has been applied in Washington.⁴

SECTION 2.

DOWER.

§ 1001. The right of. Dower at common law exists [352] where a man is seized of an estate of inheritance and dies in the life-time of his wife. She is entitled to be endowed for her natural life of the third part of all the lands whereof her husband was seized, either by deed or in law at any time during the coverture, and which any issue which she might have had could by possibility have inherited.⁵ Marriage, seizin of

¹ Trustees of Union College v. City of New York, 173 N. Y. 38, 65 N. E. Rep. 853.

² Burr v. Woodrow, 1 Bush, 692.

³ Wythe v. Myers, 3 Sawyer, 595; Neff v. Pennoyer, id. 495. See Arnold v. Woodward, 14 Colo. 164, 23 Pac. Rep. 444.

⁴ Columbia, etc. R. Co. v. Histogen-

etic Medicine Co., 14 Wash. 475, 45 Pac. Rep. 29.

⁵ 4 Kent's Com. 35; Butler v. Cheatham, 8 Bush, 594 Carter v. McDaniel, 94 Ky. 564, 23 S. W. Rep. 507.

It was contended in the last case that because the husband was in possession of a reversionary interest before dower was allotted, the widow

the husband, and his death are essential; and where they concur, on the happening of the latter the right of dower becomes perfect, not as an estate or interest in the land but as a chose in action.¹

§ 1002. It is assignable on a valuation. Whatever the proceeding by which dower is recoverable, the value of the lands must be ascertained, for it is by that standard that the dower right is measured. If the lands were aliened by the husband and have afterwards increased in value, it has been a question whether such increase should be excluded from the valuation. Where the increase is the result of improvements made on the land by the alienee, it does not enter into the estimation for the purpose of dower; in other words, the admeasurement is then to be made according to the value at the date of alienation; the dowress recovers the equivalent of one-third of the value of the land as such value was at that [353] time.² But if the value is enhanced by extrinsic or general causes, the weight of authority seems to be in favor of including it. Tilghman, C. J., said: "I have found no adjudged case in the year books confining the widow to the time of the alienation by her husband where the question did not arise on improvements made after the alienation; and,

was entitled to dower. The court said: We do not think so, because he held the possession subject to the superior and paramount right of the widow to the possession of any part of the land that might be assigned to her as dower, and when she obtained the possession of the same by virtue of this paramount right, the inchoate right to dower therein ceased. He stood in the same attitude that he would have done if he had lost the right of possession by a superior title.

¹ 4 Kent's Com. 35; Sheafe v. O'Neil, 9 Mass. 13; Hildreth v. Thompson, 16 id. 191; Croade v. Ingraham, 13 Pick. 33; Shields v. Batts, 5 J. J. Marsh. 13; Stedman v. Fortune, 5 Conn. 462; Jackson v. Aspell, 20 Johns. 412; Cox v. Jagger, 2 Cow. 638, 14 Am. Dec. 522; Yates v. Pad-

dock, 10 Wend. 528; Johnson v. Shields, 32 Me. 424; Summers v. Babb, 13 Ill. 483; Moore v. New York, 4 Sandf. 456; Torrey v. Minor, Sm. & M. Ch. 489; Harrison v. Wood, 1 Dev. & B. Eq. 437; Potter v. Everitt, 7 Ired. Eq. 152; Webb v. Boyle, 63 N. C. 271; Van Name v. Van Name, 23 How. Pr. 247.

² Davis v. Hutton, 127 Ind. 481, 26 N. E. Rep. 187, 1006; Griffin v. Regan, 79 Mo. 73; Humphrey v. Phinney, 2 Johns. 484; Hale v. James, 6 Johns. Ch. 258, 10 Am. Dec. 328; Tod v. Baylor, 4 Leigh, 498; Wilson v. Oatman, 2 Blackf. 223; Thrasher v. Pinckard, 23 Ala. 616; Dunseth v. Bank of U. S., 6 Ohio, 77; Hogg v. Hensley, 100 Ky. 719, 39 S. W. Rep. 247; Fritz v. Tudor, 1 Bush, 29; Young v. Thrasher, 115 Mo. 222, 21 S. W. Rep. 1104.

having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and justice of the case, which is that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing these out of the estimate she shall be endowed according to the value at the time her dower shall be assigned to her.”¹ This view is supported by Story and Kent and many adjudications.² The rule has frequently been stated, however, to be that when lands are alienated by the husband during coverture, his widow is to be endowed at their value at the time of alienation, thereby excluding her from the benefit of any subsequent increase in their value from any cause.³ As to lands of which the husband died seized, she is entitled to dower according to their value at the time of the assignment.⁴ She is entitled to

¹Thompson v. Morrow, 5 S. & R. 289.

²Baden v. McKenney, 18 D. C. 268; Powell v. Monson & B. Manuf. Co., 3 Mason, 347, 374; Smith v. Addleman, 5 Blackf. 406; Dunseth v. Bank of United States, 6 Ohio, 77; Allen v. McCoy, 8 Ohio, 418; Gore v. Brazier, 3 Mass. 544; Scammon v. Campbell, 75 Ill. 223; Barney v. Frowner, 9 Ala. 901; Summers v. Babb, 13 Ill. 483; Manning v. Laboree, 33 Me. 343, 347; Hobbs v. Harvey, 16 Me. 80; Mosher v. Mosher, 15 Me. 371; Bowie v. Berry, 3 Md. Ch. 359; Fritz v. Tudor, 1 Barb. 28; Westcott v. Campbell, 11 R. I. 378; Carter v. Parker, 28 Me. 509; Wall v. Hill, 7 Dana, 175; Taylor v. Brodrick, 1 id. 348; Lawson v. Morton, 6 id. 471; Young v. Thrasher, 115 Mo. 222, 235, 21 S. W. Rep. 1104. See Doe v. Gwinnell, 1 Q. B. 682.

In Rannels v. Washington University, 96 Mo. 226, 9 S. W. Rep. 569, the property, when conveyed by the husband, was unimproved and non-productive. Because of improvements and the increased value, one-fourth of it as improved was set off to the widow. It was contended that she was not entitled to damages for the detention of that part be-

cause any profit realized from it was the result of the improvements made by the grantee. This view was pronounced illogical and unjust in view of the fact that the whole property produced \$800 or \$900 per annum. “It is true that without the improvements the property would have produced no rental income, but it does not follow that plaintiff is entitled to no damages. To so hold is to look to the improvements alone and to disregard the land. This we have no right to do, for the land is a substantial part of the capital which produced the income.”

³Humphrey v. Phinney, 2 Johns. 484; Shaw v. White, 13 id. 179; Dorchester v. Coventry, 11 id. 509; Walker v. Schuyler, 10 Wend. 481; Green v. Tennant, 2 Harr. 336; Ayer v. Spring, 9 Mass. 8; Catlin v. Ware, id. 217; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Markham v. Merrett, 7 id. 437, 40 Am. Dec. 76; Thomas v. Gammel, 6 Leigh, 9; Pollard v. Underwood, 4 Hen. & M. 459; Leggett v. Steele, 4 Wash. C. C. 305.

⁴Catlin v. Ware, 9 Mass. 217; Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 id. 343; Larowe v. Beam, 10 Ohio, 498.

[354] have such part of the land set out as dower as will produce an income equal to one-third part of that which the whole estate would then produce.¹ In Kentucky, if the property is indivisible, it is in the discretion of the chancellor to allow the widow a stated portion of the rents or a gross sum in lieu of dower, computed in accordance with the life tables. "Having a joint interest with the vendee in the property, and it being indivisible, she would have been entitled under the code to a decree of sale and a division of proceeds."² The allowance of dower should not be made payable in advance.³

§ 1003. **Damages for detention of dower.** Originally, damages were not recoverable in an action at law for dower.⁴ They were first given by the statute of Merton; but as that only applied to actions for dower in lands of which the husband died seized, damages continued to be denied in actions brought against the husband's alienee.⁵ At common law the right to damages was limited by the remedy. In this country damages are generally, by statute or otherwise, recoverable against the alienee from the time of demand and refusal, or of the institution of suit.⁶ The heir or devisee in possession is answerable for damages from the death of the husband, and

One who purchases after demand made is liable for damages from the time it was made. *Rannels v. Washington University*, 96 Mo. 226, 9 S. W. Rep. 569.

¹ *Carter v. Parker*, 28 Me. 509.

² *Hogg v. Hensley*, 100 Ky. 719, 724, 39 S. W. Rep. 247.

³ *Young v. Thrasher*, 115 Mo. 222, 21 S. W. Rep. 1104.

⁴ 2 Saund. 45, note 4; *Fisher v. Morgan*, 1 N. J. L. 125; *Wright v. Jennings*, 1 Bailey, 277; *Layton v. Butler*, 4 Harr. 507.

⁵ *Kendall v. Honey*, 5 T. B. Mon. 282; *Marshall v. Anderson*, 1 B. Mon. 198; *Waters v. Gooch*, 6 J. J. Marsh. 589, 22 Am. Dec. 108; *Embree v. Ellis*, 2 Johns. 119; *Fisher v. Morgan*, 1 N. J. L. 125; *Hopper v. Hopper*, 22 id. 715; *Gaston v. Bates*, 4 B. Mon. 366.

⁶ *O'Ferrall v. Simplot*, 4 Iowa, 381; *Beavers v. Smith*, 11 Ala. 20; *Slatter*

v. Meek, 35 Ala. 528; *Atkin v. Merrell*, 39 Ill. 62; *Galbreath v. Gray*, 20 Ind. 290; *Price v. Hobbs*, 47 Md. 359; *Steiger v. Hillen*, 5 Gill & J. 121; *McClannahan v. Porter*, 10 Mo. 746. But see *Benner v. Evans*, 3 P. & W. 454; *Barnet v. Barnet*, 15 S. & R. 72; *McElroy v. Wathen*, 3 B. Mon. 135; *Roan v. Holmes*, 32 Fla. 295, 13 So. Rep. 339, 21 L. R. A. 180; *Bedford v. Bedford*, 136 Ill. 354, 26 N. E. Rep. 662; *Marsh v. Irwin*, 168 Ill. 50, 47 N. E. Rep. 768.

A person acting in his own behalf as the owner of a dower right may not make a demand upon himself as the guardian and trustee of the infant heirs, and by refusing or neglecting to comply with such demand make them liable to pay him damages. *Rawson v. Corbett*, 150 Ill. 466, 37 N. E. Rep. 994.

in New York, Maryland, New Jersey, and perhaps other states, even without a demand, unless he plead *tout temps prist*; and even on sustaining that plea he is liable from the commencement of the suit.¹ If that issue be found for the demandant she is entitled to damages from the death of the husband, and not from the date of the demand only.² The statute of Merton seems not to have been adopted in South Carolina, and therefore damages are not recoverable in actions for dower;³ and in that state interest cannot be recovered in a court of law on a sum of money assessed in lieu of [355] dower where the husband died seized; but by statute interest may be allowed on assessments against the husband's alienee.⁴ It has been usual there to assess one-sixth of the value of the entire fee as equivalent to the widow's estate for life in one-third of the land, and as a general rule it is said that that proportion should be adhered to except in extreme cases of youth on the one hand, or of age and infirmity on the other.⁵ In Maryland damages against the husband's alienee can be recovered only in equity.⁶ The admeasurement and assignment of dower defines it with a view to future enjoyment. If withheld afterwards the loss is of that specific parcel. For withholding dower before assignment, damages, when recoverable, include, but do not consist exclusively of, the net annual value of the third part of the lands in which the right of dower exists.⁷ In a Canadian case,⁸ after a judgment of seizin in dower,

¹ Darnall v. Hill, 12 Gill & J. 388; Thrasher v. Tyack, 15 Wis. 256; Hitchcock v. Harrington, 6 Johns. 290; Hopper v. Hopper, 22 N. J. L. 715; Rankin v. Oliphant, 9 Mo. 239; Layton v. Butler, 4 Harr. 507; Slatter v. Meek, 35 Ala. 528; Turner v. Morris, 27 Miss. 733; Thomas v. Gammel, 6 Leigh, 9.

² Watson v. Watson, 20 L. J. (C. P.) 25.

³ Heyward v. Cuthbert, 1 McCord, 386.

⁴ Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 id. 343. See Jeffries v. Allen, 34 S. C. 189, 13 S. E. Rep. 365, for a construction of the statute of 1883.

⁵ Wright v. Jennings, *supra*.

⁶ Sellman v. Bowen, 8 Gill & J. 55, 29 Am. Dec. 524; Kiddall v. Trimble, 1 Md. Ch. 143.

⁷ Where the executors failed to comply with the statute respecting the setting aside of dower the widow was entitled to one-third of the net rents and profits during the time that dower was withheld, and these were due her at the time, each year, of their receipt by the executors, together with interest at the legal rate from such time. The gross amount of the rentals is the actual value of the land each year, not the amount which the executors may have received. Henderson v. Chaires, 35 Fla. 423, 17 So. Rep. 574.

⁸ Robinett v. Lewis, Draper, 272.

on a writ of inquiry, it was held that the *mesne* value of the premises between the death of the husband and the judgment should be assessed; also the demandant's taxable costs in obtaining judgment of seizin; her costs of executing the writ of *habere facias*, and her necessary traveling expenses incurred in prosecuting the suit. It was also held that her residence on the premises, in the family, and at the expense of the heir at law for part of the time between the death of the husband and her obtaining judgment, was not admissible as a set-off to her damages for the detention, though proper to go to the jury in mitigation.¹

¹ See *Bogardus v. Parker*, 7 How. Pr. 303.

In *Fisher v. Morgan*, 1 N. J. L. 125 (1792), Kinsey, C. J., said: "One question which has been debated is whether the word *damages* includes the value or *mesne* profits, or whether there is to be a recovery of the value or third part of the profits and also damages for the detention, with costs. Upon this subject the books seem irreconcilable. It would appear from Co. Litt. 32*b*; the Statute of Merton, 20 H. III., cap. 1, 1 Ruffhead, 16; 2 Inst. 80; Rastal's Entries, *b*; Spiller v. Adams, 8 Mod. 25, Hetley, 141, as if the value and damages for detention were not distinguishable from each other, but assessed and recovered together under the name of *damages*. But although the word *damna*, properly taken, does include both the *mesne* profits and the extra sum for the illegal detention, yet there are not wanting respectable authorities who appear to regard them as distinct objects of the suit and judgment. In *Trials Per Pais*, 333, where the duty of the jury is laid down, it is said, if they find the husband died seized, then they are to inquire: 1st. Of the value beyond reprises. 2d. What time has elapsed since the death of the husband. 3d. What damages the demandant has sustained by the de-

tention of the dower. In *Dennis v. Dennis*, 2 Saund. 328, the jury find, first, that the husband died seized; secondly, the value; thirdly, the damages for the detention beyond the value and costs, by the name of damages; fourth, the costs and charges. The judgment follows, first, to recover seizin of the third part; second, the value of the third part; third, for damages found by the jury, extra, and the costs of increase; and the record concludes, *value* and *damages*, and not, as in *Rastal*, which *damages* amount to, etc. *Clifton*, 301-303; *Hoxley*, 99; *Ashton*, 263, 265, seem to confirm this form of entry. As to the question before the court, it is this: Whether, as the jury have not found that the husband died seized, the court are empowered to give judgment either for the value — the damages for detention — or costs. In *Dyer*, 28*a*, it is laid down that 'the common practice is, and the precedents of the common pleas are, that a woman demandant in dower shall not recover any damages unless the husband died seized; and this by the Statute of Merton, c. 1.' The same law is laid down in *Doct. and Stud.*, cap. 13, p. 140; Co. Litt. 32*b*; *Yelv.* 112. The form of the writ of inquiry strengthens the authority of these books; it always directs the jury to

Dower was originally granted for the sustenance of [356] widows, and for this purpose they were relieved of feudal exactions. It was provided by Magna Charta that a widow should give nothing for her dower, and tarry in the chief house of her husband for forty days after his death, within which time it was required that dower be assigned her.¹ Hence she has a right to damages if it be not so assigned; but they can- [357] not properly be given for withholding dower, except for such withholding after the duty attaches to assign it. The alienee of the husband wrongfully withholds it after demand, and the heir and his alienee from the death of the husband. In her action against the heir, however, he may plead *tout temps prist*, and if he succeeds she will not recover damages because it is said the heir holds by the title and does no wrong till a demand is made.² If the tenant comes the first day and acknowledges the action and avows that he was at all times ready to render dower, the demandant could take judgment; then she would recover only seizin *et nihil de misâ quia venit primo die*. But if the demandant would have damages she may reply that she requested her dower, and the tenant did not endow her, and then the judgment for damages and value will wait till the issue is tried and depend on the result.³ She is not called on to prove such demand except upon that issue.⁴ If the heir sells, he by that act denies dower, and his grantee cannot plead *tout temps prist* because he had not the land all the time since the death of the husband.⁵ That plea is available only to the heir. When he sells, and thus repudiates the

inquire if the husband *died seized*, and *if he did*, then to inquire of the value and damages. A note in Jenk. 45, seems contrary to this, and to give countenance to the idea that, if the husband did not die seized, she shall recover her damages from the time of the demand from the tenant. Buller adopts the same doctrine, but in neither of these books is there any other authority cited than 1 Inst. 32b, which, as we have seen, establishes the contrary law. The dicta of these writers are respectable authorities, but the court are compelled to reject them on the present occa-

sion as not warranted by any judicial opinion, and as insufficient to weigh against the law as it has long been established. See Sheppard v. Wardell, 1 N. J. L. 452; Martin v. Martin, 14 id. 125 (1833); O'Flaherty v. Sutton, 49 Mo. 583; Thomas v. Mallinckrodt, 43 Mo. 58.

¹ Co. Litt. 32b, sec. 36.

² Co. Litt. 33a, sec. 36.

³ Id., note.

⁴ Hitchcock v. Harrington, 6 Johns. 290; Woodruff v. Brown, 17 N. J. L. 246.

⁵ Co. Litt. 33; Park on Dower, 303.

dower and in effect refuses it, such plea cannot be made. And the widow is entitled to recover against the feoffee of the heir damages for the whole period from the death of the husband — although such defendant has occupied and claimed the land for only a portion of that time.¹ Interest is allowable upon the instalments of dower as they fall due.² By analogy to the recovery of rents under the Kentucky statutes, interest upon the gross sum allowed as dower, as against a vendee should be computed only from the time suit was begun.³

Where the children of deceased parents sought to recover damages from the estate of their father on account of the rents and profits received by him from lands of their mother, he not having demanded that his dower interest therein be set off, and the trial court allowed such estate credit for the care, support and maintenance of the children, the supreme court said: At common law the father was bound to support his children, and the strict rule was that he was entitled to no reimbursement for his outlays. As a general rule, no allowance will be made him out of the property of his infant children, if his own means are adequate for their maintenance. Where, however, the father is without any means, or is without sufficient means to maintain and educate his children suitably to their condition and prospects, equity will make him an allowance out of their estates for such purpose. In the matter of granting such an allowance courts are more inclined to be liberal than was their practice in the early history of the law. It is not necessary that the father should be actually bankrupt or insolvent in order to justify a charge against the property of his infant children for their support. The welfare and happiness of the children must be considered, and if the means of the father are inadequate to the promotion of their welfare and happiness their own property may be resorted to for their maintenance in whole or in part. Each case will depend largely upon its own circumstances.⁴

¹ Woodruff v. Brown, *supra*; Sea-ton v. Jamison, 7 Watts, 533; Hopper v. Hopper, 22 N. J. L. 715.

² Seitzinger's Estate, 170 Pa. 531, 32 Atl. Rep. 1101.

³ Hogg v. Hensley, 100 Ky. 719, 725, 39 S. W. Rep. 247.

⁴ Bedford v. Bedford, 136 Ill. 354, 360, 26 N. E. Rep. 662. See Schouler's Domestic Rel., sec. 238; 3 Pom. Eq. Juris., sec. 1309, n. 4; Newport v. Cook, 2 Ash. 332; Gilley v. Gilley, 79 Me. 292, 9 Atl. Rep. 623, 1 Am. St. 307; Fuller v. Fuller, 23 Fla. 236.

§ 1004. **Extinguishment of dower right.** At law, where no statutes protect her, the widow's right to damages is extinguished by her death.¹ But it is otherwise in equity.² She has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by a sale of her husband's lands which were subject to her dower, and increased by being sold clear of that incumbrance with her consent.³ In determining the value of dower, when to be paid out of the proceeds of the land sold so as to extinguish the right, its present worth is estimated upon the basis of an annuity of such amount as equals the legal interest on one-third of those proceeds for a period which constitutes the widow's expectancy of life according to the rules generally adopted in calculating the probable time a person will live.⁴ And this sum is recoverable, though she dies before its recovery and short of the time included in her expectancy. In such case the thing to be appraised, and with which the widow parts, is not the value of her interest in the land, but the value of her expectancy.⁵

§ 1005. **Reprisals.** At common law there were certain reprisals which were made from the damages of the widow, and among these sometimes were included a deduction on account of her occupation of some part of the property. The legitimate extent of such deduction appears to have been this: Whatever part of the property the widow has been in the actual enjoyment of was thrown out of the estimation of damages, and on the simple ground that, from such property, she had not been deforced of her dower. But this rule merely excluded the claim to recover the value of her thirds in the land during the time she had so occupied it; it did not authorize the heir to set up a counter-claim in the suit for dower for the other two-thirds of the value of the premises so having

¹ *Rowe v. Johnson*, 19 Me. 146; *Atkins v. Yeoman*, 6 Met. 438; *Sandback v. Quigley*, 8 Watts, 460; *Turney v. Smith*, 14 Ill. 242. See *Karns v. Tanner*, 74 Pa. 339.

² 1 Story's Eq., § 625; *Mulford v. Hiers*, 13 N. J. Eq. 13; *Curtis v. Curtis*, 2 Bro. Ch. 632; *Dormer v. Fortesque*, 3 Atk. 130; *Park on Dower*

ch. 15, p. 330. See *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505.

³ *Maccubbin v. Cromwell*, 2 Har. & G. 443; *Bonner v. Peterson*, 44 Ill. 253.

⁴ *O'Donnell v. O'Donnell*, 3 Bush, 216; *Alexander v. Bradley*, id. 667. See *Shippen's Appeal*, 80 Pa. 391; *How v. How*, 48 Me. 428.

⁵ *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505.

been occupied. If the widow had occupied the land without the assent of the heir she was a mere trespasser, and it would not be competent for him in the action for dower to set off the damages thus sustained; and if, on the other hand, he had

The question as to whether the legal representatives of a deceased widow may recover the *mesne* profits of her dower interest, for which she had made demand in her lifetime, in land of which her husband died seized, she having died before dower was assigned, was carefully considered in *Armstrong v. Union College*, 55 App. Div. 302, 66 N. Y. Supp. 942. After discussing the cases in New York, and especially *Johnson v. Thomas*, 2 Paige, 377, and *Kyle v. Kyle*, 67 N. Y. 400, respecting the scope of which there was some doubt in the mind of the writer of the opinion, he said: The decisions of the courts of the different states are conflicting in regard to the right of the administrator of a widow to recover *mesne* profits where she has died before dower has been assigned. In Maryland, if her death occurs pending the action to establish her dower, her personal representatives may recover *mesne* profits; otherwise not. *Kiddall v. Trimble*, 1 Md. Ch. 143; *Steiger's Adm'r v. Hillen*, 5 Gill & J. 121. In Mississippi the representatives of a widow may recover the damages, although she took no proceedings during her lifetime to recover her dower. *Harper v. Archer*, 28 Miss. 212. In *Paul's Ex'rs v. Paul*, 36 Pa. 270, it was held that in equity the representatives of a widow entitled to dower may recover the rents and profits, although she died before her dower was assigned, and before any action had been commenced for that purpose. The same rule was laid down in North Carolina in *Peyton v. Smith*, 2 Dev. & B. Eq. 325, 352. In Ohio in *Miller's Adm'r v. Woodman*,

14 Ohio, 518, it was held that the right to *mesne* profits was lost by the death of the widow while her action for dower was pending. Subsequently the rule in that state was changed by statute, so that now representatives of a widow in such case may recover *mesne* profits. In Illinois the question has not been settled by judicial decision. *Turney v. Smith*, 14 Ill. 242. The Kentucky courts have also refrained from making an authoritative declaration upon the subject. *Coons v. Nall's Heirs*, 4 Litt. 264.

We have reviewed the decisions bearing upon the question involved in this case, directly or by analogy, thus at length because it is strenuously urged by counsel that the precise question was definitely passed upon by the court of appeals in *Kyle v. Kyle*, *supra*; that the decision in that case fully supports his contention and should be regarded as controlling. Many of the expressions contained in the opinion of the court in that case, and the line of argument adopted, give force to the counsel's contention. If we were of the opinion that the court of appeals held or intended to hold in that case that the representatives of a deceased dowress cannot in any case recover damages from an heir or other person for withholding dower to which she was entitled in lands of which her husband died seized solely because she died before judgment was recovered assigning her dower, but after suit brought by her for that purpose, we would not assume to criticise such decision, but would readily yield assent to it; but in view of the uncertainty as to exactly what

consented to such occupation, he had his action to call [359] her to account. But in the action for dower the effect of the enjoyment by the widow was to estop her from saying that in such land she had been deforced of her dower, and on that account to claim damages.¹

§ 1006. Dower limited to husband's equitable interest.

Dower is generally confined to the beneficial interest which the husband acquired during coverture in the land.² If the land is subject to a paramount charge or incumbrance, as where the dowress has joined with her husband in making a

was held in that case upon the precise question here involved, as is indicated by the language of the opinion and the *quare* in the syllabus, and considering that such holding would be in conflict with the great weight of judicial authority upon the subject, both in England and the other states of the Union, and because such a ruling is unjust and inequitable, and would encourage resistance to honest demands solely for delay, and is contrary to the rules declared to be applicable to cases similar in principle, we are of the opinion that the court did not hold or intend to hold in the Kyle case the doctrine contended for by counsel. Especially so when we consider that the facts in that case were essentially different from those in the case at bar, and that the conclusion reached did not necessarily involve the adoption of such rule by the court. The conclusion of the whole matter is that the representatives of a deceased widow may recover the *mesne* profits of her dower interest in lands of which her husband died seized, although she may have died before such dower was assigned, especially if suit was brought by her for that purpose in her life-time.

In Florida where land has been aliened by the husband and the widow has died pending suit for the admeasurement of dower, but before

an adjudication of her contested right thereto, as against her husband's alienee, her administrator cannot proceed with the suit solely for the purpose of recovering *mesne* profits as damages. "The damage in such cases is an incident to the principal right and falls on the death of the widow at the termination of the principal demand." *Roan v. Holmes*, 32 Fla. 295, 303, 13 So. Rep. 339.

¹ *McLaughlin v. McLaughlin*, 22 N. J. Eq. 505; *Perrine v. Perrine*, 35 Ala. 644; *Driskell v. Hanks*, 18 B. Mon. 855; *Craige v. Morris*, 25 N. J. Eq. 467; *Strawn v. Strawn*, 50 Ill. 256.

² *Welch v. Buckins*, 9 Ohio St. 331; *Fontaine v. Boatman's Savings Inst.*, 57 Mo. 552; *Bullard v. Bowers*, 10 N. H. 500; *Griggs v. Smith*, 12 N. J. L. 22; *Edmundson v. Welsh*, 27 Ala. 578; *Leavitt v. Lamprey*, 13 Pick. 382, 23 Am. Dec. 685; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Nicoll v. Miller*, 37 Ill. 387; *Nicoll v. Todd*, 70 Ill. 295; *Stow v. Steel*, 45 Ill. 328; *Stow v. Tift*, 15 Johns. 458, 8 Am. Dec. 266; *Coates v. Cheever*, 1 Cow. 460; *Gammon v. Freeman*, 31 Me. 243; *Gilliam v. Moore*, 4 Leigh, 30, 24 Am. Dec. 704; *Winn v. Elliott*, *Hardin*, 482; *Hale v. Munn*, 4 Gray, 132. See *Barnes v. Gay*, 7 Iowa, 26; *Yeo v. Mercereau*, 18 N. J. L. 387.

mortgage; or he, on instantaneous seizin, alone mortgages it for purchase-money; or it was subject to a judgment or mortgage at the time of the marriage, or when the husband acquired it, her dower is confined to the right of redemption; it is subject to the incumbrance and liable to be foreclosed, or to contribute to the payment of the debt.¹

§ 1007. **Dower right subject to incumbrance.** It has always been the policy of the law to preserve with care the right of dower when it has once attached to the property of the husband; but the right always exists subject to all the equities [360] there may be against his title at the time it attaches.² Payment of the incumbrance by him or his personal representative will inure to the relief of dower; but when a widow claims dower from an heir or purchaser who has discharged the lien she will be required to contribute, and must pay proportionately to the value of her dower, which will be the interest for her life on one-third of the debt that was a lien or a gross sum equivalent thereto.³ If there is a surplus on the

¹ *Carll v. Butman*, 7 Me. 102; *Richardson v. Skolfield*, 45 id. 386; *Simonton v. Gray*, 34 Me. 50; *Stribling v. Ross*, 16 Ill. 122; *Manning v. Laboree*, 33 Me. 343, 52 Am. Dec. 655; *Rawlings v. Lowndes*, 34 Md. 639; *Stewart v. Beard*, 4 Md. Ch. 319; *Birnie v. Main*, 29 Ark. 591; *Opdike v. Bartels*, 11 N. J. Eq. 133; *Hinchman v. Stiles*, 9 id. 361; *Walton v. Hargroves*, 42 Miss. 18; *Culver v. Ex'r of Harper*, 27 Ohio St. 464; *McMahon v. Kimball*, 3 Blackf. 1; *Coles v. Coles*, 15 Johns. 319; *Young v. Tarbell*, 37 Me. 509; *Mills v. Van Voorhees*, 20 N. Y. 412; *Clark v. Monroe*, 14 Mass. 351; *Lewis v. James*, 8 Humph. 537; *Mantz v. Buchanan*, 1 Md. Ch. 202; *Johnson v. Thomas*, 2 Paige, 377. See *King v. Stetson*, 11 Allen, 407; *Smith v. McCarty*, 119 Mass. 519; *Greenbaum v. Austrian*, 70 Ill. 591.

² *Firestone v. Firestone*, 2 Ohio St. 415. See *Crane v. Palme*, 8 Blackf. 120.

³ *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Evertson v.*

Tappen, 5 Johns. Ch. 497; *Atkinson v. Stewart*, 46 Mo. 510; *Rossiter v. Cossitt*, 15 N. H. 38; *Woods v. Wallace*, 30 N. H. 384; *Bolton v. Ballard*, 13 Mass. 227; *McArthur v. Franklin*, 16 Ohio St. 193; *Bullard v. Bowers*, 10 N. H. 500; *Peckham v. Hadwen*, 8 R. I. 160; *Coates v. Cheever*, 1 Cow. 460; *Creecy v. Pearce*, 69 N. C. 67; *Hildreth v. Jones*, 13 Mass. 525; *Jennison v. Hapgood*, 14 Pick. 345; *Snyder v. Snyder*, 6 Mich. 470; *Cockrill v. Armstrong*, 31 Ark. 580; *Danforth v. Smith*, 23 Vt. 247; *Van Vronker v. Eastman*, 7 Met. 157; *Bell v. Mayor*, 10 Paige. 49. See *Newton v. Sly*, 15 Mich. 391; *Wilson v. Davisson*, 2 Rob. (Va.) 384.

In *Campbell v. Campbell*, 13 N. J. Eq. 415, a bill was filed by the widow of an intestate for dower in lands of three kinds: 1, that which was subject to a mortgage put thereon by the intestate; 2, that which was purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the

foreclosure of a mortgage or other incumbrance to which [361] dower in the land is subject it will attach to such surplus.¹ The widow may redeem from a paramount mortgage; but in that case she must pay the whole debt.² But if the mortgage is held by the purchaser of the equity of redemption or, in

purchase-money, and the payment thereof assumed by him; and 3, that which belonged to him as a member of a partnership. The chancellor said: "It is, of course, unnecessary to speak of the real estate owned by him individually, which was not subject to any incumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. *Keene v. Munn*, 1 C. E. Green, 398; *McLenahan v. McLenahan*, 3 id. 101. As to that which was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment whereof he assumed, his personal estate is not bound to exoneration. In such case, to make his estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country and England, is that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty. But the point under consideration was directly passed upon and decided in *McLenahan v. McLenahan*, *ubi supra*. There the amount of the mortgage had been allowed to the intestate as so much of the purchase-money. See, also, *Crowell v. Hospital of St. Barnabas*,

12 C. E. Gr. 650, and *King v. Whiteley*, 1 Hoffm. Ch. 477.

"The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the co-partnership, and any balance which may be due from one copartner to another. On the winding up of the affairs of the firm, as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining after paying the debts and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. *Uhler v. Semple*, 5 C. E. Gr. 288; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Shearer v. Shearer*, 98 Mass. 107; 1 Wash. on R. P. (4th ed.) 669; 1 Scribner on Dower, 536; *Foster's Appeal*, 74 Pa. 391, 15 Am. Rep. 553." *Bopp v. Fox*, 63 Ill. 540.

¹ *Matthews v. Durgee*, 45 Barb. 69; *Titus v. Neilson*, 5 Johns. Ch. 452; *Smith v. Jackson*, 2 Edw. Ch. 28; *Hawley v. Bradford*, 9 Paige, 200, 37 Am. Dec. 390; *Keith v. Trapier*, 1 Bailey Eq. 63; *Boyer v. Boyer*, 1 Cold. 12; *Bank v. Owens*, 31 Md. 320, 1 Am. Rep. 60.

² *Morris v. Morrison*, 45 N. H. 490.

other words, by the party bound to contribute the residue of the mortgage debt, she may redeem by paying her fair proportion according to her estate.¹ If the defendant in such case has been in possession under the mortgage she is entitled to an account of rents and profits, although the property may be sold pending the action for dower.² In computing the sum due on the mortgage it has been held that annual rests should be made; that the sums paid by the defendant the first year for repairs, taxes, etc., should be deducted from the gross rents received by him, and the balance be taken as the net rents; that the interest on the mortgage debt for the first year should be added to the principal, the net rent be deducted from the aggregate, and the balance become a new principal; and so on from year to year to the time of judgment.³

Where a mortgage, in which the wife joined, was foreclosed in the life-time of the husband against him alone and the purchaser went into possession, it was held that as to the widow [362] applying to redeem her dower interest he was to be regarded as the mortgagor and mortgagée occupying in common according to their respective interests; that, regarding the price paid at the judicial sale as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage at the time of the sale bore to the price at which the land was sold, and that, in ascertaining the annual rents, the enhanced value of the land from improvements, other than ordinary repairs, should be excluded. Taxes and such repairs should be deducted to get the net rents. The plaintiff, not having been a party to the foreclosure suit, was entitled to have the amount taken in the same manner as though no decree had been rendered; therefore, in the computation there should be no rest made at the time of the rendition of the decree. In determining the amount to be paid by the widow she should be charged with such part of one-third of the debt remaining unpaid as bore the same proportion to the one-third of such debt as the value of her life-estate in one-third of the land bore to the value of an unincumbered fee in one-third of the entirety; in other words,

¹ Woods v. Wallace, 30 N. H. 384;
Van Vronker v. Eastman, 7 Met. 157;
McArthur v. Franklin, 16 Ohio St.
193.

² Witthaus v. Shack, 38 Hun, 560.

³ Van Vronker v. Eastman, *supra*.

the widow should pay the present worth of an annuity for her life equal to one-third of the interest of the debt found due at the taking of the account.¹

Where land is sold to satisfy a paramount lien and there is a surplus, a wife's contingent dower interest in it will be recognized. It has been held in New York that she is entitled, as against judgment creditors, to have one-third of the amount invested for her benefit and kept invested during the joint lives of herself and her husband, and during her own life in case of her surviving him, as and for her dower in such surplus moneys.² In a case in Ohio³ the same interest was recognized; but the court disapproved of such an investment as a mode of protecting or preserving it; and it was held that its value, ascertained by reference to the tables of recognized authority, in connection with the state of health and constitutional vigor of the wife and her husband, be paid to her.⁴

¹McArthur v. Franklin, *supra*.

²Denton v. Nanny, 8 Barb. 618.

³Unger v. Leiter, 32 Ohio St. 210.

⁴See Bonner v. Peterson, 44 Ill. 253.

